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[1] Resigned, September 16, 1954.

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42 Cal.2d 835

RIAVE
v.
COMMITTEE OF BAR EXAMINERS et al.
S. F. 18759.

Supreme Court of California.
In Bank.
May 27, 1954.

Original proceeding to review resolution of the Committee of Bar Examiners denying an application for admission to the Bar. The Supreme Court held that the statute excusing the requirement of a final bar examination where, inter alia, the applicant after his graduation from an accredited law school and prior to the next final bar examination shall have entered upon active duty in the armed forces during a period of hostilities between the United States and any other nation, was not applicable to the applicant, who had been called for a fourteen day tour of "active duty for training", though the Korean conflict commenced three days before such tour ended.

Application denied.

Attorney and Client 🔑6

Statute excusing requirement of bar examination where, inter alia, applicant after graduation from accredited law school and prior to next bar examination shall have entered on active duty in armed forces during period of hostilities involving United States was not applicable to applicant who had been called for fourteen day tour of "active duty for training", though the Korean conflict commenced three days before such tour ended. Business and Professions Code, §§ 6060(h), 6060.8.

See publication Words and Phrases, for other judicial constructions and definitions of "Active Duty".

Morse Erskine, San Francisco, for petitioner.

Jerold E. Weil, Los Angeles, and Richard J. Archer, San Francisco, for respondents.

PER CURIAM.

A resolution of the Committee of Bar Examiners denying Lionel L. Riave's application, made under section 6060.8 of the Business and Professions Code, for admission to practice law without examination, declares that he has not complied with all of the statutory requirements. The record upon which the Committee acted is before this court upon Riave's petition to review its determination. Rules on Original Proceedings in Reviewing Courts, rule 59(b).

Section 6060.8 excuses the requirement of a final bar examination, B. & P. C., § 6060(h), in certain circumstances. One of them is that the applicant, after graduation from an accredited law school and prior to the next final bar examination, shall have "entered upon active duty in the armed forces during a period of hostilities between the United States and any other nation". With the exception of this provision, it is undisputed that all of the requirements to allow Riave's admission to practice have been satisfied.

According to his petition, Riave presently is a major in the Air Force Reserve. After serving in the Army Air Force during the second world war, he was released to inactive duty. His education, interrupted by the war, was resumed, and, in June, 1950, he graduated from an accredited law school. The first final bar examination after that date was in October, 1950.

Prior to his graduation, Riave received orders to report on June 17, 1950, to an air force base for a 14-day tour of "active duty for training." On June 27th, three days before Riave's tour of duty terminated, hostilities commenced between the United States and North Korea. When he was released from this tour of duty, he was advised by his superior officers that he soon would be called for extended active duty. Although he participated in voluntary training and orientation classes immediately thereafter, he was not called to duty until March 1951. Neither Riave nor the Bar Examiners rely upon these additional facts as being determinative of the present application. The narrow issue presented is whether his period of "active duty for training" amounts to entry upon "active duty in the armed forces during a period of hostilities" within the meaning of section 6060.8 of the Business and Professions Code.

Riave takes the position that "active duty in the armed forces" must be read as including training periods, since the section makes no express qualification concerning the type of duty or length of tour. The Bar Examiners assert that the Legislature could not have intended to exempt from examination reservists in the armed forces who are called only for annual training duty.

The various federal statutes and regulations applicable to the calling of reserve officers to duty differentiate between "active duty" and "active duty for training". In the Armed Forces Reserve Act of 1952, Act of July 9, 1952, ch. 608, 66 Stat. 481 et seq., 50 U.S.C.A. § 901 et seq., active duty is defined as "full-time duty in the active military service of the United States, other than active duty for training." 50 U.S.C.A. § 901(b). The Servicemen's Indemnity Act of 1951, Act of April 25, 1951, ch. 39, 65 Stat. 33, 38 U.S.C.A. § 851, and the Act of June 20, 1949, relating to compensation for injuries in the line of duty, 63 Stat. 202, 10 U.S.C.A. § 456(2), mention both active duty and active duty for training as being within the coverage of their provisions. On the other hand, Air Force Regulation 45–5, in effect in 1952, defines active duty as being synonymous with "active military service," the latter term being stated to include both "extended active duty" and "active duty for training."

Authority for calling to active duty a reserve officer has existed since 1920, with the enactment of the provisions which were carried into former section 369 of Title 10 of the United States Code. Act of June 4, 1920, ch. 227, subch. I, § 32, 41 Stat. 776. By the terms of that section the President was authorized at any time to order such officer to active duty, with the limitation that he could not be required to serve without his consent in excess of 15 days during any calendar year, except in time of national emergency. Implementing this section were various executive orders and regulations of the military forces. The provisions of former section 369 of Title 10 now appear in subdivisions (b) and (c) of section 961 of Title 50 of the U.S.C.A.

Air Force Regulation 35–76, together with regulations preceding it, established "a tour of active duty for training for the purpose of maintaining unit or individual proficiency." Such tours were limited in duration to 15 consecutive days, with no reservists being permitted to receive more than one short tour of active duty in any fiscal year. They are to be distinguished from "extended active duty," which is "[a]ny tour of active duty performed by an individual with the active establishment, and entered into with the original expectation of serving for an indefinite or stated period of time. Tours under the provisions of AFR 35–76, regardless of duration, are not considered to be extended active duty." Air Force Reg. 45–5. It was common practice in the Air Force, as in other service branches, to arrange such short tours of duty approximately annually, within the limitations of departmental budget allowances. Riave's tour of duty was of this nature.

Section 6060.8 of the Business and Professions Code was enacted in 1951, after hostilities with North Korea had commenced. Stats.1951, c. 1722, § 1. It excused the requirement of a final bar examination, B. & P. C., § 6060(h), for a veteran of World War II who graduated from an accredited law school after May 1, 1950 and following graduation and "prior to the date of the next final bar examination, entered upon active duty in the armed forces during a period of hostilities between the United States and any other nation, or * * * during such hostilities, received orders to enter upon such active duty prior to the date of the next final bar examination, and thereafter actually enters upon such active duty within 15 days after the date of said final bar examination."

It is a matter of common knowledge that, immediately after the commencement of hostilities in Korea, many veterans of World War II serving in reserve components, were recalled to active service in that conflict. The apparent purpose of section 6060.8 was to benefit those veterans whose law study was interrupted by recall to military service. This purpose contemplates the call to extended periods of military service which the national emergency resulting from the Korean situation made necessary, rather than the annual 15-day periods of training duty.

Such short tours of duty neither resulted from, nor were affected by the Korean conflict. Continuously during the last 30 years they have been a part of our country's program for maintaining the efficiency of the armed forces. Training of members of the reserves was carried on during the Korean hostilities and is still authorized by law. Yet at no time in all these years has the Legislature when exempting veterans from bar examinations, expressly mentioned the annual training duty of a reservist as a basis for such an exemption. Undoubtedly the reason for this is that such duty is limited to 15 days annually and, except during a time of national emergency, is the only type of full time duty a reservist may be required to serve without his consent. Under these circumstances it is not reasonable to infer that the Legislature intended to include this type of duty when in section 6060.8 of the code it used the expression "active duty in the armed forces during a period of hostilities".

The meaning of the term "active duty in the armed forces" is made clear in a recent enactment involving another field of veterans' benefits. Section 980 of the Military and Veterans' Code defines "veteran" for the purpose of aid and welfare benefits under division IV of that code. Formerly, the term was limited to those persons serving in the military or naval service during World War II. By amendment in 1953, the section was expanded to include "any person who served in the active military, naval or air service on or after June 27, 1950, and prior to a future date to be established by proclamation of the Governor * * *.

"Whenever the Governor, after June 27, 1950, finds that the United States is no longer engaged in any type of campaign involving persons in *active duty in the armed forces,* he shall issue a proclamation establishing the date after which persons entering *active duty in the armed forces* shall not be considered veterans for the purposes of this chapter.

"As used in this chapter 'veteran' does not include:

* * * * * *

"(g) A person whose service with the armed forces was due to temporary active duty orders *for the sole purpose of training duty,* processing or a physical examination." Emphasis added, Stats.1953, c. 1334.

The amendment was enacted as an emergency measure, with the facts constituting such emergency stated to be as follows:

"At the present time the law is not specific as to the required length of active service in the military forces to entitle one to the benefits of the California Veterans Farm and Home Purchase Act [Military and Veterans Code, § 985 et seq.] It is necessary that the statute defining 'veteran' be clarified as soon as possible because at the present time persons who take short active duty training periods in the armed forces are demanding veterans' benefits under the Farm and Home Purchase Act and are claiming that they are eligible for such assistance. The statute was never intended to grant the benefits on the basis of such training."

Because of this conclusion, it is unnecessary to discuss other contentions of the State Bar.

The application is denied.

TRAYNOR, J., did not participate.

42 Cal.2d 880

TYRELL
v.
COMMITTEE OF BAR EXAMINERS et al.

L. A. 22940.

Supreme Court of California.
In Bank.
May 27, 1954.

Original proceeding to review resolution of the Committee of Bar Examiners denying an application for admission to the Bar. The Supreme Court held that the statute excusing the requirement of a final bar examination where, inter alia, the applicant after his graduation from an accredited law school and prior to the next final bar examination shall have entered upon active duty in the armed forces during a period of hostilities between the United States and any other nation, was not applicable to the applicant, who had been called to temporary active duty for a single day solely for the purpose of taking a physical examination.

Application denied.

Attorney and Client ⇨6

Statute excusing requirement of bar examination where, inter alia, applicant after graduation from accredited law school and prior to next bar examination shall have entered upon "active duty" in armed forces during period of hostilities involving United States, was not applicable to applicant who had been called to temporary active duty for single day solely for purpose of physical examination. Business and Professions Code, §§ 6060(h), 6060.8.

See publication Words and Phrases, for other judicial constructions and definitions of "Active Duty".

Donald G. Hall, Los Angeles, for petitioner.

Richard J. Archer, San Francisco, for respondents.

PER CURIAM.

John Rix Tyrell seeks to review a resolution of the Committee of Bar Examiners denying his application under section 6060.8 of the Business and Professions Code for admission to practice law without examination. The basis of the committee's action was the determination that Tyrell had not "entered upon active duty in the armed forces" as required by that section.

After serving in the United States Naval Reserve during World War II, Tyrell was released to inactive duty. He commenced the study of law and in June, 1952, was graduated from an accredited law school. The next final bar examination was conducted in October of that year.

Prior to graduation, Tyrell received orders to report on June 9th to a naval base for a 14-day tour of active duty for training. He was released to inactive duty at the end of that period, but on September 25th he was recalled to active duty for one day for the purpose of taking a physical examination. In October, Tyrell took the bar examination but failed to receive a passing grade.

In Riave v. Committee of Bar Examiners, Cal.Sup., 271 P.2d 1, it was held that the apparent purpose of section 6060.8 of the Business and Professions Code was to benefit those veterans whose law study was interrupted by recall to military service for the extended periods made necessary by the national emergency resulting from the Korean hostilities. That purpose does not contemplate the annual short tours of duty for training, and there is even less reason to conclude that the legislature intended to exempt from a bar examination persons called to temporary active duty for a single day solely for the purpose of processing or a physical examination. Cf. Mil. & Vet. Code, § 980(g).

The application is denied.

TRAYNOR, J., did not participate.

CITY OF LOS ANGELES
v.
BELRIDGE OIL CO.
L. A. 22586.

Supreme Court of California.
In Bank.
May 26, 1954.
Rehearing Denied June 23, 1954.

City brought action against corporation to recover business license taxes. The Superior Court, Los Angeles County, Roy L. Herndon, J., entered judgment adverse to city, and city appealed. The Supreme Court, Carter, J., held that where all wells of company, which was engaged in production and sale of crude oil and natural gas, were located in Kern County, and its field office was located in Kern County, and its products were delivered to purchasers directly at field plants and never entered territorial limits of Los Angeles, but its main office was situated in Los Angeles, and all contracts were signed at main office, company was subject to section of Los Angeles city ordinance providing that every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares or merchandise at wholesale, and not otherwise specifically licensed by other provisions of the ordinance shall pay certain business license taxes.

Judgment reversed.

Schauer, J., dissented.

Prior opinion 260 P.2d 217.

1. Municipal Corporations 🔑956(1)

Municipal tax laws are to be construed against municipality and in favor of taxpayer.

2. Municipal Corporations 🔑956(1)

Rule that municipal tax laws are to be construed against municipality and in favor of taxpayer does not take precedence over other fundamental rules of statutory construction.

3. Municipal Corporations 🔑956(1)

Judicial construction of municipal tax laws should be in keeping with the natural and probable legislative purpose, and should avoid conflict and harmonize all applicable provisions of the law on the subject, if possible.

4. Municipal Corporations 🔑120

Where construction of a particular section of a municipal taxing ordinance is involved, the ordinance should be looked to in its entirety and its provisions should be construed together.

5. Municipal Corporations 🔑111(1)

Section of city ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of the ordinance, shall pay certain business license taxes, is not too vague.

6. Licenses 🔑15(1, 3)

All businesses which are engaged in selling goods, wares, or merchandise at wholesale in city, and which are not licensed by other sections of city ordinance, come within section of the ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not specifically licensed by other provisions of the ordinance, shall pay certain business license taxes, regardless of whether they are engaged in "manufacturing and selling" or merely "selling."

7. Licenses 🔑15(3)

In determining whether section of city ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of ordinance, shall pay certain business license taxes, is applicable, fact that goods sold are produced in remote areas is unimportant.

8. Licenses 🔑15(1, 3)

In determining whether section of city ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of ordinance, shall pay a certain business license tax, is applicable, it is immaterial whether goods are produced in a company owned plant or are purchased from an independent producer.

9. Licenses ⚷15(1)

Section of city ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not specifically licensed by other provisions of the ordinance, shall pay certain business license taxes, is not limited in its application to a seller engaged in the merchandising business.

10. Licenses ⚷15(3)

Where all wells of company, which was engaged in production and sale of crude oil and natural gas, were located in Kern County, and its field office was located in Kern County, and its products were delivered to purchasers directly at field plants and never entered territorial limits of Los Angeles, but its main office was situated in Los Angeles, and all contracts were signed at main office, company was subject to section of Los Angeles city ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares or merchandise at wholesale, and not otherwise specifically licensed by other provisions of the ordinance, shall pay certain business license taxes.

11. Licenses ⚷15(1)

"Business license tax" imposed by city ordinance was a privilege tax exacted for the privilege of engaging in the activity of selling.

See publication Words and Phrases, for other judicial constructions and definitions of "Business License Tax".

12. Licenses ⚷7(9)

When goods, wares, or merchandise are sold within city, rate of business license tax imposed on the sale by city ordinance may be measured by the gross receipts derived from the sale.

13. Licenses ⚷7(1)

Fact that city ordinance providing that every person manufacturing and selling any goods, wares, or merchandise at wholesale or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of ordinance, shall pay certain business license taxes, is construed as imposing tax on the sale within the city of goods, wares, or merchandise produced and delivered outside city and never brought within the city does not render the ordinance unconstitutional.

14. Municipal Corporations ⚷956(1)

Municipal corporations have no inherent power of taxation, but possess only such taxing power as has been granted to them by the Constitution or statute.

15. Limitation of Actions ⚷34(7)

Three-year limitation statute applicable to an action on a liability created by "statute," other than a penalty or forfeiture, was applicable to action by city to recover business license taxes under city ordinance. Code Civ.Proc. 338, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Statute".

16. Limitation of Actions ⚷58(6)

City's cause of action to recover business license taxes accrued under three-year limitations statutes when tax became delinquent. Code Civ.Proc. § 338, subd. 1.

17. Limitation of Actions ⚷58(6)

Where business license taxes imposed by city ordinance were due before the close of business on the last day of February of each year, city's action after March 1, 1951, to recover taxes for the year 1948, was barred by three-year limitation statute. Code Civ.Proc. § 338, subd. 1.

◆

Ray L. Chesebro and Roger Arnebergh, City Attys., Bourke Jones, Asst. City Atty., and James A. Doherty, Deputy City Atty., Los Angeles, for appellant.

Wellborn, Barrett & Rodi, Vernon Barrett and F. C. L. Head, Los Angeles, for respondent.

CARTER, Justice.

Plaintiff appeals from a judgment in an action to recover business license taxes from the defendant. All the facts were stipulated to, and each party moved for summary judgment. The motion of defendant company was granted.

By its complaint in this action plaintiff sought a judgment in the amount of $9,768.30 as unpaid business license taxes owing for the years 1948–1950, inclusive. This claim is based on the ground that plaintiff has a right, under the provisions of sections 21.166 of the Los Angeles City Tax Ordinance, to impose a business license tax on defendant measured by the company's gross receipts. Section 21.166 provides that "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition. * * *"

Defendant company is engaged in the production and sale of crude oil and natural gas. All of its wells are located in Kern County which is the scene of all productive operations. The field office of the defendant is located in Kern County while the main office is situated in the city of Los Angeles. Its various products which are marketed under long-term contracts, are delivered to the purchasers directly at the field plants and never enter the territorial limits of the city of Los Angeles.

The board of directors of defendant company meets in Los Angeles, most of the company's banking is done in Los Angeles and the corporate officers spend the major portion of their time at the main office in Los Angeles. Negotiations for the sale of defendant's products are conducted in part at the main office, in part at the offices of purchasers and in part by mail, telegraph or telephone communications between the defendant's main office in Los Angeles and the customer. Defendant company signs all contracts at its main office.

All obligations, including payrolls, are paid from the head office except emergency wage payments and disbursements for miscellanous items, which are paid from a checking account in Bakersfield carrying an average balance of between $2,000 and $3,000. The main office makes all purchases, except those of an emergency nature, and payment for the sales of all items sold by defendant are received from purchasers at the main office and deposited in Los Angeles bank accounts. Based upon these facts the plaintiff city takes the position that the defendant company is engaged in selling in the City of Los Angeles the oil and gas it produces in Kern County, and that it is therefore subject to the tax provided for in section 21.166 of the Los Angeles City Tax Ordinance.

Defendant's theory of the case is that the company's operations are not such as to make it taxable under the provisions of section 21.166, and that even if that section is applicable, plaintiff city has no constitutional right to levy a tax under its provisions based on defendant's total gross receipts. Defendant also contends that the city's right to a recovery for the year 1948 is barred by the applicable limitation provisions of section 338, subd. 1, of the Code of Civil Procedure.

In substance the principal problem presented is one of construction—construction as to the scope and intended purview of section 21.166 of the Los Angeles Tax Ordinance. Plaintiff city contends that defendant company is a person selling goods, wares and merchandise at wholesale within the meaning of section 21.166. Defendant company claims that it is not.

Defendant argues that section 21.166 covers two types of businesses. Those which are engaged in the "manufacturing and selling" of goods, wares or merchandise at wholesale and those which are engaged in "selling" of goods, wares or merchandise at wholesale. This contention is based upon the ground that if "selling" by its own force includes "manufacturing and selling" there would have been no reason to separately mention "manufacturing and selling." In view of this language, defendant argues that the term "selling" is not intended to include "manufacturing and selling" and therefore it necessarily follows that the term "selling" was not intended to include such activities as "producing and selling" or "mining and selling." Based upon this premise, defendant concludes that the inference is clear that the term "selling" is only intended to cover businesses of a merchandising nature, where selling, rather than the creation or capture of something to sell, is the essence of the enterprise; and therefore since the dominant portion of defendant's business is the capture of something to sell, section 21.166 is not applicable.

There seems to be no doubt that the defendant company was engaged in selling, since a company which derives several million dollars a year from the sale of petroleum products is obviously engaged in selling those products. However, we still have the problem of whether the defendant company was a person "selling" within the meaning of section 21.166.

[1-4] In analyzing the scope and meaning of a tax ordinance of this type, we are aware that tax laws are to be construed against the municipality and in favor of the taxpayer, but it must also be remembered that such a rule does not take precedence over other fundamental rules of statutory construction. It is fundamental that "judicial construction should be in keeping with the natural and probable legislative purpose, and avoid conflict, and harmonize all the applicable provisions of the law on the subject, if possible." McQuillian, Municipal Corporation, 3rd Ed., Vol. 16, Taxation, § 44.12. Also where the problem involves the construction of a particular section of a taxing ordinance, the ordinance should be looked to in its entirety and its provisions construed together. Bramman v. City of Alameda, 162 Cal. 648, 124 P. 243.

In the case at bar, the section in question (21.166) is but one small part of Ordinance No. 77,000 which is the license ordinance of the City of Los Angeles. Considering the ordinance as a whole, we find that it contains various introductory sections covering such items as definitions, interpretation, enforcement, penalties, and license transfers; followed by a great many sections setting out the tax liability of specific business enterprises such as hotels, laundries, theaters, oil wells located in the City of Los Angeles, etc. Aside from the sections referring to specific businesses, the ordinance contains three so-called "catch-all" sections: Section 21.166 provides that "Every person manufacturing and selling any goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay; * * *"; section 21.167 covers those who manufacture and sell or sell goods at retail and who are not licensed by other provisions; and section 21.190 provides that "Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article shall pay * * *." While these other sections are not in issue here, a study of their provisions and of the ordinance as a whole is helpful in construing the intended scope and meaning of section 21.166.

[5] An analysis of the ordinance in its entirety makes it apparent that even though several hundred types of businesses are specifically provided for it is almost impossible to cover each and every type of business by a specific section. For this reason the legislative body found it expedient to include three "catch-all" sections which were intended to cover those business enterprises not specifically taxed by the other sections. Such "catch-all" provisions are not considered too vague and they have been upheld by the courts. City of Los Angeles v. Rancho Homes, Inc., 40 Cal.2d 764, 256 P.2d 305.

There can be no doubt that the legislative body intended the "catch-all" sections to be sufficiently broad to cover all business enterprises not licensed under other sections of the ordinance. With this purpose in mind it is obvious that the language used in each of the three "catch-all" sections was intended to be such as would cover a wide range of activities. Our problem here is to determine whether the language of one of these "catch-all" sections, section 21.166, is sufficiently broad to include the business operations of defendant company.

[6–8] Keeping in mind the broad scope and purpose of section 21.166 it becomes apparent that it was intended to cover all businesses engaged in manufacturing and selling at wholesale in the city and also those businesses which merely engaged in selling at wholesale in the city. Thus all businesses which are engaged in selling goods, wares or merchandise at wholesale in the City of Los Angeles and which are not licensed by other sections of the ordinance come within section 21.166. This is true regardless of whether they are engaged in "manufacturing and selling" or merely "selling." The important thing is that they are engaged in selling within the City of Los Angeles. If they are so engaged, all gross receipts attributable to selling in the City of Los Angeles are subject to the business license tax provided for by section 21.166. The fact that the goods sold are produced in remote areas is unimportant. It is also immaterial whether they are produced in a company owned plant or purchased from an independent producer. The important thing is that the taxpayer is engaged in selling goods at wholesale in the City of Los Angeles.

Section 21.166 of the tax ordinance was meant to cover those businesses, not covered by other sections, which are engaged in selling goods at wholesale in the city. It is so worded to include those who manufacture and sell as well as those who merely sell in the city. The fact that an organization is engaged in selling in the city is sufficient and it is of no import that selling is but a small part of the total effort or that selling is not difficult for the instant company. There is no reason to believe that the authors of section 21.166 were concerned with the degree of effort or expense involved in the selling of goods nor were they concerned with whether or not selling was the dominant or incidental activity of the company. The main concern would appear to be whether or not the company was engaged in the selling of goods. The purpose of the section was to place a business license tax on those activities which took place within the City of Los Angeles regardless of their relationship to activities outside the city.

[9] The defendant company has argued that the term "selling" was not intended to include other elements such as "producing and selling" or "mining and selling", but rather that it could only mean selling of a merchandising nature. Such argument seeks to narrow the meaning of the words used to the point of actually destroying the general purpose of a "catch-all" section. The sale of goods is defined in section 1721 (2) of our Civil Code as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." There is no requirement that the seller must be in the merchandising business before the transaction can be called a sale and likewise it is not logical to attempt to narrow the meaning of the term "selling" to include only those whose dominant business is of a merchandising nature.

There is nothing in section 21.166 or anywhere in the entire taxing ordinance indicating that the word "selling" was only meant to include businesses where selling was the dominant part of a taxpayer's business. On the contrary section 21.08(t) of the Los Angeles Tax Ordinance provides that "The phrase 'selling goods, wares and merchandise' shall, in addition to any other meaning established at law, be deemed to extend to and include in its application persons who engage in the business of fabricating, serving or supplying, for a price, tangible personal property furnished, produced or made at the special order of purchasers or consumers, or for purchasers or consumers who do or do not furnish, directly or indirectly, the specifications therefor." Thus the business of "selling" includes not only those businesses where merchandising is the dominant element but also those businesses which are engaged in "fabricating, serving or supplying" goods for a price.

[10] In the case at bar defendant company, being a corporation, is a person as defined in section 21.08(p) of the Los Angeles Tax Ordinance. The petroleum products with which it deals are considered in the nature of merchandise, State of Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716, and the gross receipts of defendant company are

derived from the sale of such merchandise. Most negotiations for these sales were conducted through the defendant's Los Angeles office and all the contracts were signed by defendant in Los Angeles. Also payment for all sales is received from purchasers at the Los Angeles office. These factors along with the other stipulated facts make it apparent that defendant's Los Angeles office was engaged in the activity of "selling goods, wares or merchandise at wholesale" within the City of Los Angeles and was therefore subject to the provisions of section 21.166 of the Los Angeles Tax Ordinance.

The mere fact that the products sold never entered the City of Los Angeles does not prevent the selling activities from taking place in Los Angeles. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565. The business license tax in question here, is based on the fact that the selling activity is carried on within the city and it is immaterial where the products are produced or delivered. In the 1953 case of Keystone Metal Co. v. City of Pittsburgh, 374 Pa. 323, 97 A.2d 797, the sales transaction was consummated in Pittsburgh but the goods were shipped from a point outside Pennsylvania to a plant in New Jersey. The Supreme Court of Pennsylvania held that the receipts of such sale should be included in the measure of the City of Pittsburgh's license tax, based on gross receipts. The court held that the selling activities within the city were sufficient to sustain imposition of the tax even though delivery and passage of title took place outside the city.

Defendant company also contends that even if section 21.166 is applicable, the city cannot constitutionally tax the total gross receipts of the company since such would be an attempt to impose a tax on business carried on outside the city. This argument is based on the ground that since the total gross receipts include the proceeds of products produced and delivered outside the city the effect would be to allow a city to tax transactions occurring outside its boundaries. This argument seems to lose sight of the nature of section 21.166.

[11-13] The business license tax here sought to be collected is a privilege tax, exacted for the privilege of engaging in the activity of "selling." When this activity takes place within the city, the rate of tax may be measured by the gross receipts derived therefrom. Union Pac. R. Co. v. City of Los Angeles, 53 Cal.App.2d 825, 830, 128 P.2d 408. As stated by this court in Martin Ship Service Co. v. City of Los Angeles, 34 Cal.2d 793, 796, 215 P.2d 24, 26, "In view of the recent decisions of the United States Supreme Court in Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475 [92 L.Ed. 1832], and Central Greyhound Lines, Inc., v. Mealey, 334 U.S. 653, 68 S.Ct. 1260 [92 L.Ed. 1633], the city may clearly tax plaintiffs' local activities and the gross receipts therefrom." In the case at bar it is true that some of these gross receipts are attributable to extra-territorial elements such as the production and delivery of the goods. However there is no constitutional objection to resorting to extra-territorial elements in determining the rate of tax. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193; Maxwell v. Bugbee, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed. 1124; Cedar Hill Cemetery Corp. v. Dist. of Columbia, 75 U.S.App.D.C. 84, 124 F.2d 286. The activity being taxed here is the activity of selling and such activity can be taxed by the city even though the goods never enter its territorial limits. Keystone Metal Co. v. City of Pittsburgh, supra, 374 Pa. 323, 97 A.2d 797.

In the instant case we can find no objection, constitutional or otherwise, to the imposition of a business license tax on the privilege of engaging in selling activities within the city. Likewise there is no objection to basing the rate of such tax on the gross receipts attributable to such selling activities, even though various extra-territorial events contribute to such gross receipts. There is, however, one important limitation which should be pointed out and that is this: even though the city can tax the activity of selling it can only base the tax on such selling activities as are carried out within its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included. Such a construction necessarily follows from the fact that the business license tax is on the privilege of engaging in selling activities in the City of Los Angeles and as such should only be based upon such activities.

In the case of Gotlieb v. City of Birmingham, 243 Ala. 579, 11 So.2d 363, 364, the city ordinance imposed a tax on "each packing house" and on persons "soliciting or selling packing house products". In construing the scope of this city ordinance the court held that in computing the license tax, based upon gross receipts, sales outside the territorial limits of the city should not be included. In City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corporation, 8 Cir., 1936, 81 F.2d 193, 106 A.L.R. 1327, a city license tax on persons engaged in the business of selling gasoline, based on the number of gallons sold, was held to be inapplicable to sales made outside the city. The court at page 196 of 81 F.2d stated that "there is a presumption that the governing body of the city was legislating with reference to the conduct of business within the territorial limits of the city, and there is nothing in the provisions of the ordinances indicating that it was the intention to give them extraterritorial effect." To allow a city to levy a license tax based upon gross receipts attributable to selling activities outside the city would be an unreasonable discrimination and a denial of equal protection of the law. See Ferran v. City of Palo Alto, 50 Cal.App.2d 374, 122 P.2d 965. If such taxation were allowed it would unjustly discriminate against those firms whose selling activities in Los Angeles compose but a small fraction of the total sales effort and whose gross receipts are in large part attributable to selling activities in other areas. As stated in Franklin v. Peterson, 87 Cal.App.2d 727, 730, 197 P.2d 788, 790, "It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the constitution, but to make a valid statute or ordinance within the scope of its constitutional powers." In the instant case a just and reasonable construction requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the City of Los Angeles.

It is also contended, by defendant company, that the plaintiff city's cause of action for the recovery of 1948 taxes is barred by subdivision 1 of section 338 of the Code of Civil Procedure. Defendant had previously taken the position, in the trial court, that the two-year limitation of section 339, subd. 1, Code Civ.Proc., might also be applicable but in their appeal this view has been abandoned. Plaintiff argues that the four-year period of section 343 is applicable, and it therefore becomes necessary to determine whether the limitation period on the city's cause of action for taxes is governed by the provisions of section 338, subd. 1, or by the provisions of section 343.

Section 343 of the Code of Civil Procedure provides that "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." In view of this wording section 343 can only apply if no limitation period for the instant action is provided for in the previous sections. Defendant company contends that the instant cause of action by the city for taxes comes within the limitation period of previous section 338, subd. 1, and therefore section 343 cannot apply. We are inclined to agree.

The three-year limitation period of section 338, subd. 1, which is applicable to "An action upon a liability created by statute, other than a penalty or forfeiture", adequately covers the instant cause.

[14, 15] It is true that section 338, subd. 1, purports to cover only those liabilities created by statute, but in John P. King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801, the Supreme Court of the United States construed the word statute as including municipal ordinances. Thus by the direct approach of construction it would be possible to say that the instant license tax was a liability created by statute. It is also possible to reach the same result by the indirect method since we find that a liability created by statute is a liability which would not exist but for a statute. Fidelity & Deposit Co. of Maryland v. Lindholm, 9 Cir., 1933, 66 F.2d 56, 58, 89 A.L.R. 279. In the instant case the city license tax, though created in the final instance by the license ordinance could not have existed but for the power delegated to the city by the state Constitution and statutes. This is true since "[m]unicipal corporations have no inherent power of taxation. On the contrary, they possess with respect thereto only such power as has been granted to them by the constitution or statute." McQuillian, Municipal Corporations, 3rd Ed., Vol. 16, § 44.05. In Wright v. City of Lorain, 70 Ohio App. 337, 46 N.E.2d 325, it was held that the liability of a city to pay a policeman's salary, which was provided for by city ordinance as authorized by state statutes, was a liability created by statute. Reasoning from this basis the Ohio court held that the action for the recovery of such salary was barred by the provisions of the limitation statute dealing with liabilities created by statute. Regardless of whether we prefer this indirect approach or the direct approach of construing the word statute to include ordinance, the inevitable conclusion is that the liability in question was created by statute and therefore the limitation period of section 338, subd. 1, is applicable.

[16, 17] In the case at bar the three-year period of limitation of section 338, subd. 1, which is applicable, runs from the time the cause of action accrues, and the cause of action accrues when the tax becomes delinquent. Since the tax due under section 21.166 must be paid before the close of business on the last day of February of each year (sections 21.20 and 21.24.1 of the Los Angeles Tax Ordinance), the tax for the year 1948 was delinquent on March 1, 1948. The three-year limitation period which began to run from this date expired on March 1, 1951, which was prior to the filing of the complaint by plaintiff city, and, therefore, the city's cause of action for recovery of the 1948 tax is barred.

We hold, therefore, that the defendant company is subject to the business license tax under the provisions of section 21.166 of the Los Angeles Tax Ordinance as here construed but that the city's cause of action to recover such tax for the year 1948 is barred.

Judgment reversed.

SHENK, Acting C. J., and EDMONDS, TRAYNOR and SPENCE, JJ., and BRAY, J. pro tem., concur.

SCHAUER, Justice.

I dissent. It is my view that the opinion prepared for the District Court of Appeal (reported at 260 P.2d 217), authored by Justice Fox and concurred in by Presiding Justice Moore and Justice McComb, adequately discusses and correctly resolves the issues which are presented on this appeal. For the reasons therein stated, I would affirm the judgment.

In re Guardianship of HIROKO KAWAKITA et al.

HIROKO KAWAKITA et al. v. LORENZ.
L. A. 22281.

Supreme Court of California.
In Bank.
May 28, 1954.

Rehearing Denied June 23, 1954.

Proceeding on motion to vacate, annul, and declare void an order for appointment of guardian. The Superior Court, Imperial County, L. J. Mouser, J., denied the motion to vacate the order of appointment, but vacated, annulled, and declared void all orders in guardianship proceeding subsequent to appointment of guardian, and movant appealed. The Supreme Court, Traynor, J., held that where guardian had been discharged four years prior to commencement of this proceeding, order appealed from was not tantamount to any of the orders listed in statute covering appealable orders in guardianship proceedings, and, therefore, order denying the motion was not an appealable order.

Appeal dismissed.

Carter, J., dissented.

Prior opinion 258 P.2d 1036.

See also 271 P.2d 18.

1. Guardian and Ward 🔑18

Only those orders mentioned in statute covering appealable orders in guardianship proceedings are appealable. Probate Code, § 1630.

2. Guardian and Ward 🔑18

Where guardian had been discharged four years prior thereto, order denying motion to vacate, annul and declare void the order for appointment of a guardian was not an appealable order. Probate Code, § 1630.

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Morris Lavine, Los Angeles, for appellants.

Horton & Knox, Harry W. Horton and R. L. Knox, Jr., El Centro, for respondent.

TRAYNOR, Justice.

Hiroko Kawakita and her brother, Tomoya, are native-born children of Yasabura Kawakita, an alien Japanese, who was appointed guardian of his children and of their estates in 1923. In 1927, Yasabura furnished the funds to purchase a lot in Calexico on which there was a two-story brick business building. The purchase price of the property was $33,000, and $7,000 in improvements were added during the next ten years. Title was taken in the names of the children as tenants in common, subject to a trust deed in favor of Yasabura. Hiroko attained her majority on October 19, 1937, and Tomoya attained his on September 26, 1942. In 1938, Yasabura filed an account of his guardianship. The court approved the account, but refused to close the guardianship of Hiroko and her estate because of the deficit due to Yasabura on the trust deed. In 1939, Tomoya went to Japan where he remained throughout the war and until his return to the United States in 1946. Yasabura was sent out of the state to an internment camp for Japanese aliens in February 1942. On March 10, 1942, he executed a general power of attorney to his daughter, Hiroko, who was subsequently removed to a relocation center in Arizona in May 1942. In an instrument dated "April, 1942" Yasabura resigned his guardianship. This instrument was not filed until May 4, 1942. On April 8, 1942, W. H. Lorenz, respondent herein, petitioned the Superior Court of Imperial County to be appointed guardian of the estates of Hiroko and Tomoya, who were described in the petition as "minors" owning the building mentioned above. The petition related that Yasabura had been acting as guardian, but that he had been evacuated from Imperial County and was "therefore unable to look after this estate." The petition also stated that respondent was "familiar with the rental of properties and [was] willing to act as the guardian of the property belonging to the minors." The nomination filed with respondent's petition related that the "minors" owned the property described in the petition, and that they nominated respondent as their guardian. The nomination concluded with the following statement: "I, Hiroko Kawakita am now *25* years of age and Tomoya Kawakita is now *20* years of age." The nomination was signed by Hiroko only. Neither the petition nor the nomination was verified. Notice of hearing on the petition was posted at the court house, but the record is bare of any evidence that personal notice was given to the parents of the "minors" or that a showing was made that such notice could not be given. Nor does it appear that notice was given to any person having the custody of the "minors" or their estates. The printed form used for the affidavit of notice recites only the posting of notice at the court house; the parts relating to personal notice are crossed out. After a hearing, of which there is no transcript, the court entered an order on April 27, 1942, reciting that "due proof having been made * * * and the court finding that notice of the hearing of said petition has been given ~~to~~ ——— as required by law;" and ordering that respondent be appointed guardian "upon *his* giving a *surety* bond * * *, and taking and subscribing the oath required by law." His oath was dated April 30, 1942. On the same day, respondent filed a verified petition, in which he described himself as the "duly appointed, qualified and acting guardian of the estate of the above named minors," asking that an order be made permitting him as guardian to sell the property of the guardianship estate. His letters of guardianship were not issued until five days later, May 5, 1942. Notice of hearing on the petition for permission to sell was posted at the court house and published three times in a local newspaper. The record does not reveal any notice of a place where offers or bids would be received. Prob. Code, §§ 1534, 780, 782. Further, there is no record that an appraisal was made. Prob.Code, § 784. The only statement of the value of the property that appears in the record was that made by respondent in his petition. He alleged therein that the rental value of the property was not sufficient to pay taxes, upkeep, and the interest on the debt of $13,206.25; secured by the trust deed to Yasabura; that the property was not worth more than $6,000; and that he had received an offer in that amount. It was further alleged in the petition that Hiroko had attained her majority "but that there will be no money to go into the guardianship from the sale of this property for the reason that the said property is encumbered with a trust deed in favor of Y. Kawakita * * * and that therefore the wards have no equity whatever, and [respondent] therefore thinks that it will be for the best interests of this estate that the building be sold and the estate closed." The petition for permission to sell was subsequently granted, and a sale was consummated to John T. Rashid for $6,000. Since the amount due on the trust deed was greater than the sale price, the guardianship estate received nothing from the sale. The $6,000, less the costs of the sale, were deposited in the "blocked" bank account of Yasabura, pursuant to a license issued by the United States Department of the Treasury. The guardian's annual reports for 1943 and 1944 were approved, but the estate was not closed until October 2, 1946, when the court discharged the guardian and ordered the assets of the estate—$329.68—distributed to the wards.

Tomoya returned to the United States in 1946. He was thereafter indicted for and convicted of treason. Judgment and sentence of death were imposed on October 8, 1948. United States v. Tomoya Kawakita, D.C., 96 F.Supp. 824; affirmed 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249; rehearing denied 344 U.S. 850; 73 S.Ct. 5, 97 L.Ed. 660; motion to modify death sentence denied, D.C., 108 F.Supp. 627; death sentence commuted to life imprisonment by Presidential Proclamation of October 29, 1953.

In March 1947, Hiroko, Tomoya, and Yasabura filed an action in the Superior Court of Imperial County against respondent and John T. Rashid, the vendee of the guardian's sale, to quiet title to the property sold by the guardian and to recover damages for fraud or, alternatively, to declare the guardian's deed null and void and to require Rashid to convey the property to the plaintiffs Hiroko and Tomoya. This action was dismissed on motion of the defendants on February 28, 1952, for lack of prosecution. The dismissal has been affirmed. 271 P.2d 15.

The present proceedings were instituted in the Superior Court of Imperial County on October 14, 1950, when Hiroko and Tomoya moved to "vacate, annul and declare void the Order for Appointment of W. H. Lorenz as [their] Guardian and all subsequent orders based thereon on the ground that the Court was without jurisdiction to entertain the aforesaid guardianship proceedings and to make any of the orders in this proceeding * * *." After a hearing, the court made an order denying Tomoya's motions, denying Hiroko's motion to annul the appointment of respondent as guardian, and granting Hiroko's motion to declare void all orders in the guardianship proceedings subsequent to the appointment of the guardian, "in particular the order concerning the sale of real property * * *."

Hiroko noticed an appeal from that part of the order denying her motion to annul the appointment of respondent as her guardian and from each and every part of the order denying the motions of Tomoya. She contends that the order appointing the guardian is void on its face because it appears from the judgment roll that she was not a minor, that the statutory requirements of notice were not complied with, and that the appointment was not "necessary and convenient." Respondent contends, on the other hand, that the order appointing him guardian is not void on its face and that Tomoya cannot challenge the denial of his motions on the grounds that he did not appeal and that he is now civilly dead. We have concluded that the order appealed from is not an appealable order and that therefore we have no jurisdiction to review these contentions in this proceeding.

[1, 2] Section 1630 of the Probate Code provides that "An appeal may be taken to the Supreme Court from an order granting or revoking letters of guardianship; settling an account of a guardian; instructing or directing a guardian; or refusing to make any order heretofore mentioned in this section." With the possible exception of an order granting a new trial, see, Estate of Armstrong, 8 Cal.2d 204, 206, 64 P.2d 1093, it is settled that only those orders mentioned in section 1630 are appealable in guardianship proceedings. Guardianship of Leach, 29 Cal.2d 535, 539, 176 P.2d 369; Estate of Kay, 30 Cal.2d 215, 217, 181 P.2d 1; see also, Kramer v. Superior Court, 36 Cal.2d 159, 161, 222 P.2d 874; Fredrickson v. Superior Court, 38 Cal.2d 593, 596–597, 241 P.2d 541. That section does not mention an appeal from an order either granting or denying a motion to vacate or annul a prior order of the court. Accordingly, an appeal may be taken from such an order only if in legal effect it is tantamount to one or more of the orders listed. See, Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11; Estate of Estrem, 16 Cal.2d 563, 566, 107 P.2d 36. If respondent's letters of guardianship were still in effect, it might reasonably be contended that the court's order refusing to vacate and annul the order appointing him guardian was tantamount to an order refusing to revoke letters of guardianship. See, In re Dahnke, 64 Cal.App. 555, 559, 222 P. 381; Estate of Estrem, supra, 16 Cal.2d 563, 566, 107 P.2d 36; cf., Guardianship of Brazeal, 117 Cal.App.2d 59, 60, 254 P.2d 886. In the present case, however, respondent was discharged as guardian approximately four years before this proceeding was commenced, and accordingly his letters are no longer in effect and could not now be revoked by any order to vacate and annul. Nor is the order appealed from equivalent to any of the other orders listed in section 1630.

The appeal is dismissed.

SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority has seen fit to dismiss this appeal upon the sole ground that the order appealed from is not an appealable order. Such a decision is not only erroneous and misleading but is based upon an inadequate analysis of section 1630 of the Probate Code.

It is well recognized in California that the right of appeal in probate matters is purely statutory and exists only in those cases in which it is given by statute. Estate of Funkenstein, 170 Cal. 594, 150 P. 987; In re Walkerly, 94 Cal. 352, 29 P. 719. It is equally well recognized that the right to appeal in guardianship matters is governed exclusively by Probate Code section 1630. Guardianship of Leach, 29 Cal.2d 535, 176 P.2d 369.

In the case at bar the appellants appealed from an order denying a motion "to vacate, annul and declare void" the appointment of a guardian. Since such an order has to do with guardianship proceedings it can only be appealed from if provision for such appeal has been made by section 1630 of the Probate Code. It therefore becomes apparent that the appealability or non-appealability of the instant order is dependent upon the provisions of section 1630 of the Probate Code.

Section 1630 of the Probate Code provides that "An appeal may be taken to the Supreme Court from an *order* granting or *revoking letters of guardianship*; settling an account of a guardian; instructing or directing a guardian; *or refusing to make any order heretofore mentioned* in this section." (Emphasis added.) This section makes it unquestionably clear that an appeal may be taken from an order granting or revoking letters of guardianship and that an appeal may also be taken from a refusal to make either of these orders. Thus an order revoking letters of guardianship is an appealable order. Likewise an order refusing to revoke letters of guardianship is also an appealable order. We therefore find that section 1630 of the Probate Code makes express provision for the appeal of an order refusing to revoke letters of guardianship. Not only does section 1630 expressly provide for the appeal of orders refusing to revoke letters of guardianship but the appeal of such orders has long been the accepted practice in California. In re Morhoff, 179 Cal. 595, 178 P. 294; Matter of Schwartz, 171 Cal. 633, 154 P. 304; Guardianship of Rapp, 54 Cal.App.2d 461, 129 P.2d 130. The rule in California is well established that "An appeal may be taken from a judgment or order of the superior court granting or refusing to grant, revoking or refusing to revoke, letters of guardianship; * * *." 13 Cal.Jur. 167.

Having determined that an order refusing to revoke letters of guardianship is an appealable order, we must now determine whether in the instant case the order in question was one which refused to revoke letters of guardianship. Looking to appellants' motion of October 14, 1950, we find that they sought to "vacate, annul and declare void the order of this court [probate court] made in this proceeding, on May 5, 1942, appointing W. H. Lorenz [respondent] a guardian of the estates of said Hiroko Kawakita and Tomoya Kawakita, * * *." This order of May 5, 1942, which appellants sought to vacate was entitled "Letters of Guardianship" and it provided among other things that "W. H. Lorenz is hereby appointed guardian of" the estate of Hiroko and Tomoya Kawakita. This means that appellants sought to vacate the order of May 5, 1942, by which letters of guardianship were granted to respondent. The court's refusal to make such an order, vacating the order of May 5, 1942, was clearly a refusal to "vacate, annul and declare void" the letters of guardianship. If an order refusing to "vacate, annul and declare void" is the same thing as an order refusing to "revoke" then the instant order refusing to vacate the letters of guardianship is without question an appealable order within the provisions of section 1630 of the Probate Code.

In comparing the word "revoke" with the word "vacate" we find that the courts of this country have frequently held the two terms to be synonymous. People ex rel. Filippone v. Martin, Sup., 46 N.Y.S.2d 234, 235. As for comparing the word "revoke" with the word "annul" we find that to revoke is "to annul by recalling or taking back; * * * An annulling; a cancellation. * * *" Webster's New International Dictionary, Second Ed., 1933, unabridged. In Black's Law Dictionary, Third Ed., 1933, it is stated that "revoke" means "To call back; to recall; to annul an act by calling or taking it back." The courts of this country have been in accord with such definitions, Braun Estate, 358 Pa. 271, 56 A.2d 201; Mayor, etc., of City of Houston v. Houston City Street Ry. Co., 83 Tex. 548, 19 S.W. 127; Ford v. Greenawalt, 292 Ill. 121, 126 N.E. 555. It is equally well established that the word "revoke" means to "declare void." O'Hagan v. Kracke, 165 Misc. 4, 300 N.Y.S. 351, 362; In re Will of Barrie, 393 Ill. 111, 65 N.E.2d 433; Commissioner of Internal Revenue v. Holmes' Estate, 5 Cir., 148 F.2d 740, 742. In California our courts have frequently used such terms as "revoke," "vacate" and "set aside" interchangeably. Guardianship of Van Loan, 142 Cal. 423, 76 P. 37; In re Moroff, supra, 179 Cal. 595, 178 P. 294; Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370; In re Dahnke, 64 Cal.App. 555, 222 P. 381. It thus becomes apparent that a motion to "vacate, annul and declare void" is the equivalent of a motion to "revoke."

In the case at bar the appellants sought to "vacate, annul and declare void" the letters of guardianship of respondent. This was in effect a motion to revoke such letters. The order of the probate court refusing to revoke such letters of guardianship was clearly and unequivocally an appealable order within the provisions of section 1630 of the Probate Code.

The net result is that the order appealed from is an appealable order and it is incumbent upon this court to decide the case upon its merits. The mere fact that the guardian was previously discharged is immaterial since the order to revoke and vacate because of an absence of jurisdiction does more than merely discharge a guardian, it goes back and cancels all proceedings based upon such appointment. It is well established that an order of the court which, as here, is void on its face can be set aside at any time. In re Dahnke, supra, 64 Cal.App. 555, 222 P. 381; People v. Greene, 74 Cal. 400, 16 P. 197; Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36.

In the case at bar the lower court committed a patent and obvious error in refusing to revoke the letters of guardianship since the record of the order of appointment was void on its face. The valid appointment of a guardian for a minor requires that notice of the appointment proceedings be given to the parents of the minor, or alternatively, proof must be made that such notice cannot be given. It is also requisite that the appointment be "necessary or convenient". Probate Code, §§ 1440, 1441. In the instant case no notice was given to the parents of Hiroko and Tomoya and an appointment made without such notice is a nullity. In re Dahnke, supra, 64 Cal.App. 555, 222 P. 381. Guardianship of Kerns, 74 Cal.App.2d 862, 169 P.2d 975; Guardianship of Van Loan, supra, 142 Cal. 423, 76 P. 37. The record also indicates that the appointment was neither necessary nor convenient since at the time the letters of guardianship were issued the record before the court showed that the property of the estate was worth less than $6,000; that liabilities amounted to more than $13,000; and that therefore Hiroko and Tomoya had "no equity whatever" in the property which was to constitute the guardianship estate. The law in California is well established that an order appointing a guardian of the person and estate of a minor may be vacated at any time, if the record of the appointment discloses affirmatively upon its face that the order was void for want of jurisdiction of the court to make it. Estate of Eikerenkotter, supra, 126 Cal. 54, 58 P. 370. It thus becomes apparent that the order which appellants sought to revoke was a nullity and should have been set aside.

For these reasons I would reverse the order appealed from with directions to enter an order setting aside the order appointing respondent guardian of these petitioners and all subsequent orders based thereon.

Rehearing denied; CARTER, J., dissenting.

42 Cal.2d 848

HIROKO KAWAKITA HAYASHI et al.
v.
LORENZ et al.
L. A. 22493.

Supreme Court of California
In Bank.
May 28, 1954.
Rehearing Denied June 23, 1954.

Action to declare void the appointment of guardian to quiet title to property which had been sold by guardian, and for fraud. The Superior Court, Imperial County, Elmer W. Heald, J., entered order of dismissal and plaintiffs appealed. The Supreme Court, Traynor, J., held that where action was filed March 4, 1947 and plaintiffs made no effort to bring cause to trial until February 18, 1952, and reasons advanced for delay were without merit, action was properly dismissed.

Order affirmed.

Carter, J., dissented.

Prior opinion 258 P.2d 1039.

1. Appeal and Error 🔑973

Discretion within statute authorizing dismissal of action for want of prosecution is discretion of trial court, and it will be disturbed on appeal only in cases of manifest abuse. Code Civ.Proc. § 583.

2. Judgment 🔑346

Motions 🔑59(1)

A judgment or order which is void on its face and which requires only an inspection of judgment roll or record to show its invalidity may be set aside on motion at any time after its entry by court which rendered the judgment or made the order.

3. Dismissal and Nonsuit 🔑60(7)

Where action to declare void appointment of guardian, to quiet title to property which had been sold by guardian, and for fraud was filed March 4, 1947, and plaintiffs made no effort to bring cause to trial until February 18, 1952, fact that plaintiffs had moved to vacate all orders in the guardianship on ground that each of the orders was void on its face provided no excuse for failure to bring action to trial. Code Civ.Proc. § 583.

4. Convicts 🔑1

The civil disabilities attendant upon the conviction and sentence to death of a person in federal court for a federal offense would be determined by the laws of the United States.

5. Convicts 🔑1

Civil death statutes are penal, and would be strictly construed. Pen.Code, §§ 2599–2604, 2601.

6. Convicts 🔑1

Civil death statutes were intended to apply only to persons convicted in the courts of the state and imprisoned in the prisons of the state. Pen.Code, §§ 2599–2604, 2601.

7. Dismissal and Nonsuit 🔑60(3)

Where action to declare void appointment of guardian, to quiet title to property which had been sold by guardian, and for fraud was filed March 4, 1947, and plaintiffs made no effort to bring cause to trial until February 18, 1952, fact that a plaintiff had been convicted in a federal court on October 5, 1948, for a federal offense provided no excuse for failure to bring action to trial. Code Civ.Proc. § 583; Pen.Code, §§ 2599–2604, 2601.

8. Dismissal and Nonsuit 🔑60(7)

Proceeding on motion in probate court to vacate all orders in a guardianship and criminal proceedings in a federal court wherein one of the movants was charged with a federal offense did not constitute a partial trial of action by movants to declare void appointment of guardian, to quiet title to property which had been sold by guardian, and for fraud filed March 4, 1947, and did not suspend operation of statute providing for dismissal of actions for lack of prosecution. Code Civ.Proc. § 583.

◆

Morris Lavine, Los Angeles, for appellant.

Horton & Knox, Harry W. Horton and R. L. Knox, Jr., El Centro, for respondents.

TRAYNOR, Justice.

Plaintiffs appeal from an order of dismissal entered on defendants' motion to dismiss for failure to prosecute. Code Civ. Proc. § 583.

Plaintiffs' complaint was filed on March 4, 1947. An amended complaint, filed on December 11, 1947, alleged that defendants had entered into a conspiracy to defraud plaintiffs of certain real property, and that in pursuit of this conspiracy defendant Lorenz procured his appointment as guardian of the estates of plaintiffs Hiroko and Tomoya, and, as guardian, subsequently sold the property constituting the guardianship estate to defendant Rashid for much less than its market value. It was also alleged that defendants fraudulently procured the sale to defendant Rashid of certain property belonging to plaintiff Yasabura. For a statement of the circumstances surrounding these events, see Guardianship of Hiroko Kawakita, Cal.Sup., 271 P.2d 13. Plaintiffs' amended complaint ended with a prayer for compensatory and exemplary damages, or, alternatively, for damages and for an order declaring the guardian's deed null and void and directing defendant Rashid to convey the property to plaintiffs Hiroko and Tomoya.

Defendants answered plaintiffs' amended complaint denying the alleged conspiracy to defraud, denying that each of the orders in the guardianship proceedings was void on its face as plaintiffs claimed, and asserting that plaintiff Tomoya had no standing in court either because he was a citizen of Japan (with which the United States was then still at war) or because he was civilly dead as a result of his conviction of treason and sentence to death.

On February 18, 1952, plaintiffs noticed a motion to set the cause for trial before March 4, 1952. Defendants filed a motion to dismiss the action for failure to prosecute on February 26. Both motions were heard on February 28, and, on the following day, an order was made granting the motion to dismiss. This appeal followed.

[1] Section 583 of the Code of Civil Procedure provides, in part, "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial * * *." The discretion is that of the trial court, and it will be disturbed only in cases of manifest abuse. Hillsdale Builders Supply Co. v. Eichler, 109 Cal.App.2d 117, 118, 240 P.2d 343, and cases there cited. Plaintiffs have not shown any such abuse of discretion.

[2, 3] Plaintiffs contend that because defendants, in their answer, raised certain issues as to the validity of the orders in the guardianship proceeding, Guardianship of Hiroko Kawakita, 271 P.2d 13, and as to Tomoya's standing in court, they could not go to trial until there was a final determination in the guardianship proceedings and in the case of United States v. Tomoya Kawakita, D.C., 96 F.Supp. 824. Subsequently affirmed on appeal, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249, rehearing denied 344 U.S. 850, 73 S.Ct. 5, 97 L.Ed. 660, motion to modify death sentence denied, D.C., 108 F.Supp. 627. Both in their amended complaint and in their motion to vacate the orders in the guardianship proceeding, plaintiffs took the position that each of the orders therein was void on its face. In such a case they could be attacked and their invalidity shown at any time. "It is well settled that a judgment or order which is void on its face, and which requires only an inspection of the judgment roll or record to show its invalidity, may be set aside on motion, at any time after its entry, by the court which rendered the judgment or made the order. [Citations.]" In re Dahnke, 64 Cal.App. 555, 560, 222 P. 381, 384; see also Olivera v. Grace, 19 Cal. 2d 570, 573–574, 122 P.2d 564, 140 A.L.R. 1328; Estate of Estrem, 16 Cal.2d 563, 571, 107 P.2d 36; Luckenbach v. Krempel, 188 Cal. 175, 177, 204 P. 591; People v. Davis, 143 Cal. 673, 675–676, 77 P. 651; Winrod v. Wolters, 141 Cal. 399, 402–403, 74 P. 1037; Kreiss v. Hotaling, 96 Cal. 617, 622–623, 31 P. 740; People ex rel. Bray v. City of Barnes City, 105 Cal.App. 618, 622–623, 288 P. 442. The proceedings instituted by Hiroko's and Tomoya's motions to vacate the orders in the guardianship matter therefore provide no excuse for plaintiffs' failure to bring this action to trial.

[4–7] The issue raised as to Tomoya's standing in court is likewise unavailing. His judgment of conviction was entered on October 5, 1948, less than two years after the present action was commenced. It determined the issue of citizenship. The civil disabilities attendant upon his conviction and sentence to death must be determined by the laws of the United States, under which he was convicted. Beck v. Downey, 9 Cir., 191 F.2d 150, 153, judgment vacated on other grounds, 343 U.S. 912, 72 S.Ct. 646, 96 L.Ed. 1328, and reinstated, 9 Cir., 198 F.2d 626; Panko v. Endicott Johnson Corp., D.C., 24 F.Supp. 678, 682. Tomoya was convicted and sentenced to death in the federal courts for a federal offense. There is no provision for civil death in the law of the United States, as there is in the law of California. Civil death statutes are penal, and are strictly construed. Sections 2599–2604 of the Penal Code define the "civil death" of persons sentenced to death or life imprisonment, but these statutes are not applicable to Tomoya's conviction and sentence to death. It cannot be presumed that the Legislature intended sections 2599–2604 of the Penal Code to apply to every convict, regardless of where he was convicted and imprisoned. The statutes themselves rebut any such presumption. The power given to the Adult Authority to restore certain civil rights of persons declared civilly dead, and the provision of section 2601 of the Penal Code which states that a "person sentenced to imprisonment *in the state prison* for life is thereafter deemed civilly dead", (italics added) indicate that California's civil death statutes are intended to apply only to persons convicted in the courts of this state and imprisoned in the prisons of this state.

Moreover, the record shows that Tomoya was absent from the state at the time the alleged fraudulent conspiracy was formed and implemented. He had, therefore, no first-hand knowledge of the facts on which plaintiffs' causes of action were based. Plaintiffs have thus made no showing that Tomoya's presence was necessary at the trial, or that the trial could not have been had in his absence.

[8] Plaintiffs also contend that the proceedings in the probate court and in the case of United States v. Tomoya Kawakita, supra, constituted a partial trial of this action and thus suspended the operation of section 583 of the Code of Civil Procedure. This contention is without merit. The issues involved in those proceedings either could have been determined, in so far as was necessary, in the present action or were of no consequence in relation to this action. The cases cited by plaintiffs in support of their argument, City of Los Angeles v. Superior Court, 15 Cal.2d 16, 98 P.2d 207; Mercantile Investment Co. v. Superior Court, 218 Cal. 770, 25 P.2d 12, were cases in which some proceeding had been conducted in the same action in which the dismissal was sought. Guardianship of Hiroko Kawakita, supra, and United States v. Tomoya Kawakita, supra, however, were entirely separate actions in different courts and the proceedings therein could not constitute a partial trial of the present action.

Plaintiffs' final contention, that the appeals in Guardianship of Hiroko Kawakita, Cal.Sup., 271 P.2d 13, and United States v. Tomoya Kawakita, supra, made it impossible to bring this action to trial and necessarily suspended the operation of section 583 of the Code of Civil Procedure during the time consumed on appeal, is predicated upon the validity of their contention that the proceedings in these cases constituted a partial trial of the present action, and therefore cannot be sustained.

The order appealed from is affirmed.

SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

When the trial court based its dismissal of plaintiffs' action on the provisions of section 583 of the Code of Civil Procedure, it was guilty of a gross abuse of discretion which should not in fairness and justice be upheld by this court. Section 583 provides, in part, that "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff whenever plaintiff has failed for two years after action is filed to bring such action to trial". The wording of this section makes clear that it was meant to apply only to those actions which a plaintiff could and should have prosecuted without delay.

Where there is good reason for an extended delay, where a party is unable for good reason to proceed to trial or where it would be futile or impracticable to prosecute the action promptly, an exception to the dismissal provisions of section 583 is recognized. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Bank of America v. Superior Court, 84 Cal.App.2d 34, 189 P.2d 799. It is equally well recognized in California that the time, during which for all practical purposes going to trial would be impossible due to impracticability or otherwise, is to be excluded in determining whether an action has been brought to trial within the time limit provisions of section 583 of the Code of Civil Procedure. Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405.

In the case at bar the defenses, which were set up by defendants in their answer to plaintiffs' complaint, made it highly impracticable, if not impossible, to proceed to trial until a final determination was had in two other proceedings. As one affirmative defense, defendants alleged that plaintiff Tomoya Kawakita could not maintain the action because he was an enemy alien and since the causes of action were joint, all plaintiffs were therefore barred. In another separate defense defendants alleged that certain matters had already been conclusively determined in a prior probate proceeding. The final answers to both these defenses were, as I shall point out, dependent upon the final outcome of two other proceedings. In view of this, it would have been futile for plaintiffs to have attempted to proceed with the trial until a final determination was had in these other two matters.

First, let us consider the effect of the defense that plaintiff Tomoya was an enemy alien. As a separate and affirmative defense defendants alleged "That plaintiff Tomoya Kawakita was not at the commencement of this action, and is not now a citizen of the United States, but was and is an alien and a citizen of Japan; that at the commencement of this action the government of Japan was and still is at war with and is an enemy of the United States; that by reason of the foregoing and the further fact that the first cause of action of said Amended Complaint is joint and not severable, the cause of action is barred." (A similar defense was set out against the second cause of action.) Such a defense would no doubt have been effective if Tomoya were actually an alien and a citizen of Japan since at this time a state of war still existed between the United States and Japan.

It is well established that the rights of enemy aliens to prosecute actions are, in most respects, suspended during time of war. In considering section 7(b) of the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 7(b), which provides that "* * * Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war * * *" the United States Supreme Court has stated that "This provision was inserted in the act in the light of the principle recognized by Congress and by this Court that war suspends the right of enemy plaintiffs to prosecute actions in our courts." Ex parte Colonna, 314 U.S. 510, 62 S.Ct. 373, 86 L.Ed. 379; see, also, Taylor v. Albion Lumber Co., 176 Cal. 347, 168 P. 348, L.R.A. 1918B, 185; Borovitz v. American Hard Rubber Co., D.C., 287 F. 368; H. P. Drewry, S.A.R.L., v. Onassis, 266 App.Div. 292, 42 N.Y.S.2d 74.

Looking to the facts of the case at bar, we find that prior to the filing of defendants' answer, on November 8, 1949, plaintiff Tomoya had, on September 2, 1948, been convicted of treason and found to have been a citizen of the United States. An appeal was thereafter taken and one of the principal issues was whether or not Tomoya was an enemy alien or a citizen of the United

States. Due to the appeals a final determination of Tomoya's citizenship was not had until June 2, 1952. At that time the United States Supreme Court, in a close four to three decision, held that Tomoya was, and at all times had been, a citizen of this country. Kawakita v. United States, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249. It thus becomes apparent that the question as to Tomoya's citizenship, which defendants sought to raise in their answer, was in constant litigation in the federal courts from a time prior to defendants' answer until June of 1952, yet the instant case was dismissed on February 29, 1952. It would have been highly impracticable and futile for plaintiff Tomoya to have attempted to litigate his alleged citizenship in the California courts when the question was then currently a highly contested issue in the federal courts.

The second defense which necessitated a delay in bringing the instant action to trial, was the allegation by defendants that plaintiffs had no cause of action for fraud or conspiracy to defraud due to the findings of the prior probate order. Such a defense pointed out that the probate order of May 22, 1942, provided that the property involved was not worth more than $6,000; that the property was sold for $6,000; and that Tomoya and Hiroko had no interest in the property since said property was encumbered for more than $24,000. This order which defendants rely on was the order permitting and approving the sale of the real property of the guardianship.

In their effort to avoid this defense, based on the prior order, plaintiffs moved to have the probate court set aside and vacate the letters of guardianship and all subsequent orders. Such was the most reasonable and expedient method of settling the validity of the guardianship once and for all. As stated in In re Dahnke, 64 Cal.App. 555, 560, 222 P. 381, 384, "It is well settled that a judgment or order which is void on its face, and which requires only an inspection of the judgment roll or record to show its invalidity, may be set aside on motion, at any time after its entry, by the court which rendered the judgment or made the order. People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am.St.Rep. 448; People [ex rel. Schwartz] v. Temple, 103 Cal. [447] 453, 37 P. 414."

In the instant case proper notice as required by statute, Probate Code, § 1441, had not been given to the parents of the alleged minors involved. Such a defect was apparent from the face of the record of the guardianship proceedings and an appointment made without the required notice is a nullity. In re Dahnke, supra, 64 Cal.App. 555, 222 P. 381; Guardianship of Kerns, 74 Cal.App.2d 862, 169 P.2d 975; Guardianship of Van Loan, 142 Cal. 423, 76 P. 37. It is well established that the notice required by Probate Code section 1441 is a condition precedent to the valid exercise of the power to appoint a guardian and is jurisdictional. In re Dahnke, supra, 64 Cal.App. 555, 222 P. 381. In view of this, the most effective and practical method of attacking such jurisdiction was by a motion in the probate court to revoke the letters of guardianship which were not properly granted.

It could be argued that the guardianship proceedings were subject to collateral attack in the instant proceeding and that it was unnecessary to institute the motion to revoke in the probate court; however, such an argument loses sight of the practicality and expediency of the procedure followed by plaintiffs. If plaintiffs had attempted a collateral attack of the probate order they would have encountered almost insurmountable difficulties. Such difficulties were adequately pointed out in Asher v. Yorba, 125 Cal. 513, 515, 58 P. 137, 138, when this court stated that "It must be borne in mind that this appellant is here making a collateral attack upon the judgment decreeing a sale of the minor's land, and, consequently all the rules of law hedging about the validity of such decrees are to be invoked against her. The order of sale in this case is presumed to have been a valid one. It behooves her to show to the contrary. The burden is upon her to show a void sale. The absence of evidence in this record showing the jurisdictional facts may be taken as evidence against her. If the posting of these notices was not performed according to the requirements of the statute, it was for her to show that fact. If the evidence does not show how it was done and when it was done, it will be presumed that it was done in the proper manner and at the proper time. Of course, we are not even intimating that appellant would be allowed to go outside of the record of the proceedings, and by extrinsic evidence attack the validity of the guardian's sale." Thus it is apparent that a collateral attack on the probate proceedings would have been a very difficult if not an impossible task.

On the other hand, as stated in In re Dahnke, supra, 64 Cal.App. 555, 561, 222 P. 381, "A motion to vacate a judgment or an order is a direct and not a collateral attack; and on such motion if it be made in time, any facts going to show the invalidity of the judgment or order may be presented—facts *dehors* the record as well as facts appearing on the face of the judgment roll or record. Norton v. Atchison etc. R. R. Co. [97 Cal. 388, 30 P. 585, 32 P. 452], supra; Estate of Eikerenkotter, [126 Cal. 54, 58 P. 370], supra." The court in the Dahnke case also noted that a judgment or order which is void on its face, and which requires only an inspection of the judgment-roll or record to show its invalidity may be set aside at any time by the court which rendered the order. It therefore becomes apparent that, as a practical matter, the best and most effective method of attacking the guardianship was in the probate court as plaintiffs sought to do. Until the validity of the guardianship orders were finally determined it would have been practically futile, if not impossible, to have proceeded to trial in the instant action. See Westphal v. Westphal, supra, 61 Cal.App.2d 544, 143 P.2d 405; Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d 61, 168 P.2d 665.

In view of the fact that it would have been impossible and futile, from a practical standpoint, to proceed to trial until the foregoing issues, pleaded by defendants in their defense, were finally determined, the case should be removed from the effect of Code of Civil Procedure section 583. It is well established that the *time during which it is impractical or impossible to bring a case to trial should be excluded in determining whether a case has been brought to trial within the time limit provisions of section 583.* Christin v. Superior Court, supra, 9 Cal.2d 526, 71 P.2d 205; Westphal v. Westphal, supra, 61 Cal.App.2d 544, 143 P.2d 405; Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d 61, 168 P.2d 665. When the trial court failed to recognize these well recognized exceptions to section 583 of the Code of Civil Procedure, and dismissed plaintiffs' action, it committed a gross abuse of discretion which should not be sanctioned by this court.

For these reasons I would reverse the judgment of dismissal.

Rehearing denied; CARTER, J., dissenting.

43 Cal.2d 60

RICHARDS v. STANLEY et al.

S. F. 18941.

Supreme Court of California.
In Bank.
June 11, 1954.

Rehearing Denied July 7, 1954.

Action to recover for personal injuries sustained when automobile driven by thief and owned by defendants struck motorcycle on which plaintiff was riding. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered judgment granting nonsuit, and plaintiff appealed. The Supreme Court, Traynor, J., held that absent legislation imposing such duty, driver owed no duty to general public to protect members thereof from risk of motoring activities of thief.

Affirmed.

Spence and Carter, JJ., dissented.

Prior opinion, 260 P.2d 277.

1. Negligence 🔑6

A person may not recover damages based upon violation of criminal statute or ordinance unless he is one of class of persons for whose benefit statute or ordinance was enacted.

2. Automobiles ⚷243(1)

In action to recover for personal injuries sustained when automobile driven by thief and owned by defendant struck motorcycle on which plaintiff was riding, trial court properly excluded as irrelevant ordinance forbidding automobile owner to leave automobile unlocked and unattended with keys in ignition but providing that violation thereof should not have any bearing in civil action.

3. Negligence ⚷2

An indispensable factor to liability founded upon negligence is existence of duty of care owed by alleged wrongdoer to person injured, or class of which he is a member.

4. Negligence ⚷62(3)

In absence of special relationship between parties, there is no duty to control conduct of third person so as to prevent him from causing harm to another, and this rule is applicable even in cases in which third person's conduct is made possible only because defendant has relinquished control of his property to third person, at least if defendant had no reason to believe that third person was incompetent to manage it.

5. Automobiles ⚷201(9)

Leaving key in automobile parked on public street constituted negligence on part of driver toward her own and her husband's proprietary interest in automobile, and intervening act of thief in stealing automobile would not insulate driver from responsibility for negligence toward such interest; but absent legislation imposing such duty, driver owed no duty to general public to protect members thereof from risk of motoring activities of thief.

6. Negligence ⚷2

A foreseeable risk does not necessarily give rise to a duty.

7. Evidence ⚷14

It is a matter of common knowledge that drivers under 25 years of age as a class have more accidents than older drivers and they must pay more for insurance.

8. Automobiles ⚷192(11)

An automobile owner is not negligent merely because he entrusts his automobile to a member of an "accident prone" class, unless he knows or has reason to believe that person to whom he entrusts vehicle is incompetent, and in absence of such knowledge he is under no common-law duty to protect third persons from possible misconduct on part of driver. Vehicle Code, § 402.

* * *

Frank J. Baumgarten and Harry N. Grover, San Francisco, for appellant.

Clark & Heafey, Edwin A. Heafey, Oakland, Gerald P. Martin, San Francisco, and Belcher & Koller, Oakland, for respondents.

TRAYNOR, Justice.

Plaintiff brought this action to recover damages for personal injuries suffered when his motorcycle collided with an automobile owned by defendants Mr. and Mrs. Stanley, which was being driven at the time by a thief, defendant Rawlings. The complaint alleged that Mr. and Mrs. Stanley were the owners of an automobile, which Mrs. Stanley parked on Stevenson Street near Second Street in San Francisco, leaving it "unattended and unlocked with the ignition key in said car lock" in violation of section 69 of the municipal code;[1]

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[1] "Sec. 69. *Requiring removal of ignition keys from noncommercial motor vehicle standing unattended in certain places, authorizing officers to remove.* No person shall leave a motor vehicle, except a commercial motor vehicle, unattended on any street, alley, used car lot, or unattended parking lot, without first stopping the engine, and removing and taking the ignition key from the vehicle; provided, however, that any violation of this section shall not mitigate the offense of stealing any such motor vehicle; nor shall this section or any violation thereof be admissible as evidence affecting recovery in any civil action for theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action. Whenever any police officer shall find any such motor vehicle standing in violation of this section, such police officer is authorized to remove therefrom the keys left therein and deliver the same to the officer in charge of the nearest police station."

that as a result of this carelessness, defendant Rawlings "was thereby induced to and did enter said automobile and drove it from its parking place * * * into the intersection of Army Street and Potrero Avenue in a careless and negligent manner to the point of impact" with plaintiff's vehicle; that the accident occurred at about 5:30 p. m. of said day when the Stanley's car driven by Rawlings struck plaintiff as he was driving his motorcycle, throwing him to the pavement; and that "by reason of the premises and the aforesaid carelessness and negligence of the defendants and each of them, there was inflicted upon plaintiff serious personal injuries." The Stanleys' general demurrer was overruled, and they answered denying the allegations of the complaint and pleading contributory negligence. At the start of the trial plaintiff offered municipal code section 69 in evidence, but the trial court excluded it. Plaintiff then sought leave to amend his complaint to state a cause of action for general negligence, but leave to amend was denied. The court then sustained the Stanleys' objection to the introduction of any evidence against them on the ground that the complaint failed to state a cause of action and granted their motion for a nonsuit. Plaintiff has appealed.

[1, 2] Although the ordinance provides that it shall not be admissible in evidence or have any other bearing in any civil action, plaintiff contends that it may nevertheless be relied upon as a basis for liability. He bases this contention on the theory that a city ordinance may not validly control the rules of evidence applicable in the courts and that the provision purporting to do so is severable from the remainder of the ordinance. A person may not recover damages based upon the violation of a criminal statute or ordinance, however, unless he is one of the class of persons for whose benefit the statute or ordinance was enacted. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 497, 225 P.2d 497; Routh v. Quinn, 20 Cal.2d 488, 491–492, 127 P.2d 1, 149 A.L.R. 215. By providing that the ordinance should have no bearing in any civil action, the board of supervisors made clear that the ordinance was not enacted for the benefit of persons who might be injured by the operation of stolen automobiles, and accordingly, whether or not it could validly affect the admissibility of evidence, it was properly excluded as irrelevant.

[3–5] Plaintiff contends that even if the ordinance is disregarded, his complaint states a cause of action for negligence against Mrs. Stanley. He relies on the allegations that as a result of her negligence and carelessness in leaving the car unattended on a public street with the key in it, Rawlings was induced to steal the car, and that thereafter his negligent driving resulted in injuring plaintiff. It may be conceded at the outset that the leaving of the key in the car parked on a public street constituted negligence on the part of Mrs. Stanley toward her own and her husband's proprietary interests in the automobile, and that the intervening act of the thief in stealing the car would not insulate Mrs. Stanley from responsibility for her negligence toward such interests. See Restatement, Torts, §§ 447, 449. As the court stated in Routh v. Quinn, 20 Cal.2d 488, 491, 127 P.2d 1, 3, 149 A.L.R. 215, however, "It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member." See also, McEvoy v. American Pool Corp., 32 Cal.2d 295, 298, 195 P.2d 783; Restatement, Torts, § 281(a), (b), comments c, e, g. Accordingly, it is necessary to consider the scope of the duty of the owner of an automobile to control his property for the protection of persons on the public streets.

Given a statute prohibiting the leaving of the key in an unattended vehicle on the public street, it could reasonably be contended that the legislature had established a duty on the part of motorists to protect persons on the streets from any damage caused by thieves driving stolen automobiles. See, Ross v. Hartman, 78 U.S.App.D.C. 217, 139 F.2d 14, 15, 158 A.L.R. 1370; Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74, 77–78; Ostergard v. Frisch, 333 Ill.App. 359, 77 N.E.2d 537, 539. In the absence of such a statute, however, it has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it. Baugh v. Rogers, 24 Cal.2d 200, 214, 148 P.2d 633, 152 A.L.R. 1043; Lane v. Bing, 202 Cal. 590, 592, 262 P. 318; Perry v. Simeone, 197 Cal. 132, 138, 239 P. 1056; Buelke v. Levenstadt, 190 Cal. 684, 688–689, 214 P. 42; McCalla v. Grosse, 42 Cal.App. 2d 546, 550, 109 P.2d 358; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 741, 179 P. 697; See also Kiste v. Red Cab, Inc., 122 Ind.App. 587, 106 N.E.2d 395, 398; Castay v. Katz & Besthoff, Ltd., La.App., 148 So. 76, 78; Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560, 564; Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272, 273; cf., Johnstone v. Panama Pacific International Exposition Co., 187 Cal. 323, 329-330, 202 P. 34; Restatement, Torts, § 390.

Plaintiff contends, however, that since both theft and negligent driving on the part of the thief were foreseeable consequences of leaving the key in the car, Mrs. Stanley created an unreasonable risk to persons on the streets and was therefore negligent toward him. He relies upon Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74, 79, where the court stated: "The increase in population and number of motor vehicles owned and operated in this country in the past few years is well known. The increase of casualties from traffic accidents is a matter of common knowledge and concern. The incidence of automobile thefts and damages and injuries resulting from such larcenous escapades has accordingly increased. Juvenile delinquincy has reached proportions alarming to everyone. Three major wars during the lifetime of this generation have had their effect upon the mental attitudes, not only upon those who endured the physical suffering and mental anguish, but upon all our society. Comparative regard and disregard for the rights and property of others have not been unaffected. Automobiles, once considered a luxury, are now considered by many to be a necessity. The man who once walked a mile now drives a block. The speed and power of automobiles have increased to the extent that safety experts are now showing keen awareness of their potentials even in the hands of rightful owners and careful operators. Incidents of serious havoc caused by runaway thieves or irresponsible juveniles in stolen or 'borrowed' motor vehicles frequently shock the readers of the daily press. With this background must come a recognition of the probable danger of resulting injury consequent to permitting a motor vehicle to become easily available to an unauthorized person through violation of the statute in question." These considerations were undoubtedly persuasive in motivating the Illinois Legislature to pass a statute prohibiting owners from leaving keys in their unattended vehicles and in leading the Illinois Supreme Court to construe the statute as one intended for the benefit of persons who might be injured by the operation of stolen cars. In the absence of statute, however, we do not feel that they justify the recognition of a duty on the part of car owners to protect the public from the risk of the motoring activities of thieves, when to do so would result in imposing greater liability than is now provided by statute when the owner voluntarily entrusts his car to another. See Vehicle Code, § 402.

The problem is not answered by pointing out that there is a foreseeable risk of negligent driving on the part of thieves. There is a foreseeable risk of negligent driving whenever anyone drives himself or lends his car to another. That risk has not been considered so unreasonable, however, that an owner is negligent merely because he drives himself, or lends his car to another, in the absence of knowledge on his part of his own or the other's incompetence. Moreover, by leaving the key in the car the owner does not assure that it will be driven, as he does when he lends it to another. At most he creates a risk that it will be stolen and driven. The risk that it will be negligently driven is thus materially less than in the case in which the owner entrusts his car to another for the very purpose of the latter's use.

In one sense the problem presented involves the duty of the owner of an automobile so to manage it as not to create an unreasonable risk of harm to others. It bears emphasis, however, that when Mrs. Stanley left the car it was in a position where it could harm no one, an no harm occurred until it had been taken by a thief. Thus a duty to prevent such harm would involve more than just the duty to control the car, it would involve a duty to prevent action of a third person. Ordinarily, however, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another. Lane v. Bing, 202 Cal. 590, 592, 262 P. 318; see, Ellis v. D'Angelo, 116 Cal. App.2d 310, 317, 253 P.2d 675; Restatement, Torts, § 315; Harper and Kime, The Duty to Control the Conduct of Another, 43 Yale L.J. 886. Moreover, this rule is applicable even in cases in which the third person's conduct is made possible only because the defendant has relinquished control of his property to the third person, at least if the defendant has no reason to believe that the third person is incompetent to manage it. Thus, as noted above, an automobile owner is not ordinarily negligent if he lends his car to another; except in certain special circumstances, a lessor may rely on his lessee to discharge the duty to maintain the premises in reasonably safe condition for the benefit of persons entitled to such protection, see, Restatement, Torts, §§ 355–362; Goodman v. Harris, 40 Cal.2d 254, 261, 265, 253 P.2d 447; and a supplier of lumber is entitled to assume that a building contractor will not negligently select an obviously defective piece of lumber to use as a support for a scaffold. Stultz v. Benson Lumber Co., 6 Cal.2d 688, 694–695, 59 P.2d 100.

In the present case Mrs. Stanley did not leave her car in front of a school where she might reasonably expect irresponsible children to tamper with it, see, Restatement, Torts, § 302, illus. 7, nor did she leave it in charge of an intoxicated passenger as did defendant in Morris v. Bolling, 31 Tenn.App. 577, 218 S.W.2d 754. By leaving the key in her car she at most increased the risk that it might be stolen. Even if she should have foreseen the theft, she had no reason to believe that the thief would be an incompetent driver. In view of the fact that the risk of negligent driving she created was less than the risk she might intentionally have created without negligence by entrusting her car to another, and in the light of the rule that she owed no duty to protect plaintiff from harm resulting from the activities of third persons, we conclude that her duty to exercise reasonable care in the management of her automobile did not encompass a duty to protect plaintiff from the negligent driving of a thief.

[6–8] Plaintiff contends, however, that reasonable minds might differ as to whether or not Mrs. Stanley was negligent toward him, and that accordingly, the question must be submitted to the jury. In McEvoy v. American Pool Corp., 32 Cal.2d 295, 298, 195 P.2d 783, 785, the court pointed out that, "The conclusion that certain conduct is negligent involves the finding both of a legal duty to use due care and a breach of such duty by the creation of an unreasonable risk of harm." When, as in the McEvoy case, the existence of a duty rests on the reasonable foreseeability of injury to the plaintiff, it may become primarily a question for the jury unless reasonable minds cannot differ. Necessarily involved in submitting the case to the jury, however, is a preliminary determination that, granted a foreseeable risk, a duty arises. On the other hand, there are many situations involving foreseeable risks where there is no duty. Thus in Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1, 149 A.L.R. 215, although the tax assessor could reasonably have foreseen that his error in computation would invalidate a tax sale to the purchaser's detriment, the court held that the assessor was under no duty to the purchaser to exercise due care in his computations. Determinations of the duty issue as a matter of law adversely to the plaintiff are particularly common in situations similar to that in the present case, in which the defendant's responsibility for the activities of third persons is involved. Thus in Lane v. Bing, supra, 202 Cal. 590, 262 P. 318, it was held in the absence of statute that as a matter of law a parent was not liable for the negligent driving of the parent's car by his minor child in the absence of a showing that the child was an incompetent driver. Similarly, in Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447, it was held that a lessor was not liable to a business invitee of his lessee even though he was aware of a dangerous condition existing on the premises, could have foreseen injury to visitors, and could have prevented the continuance of the dangerous condition by canceling the lease. Although in both of the foregoing situations it would be difficult to say that reasonable minds could not differ as to whether or not a duty should be imposed, the question was one of law for the court, and not for the jury, to decide.

Were we to hold that it is for the jury to decide whether Mrs. Stanley was under a duty to plaintiff to protect him from the negligent operation of her automobile by a thief, it would logically follow that in many situations where one person entrusts his car to another, a jury question would arise as to whether or not the owner should have foreseen an unreasonable risk to persons on the highway. It is a matter of common knowledge that drivers under 25 years of age as a class have more accidents than older drivers and that they must pay more for insurance. There may be other classes of drivers with similar accident experience. Nevertheless, an owner is not negligent if he entrusts his automobile to a memebr of such a class unless he knows or has reason to believe that the driver is incompetent, and in the absence of such knowledge he is under no common-law duty to protect third persons from possible misconduct on the part of the driver. Lane v. Bing, supra, 202 Cal. 590, 592, 262 P. 318; Baugh v. Rogers, supra, 24 Cal.2d 200, 214, 148 P. 2d 633, 152 A.L.R. 1043; see also, Leo v. Dunham, 41 Cal.2d 712, 714, 715, 264 P.2d 1; Rodabaugh v. Tekus, 39 Cal.2d 290, 294, 246 P.2d 663.

It is true that the problem of protecting persons on the public highways from the negligent operations of automobiles by financially irresponsible persons is less acute when the car is being driven with the permission of the owner than when it is being driven by a thief. In the former case negligence is imputed to the owner under section 402 of the Vehicle Code. Since the liability under section 402 is limited in amount, however, the problem of whether or not the owner is also under a common-law duty in the case of permissive use is not eliminated by the statute. Moreover, we could not avoid that problem here by adopting a special rule applicable only to the liability of owners of stolen automobiles without creating an anomalous situation with respect to the limits of liability. If such a rule were adopted, a person whose car was stolen would be subject to unlimited liability, although a person who entrusted his car to another would be protected by the $5,000 and $10,000 limits set forth in section 402. This result would follow although the risk created by the owner of the stolen car by leaving the key therein was materially less than that created by the owner who gave permission to another to use his car. These considerations suggest that the basic problem is really not one of negligence on the part of the owner, but rather whether or not the hazards inherent in the use of automobiles are so great that liability should be imposed on the owner without fault for any damage done by the operation of his vehicle. The Legislature has imposed such liability within limits by providing that the negligence of a driver using an automobile with the express or implied consent of the owner shall be imputed to the owner. If it is to be extended further it is for the Legislature and not for the court to do so.

There is nothing in McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783, and Benton v. Sloss, 38 Cal.2d 399, 240 P. 2d 575, contrary to our conclusion here. Those cases both held that the negligent driving on the part of a third person that caused a collision was not such an unforeseeable intervening cause as would relieve the defendant of liability for his own negligence toward the plaintiff, which also contributed to the injury. There is a clear distinction, however, between the problem of foreseeability of intervening causes in determining whether the defendant's conduct was the proximate cause of an injury, and the problem of foreseeability in determining whether the defendant was negligent at all. In the latter case the problem is whether or not the defendant's conduct was wrongful toward the plaintiff, while in the former it is whether he should be relieved of responsibility for an admitted wrong because another's wrongful conduct also contributed to the injury. The difference in treatment of these two problems is aptly illustrated by comparing the rule recently restated in Leo v. Dunham, 41 Cal.2d 712, 714, 715, 264 P.2d 1, 3, with the rule applied in the McEvoy and Benton cases. In the Leo case the court in discussing the negligence issue stated: " 'The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable grounds to think otherwise it is not negligent to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, 1156, L.R.A.1917C, 477 * * *." See, also, Rodabaugh v. Tekus, supra, 39 Cal. 2d 290, 294, 246 P.2d 663; Restatement, Torts, §§ 433, 447, 449. Thus, although it is clear that under the rule of the McEvoy and Benton cases, Mrs. Stanley would not be relieved from liability by the intervening negligent driving of the thief were she under a duty to protect plaintiff from injury from that source, since no such duty exists, no problem of intervening causation arises.

The judgment is affirmed.

SHENK and EDMONDS, JJ., concur.

SCHAUER, Justice (concurring).

I concur in the judgment on the ground that defendant was not bound to anticipate that any person would steal her car or commit any other crime in respect to it, and, accordingly, defendant owed no duty to anyone growing out of the unlawful taking and operation of the vehicle.

I dissent.

In my opinion, the complaint was sufficient to state a cause of action for negligence without reference to the alleged violation of the ordinance, and the trial court therefore erred in granting the motion to exclude any evidence and in granting the motion for nonsuit without taking any evidence.

It was alleged in the complaint that defendant Mary Stanley, at about 5:30 p. m. on the day of the accident, left her automobile "unattended and unlocked with the ignition key in said car lock" on "Stevenson Street, west of Second Street" in San Francisco; and that "by reason of the carelessness and negligent action of the said defendant, Mary Stanley, in leaving the aforesaid automobile unattended on a public street, unlocked, with the key in said lock * * * the defendant, Robert J. Rawlings was thereby induced to and did, enter said automobile and drove it from its parked place over various streets" in San Francisco "in a careless and negligent manner to the point of impact * * *" with plaintiff's vehicle. It was further alleged that the collision occurred at Army Street and Potrero Avenue in San Francisco at about 5:45 p. m. of said day, and that defendant Rawlings then and there so carelessly and negligently operated said automobile as to cause said collision; and that by reason of "the aforesaid carelessness and negligence of the defendants and each of them" serious injuries were inflicted upon plaintiff.

The charging allegations of the complaint therefore appear sufficient as against defendant Mary Stanley, unless it may be said *as a matter of law* that they were insufficient to show a violation by defendant Mary Stanley of a duty of care owing to persons lawfully using the streets, or unless it may be said *as a matter of law* that, assuming a showing of a violation of a duty of care toward persons lawfully using the streets, they were insufficient to show that such violation was a proximate cause of the injuries to plaintiff. I do not believe that it may be said *as a matter of law* that said allegations were insufficient in either respect. Under these circumstances, the motion to exclude all evidence should have been denied and the motion for nonsuit should not have been entertained until plaintiff had had the opportunity to present his case. Then, if the evidence presented showed a situation upon which reasonable minds could differ upon these issues, the motion for nonsuit should have been denied and the issues should have been presented to the jury under appropriate instructions.

There is a conflict of authority on the general subject under discussion in the various jurisdictions. See cases collected: Annotations 26 A.L.R. 912; 158 A.L.R. 1374. Thus, the owner of a negligently parked car has been absolved from liability for damages arising from a thief's negligent driving of the car into plaintiff's vehicle, upon the theory that the thief's act was the proximate cause of the accident and the car owner's original negligence was too remote to be connected as a cause therewith. Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395; Castay v. Katz-Besthoff, Ltd., La.App., 148 So. 76; Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560; Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272; Reti v. Vaniska, Inc., 14 N.J. Super. 94, 81 A.2d 377; Wilson v. Harrington, 269 App.Div. 891, 56 N.Y.S.2d 157, affirmed, 295 N.Y. 667, 65 N.E.2d 101. In similar circumstances the contrary has been held upon the premise that there may be a plurality of causes cooperating to produce plaintiff's injuries, each of which is sufficient to permit a jury to impose liability. Ostergard v. Frisch, 333 Ill.App. 359, 77 N.E.2d 537; Ney v. Yellow Cab Co., 348 Ill.App. 161, 108 N.E.2d 508; Morris v. Bolling, 31 Tenn.App. 577, 218 S.W.2d 754; Ross v. Hartman, 78 U.S.App.Div.D.C. 217, 139 F.2d 14, 158 A.L.R. 1370, certiorari denied 321 U.S. 790, 64 S.Ct. 790, 88 L.Ed. 1080; Schaff v. R. W. Claxton, Inc., 79 U.S.App.Div.D.C. 207, 144 F.2d 532; R. W. Claxton, Inc., v. Schaff, 83 U.S.App. Div.D.C. 271, 169 F.2d 303.

In Ross v. Hartman, 1943, supra, the owner's employee violated an ordinance when he left the automobile parked on the street with the key in the ignition switch. Such violation was deemed negligence *per se* and constituted the proximate cause of the injuries to plaintiff, requiring the owner of the car to respond in damages though the theft of the car and its negligent operation by the thief had intervened. In so holding the court expressly overruled its contrary decision made 27 years previously, Squires v. Brooks, 44 App.D.C. 320, which had held that the intervening act of a third person who steals a car absolves the driver who left the keys in the car from responsibility for a resulting accident. Such decision, the court said at page 14 of 139 F.2d, could not be reconciled "with facts which have become clearer and principles which have become better established than they were in 1916". While in the Ross case the court gave controlling effect to the ordinance as a safety measure designed to prevent children and thieves from tampering with an unlocked vehicle, the court, in passing on the problem, pertinently added at page 15 of 139 F.2d: "Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. The danger that they will do so on a particular occasion may be slight or great. *In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident.*" (Emphasis added.)

Then in Schaff v. R. W. Claxton, Inc., 1944, supra, 144 F.2d 532, 533, the same court followed its reasoning in the Ross case, though it did not involve a violation of the ordinance through leaving an unlocked car on the street—a "public place." Rather the driver parked the car in a restaurant's "private parking space", with the key left in the ignition switch. A stranger drove off with the car and injured the plaintiffs. Although there was no applicable ordinance, it was held that it was a question of fact for the jury as to whether the negligence of the original driver, combined with that of the thief, under the circumstances, was the "proximate cause of the accident." 144 F.2d at page 533. In accord: R. W. Claxton, Inc., v. Schaff, 1948, supra, 169 F.2d 303, certiorari denied 335 U.S. 871, 69 S.Ct. 168, 93 L.Ed. 415.

In Illinois there is a split of authority on the subject. There, as in the District of

Columbia, the liability of the owner for damages by reason of the negligent operation of his car by a thief is predicated upon the violation of an ordinance setting up the statutory standard of care to be expected of a reasonably prudent man in parking his car. However, contrary to the rule of the Ross case, in Illinois violation of the ordinance is not deemed negligence *per se* in fixing the owner's conduct as the "legal cause" of the harm to plaintiff, but is only *prima facie* evidence of negligence. Johnson v. Pendergast, 308 Ill. 255, 139 N.E. 407. Whether the primary negligence of the owner of the car is the proximate cause of the accident is governed by the customary rule in tort cases. Ostergard v. Frisch, First Dist., 1948, supra, 333 Ill. App. 359, 77 N.E.2d 537, 541. Thus in the Ostergard case it was held that the theft and subsequent negligent operation of the car by the thief in the course of flight were *reasonably foreseeable risks* of leaving a car standing unattended with the key in the ignition switch, which risks must be guarded against at the owner's peril. Then in Cockrell v. Sullivan, Third Dist., 1951, 344 Ill.App. 620, 101 N.E.2d 878, the court specifically repudiated the reasoning of the Ostergard case and held, citing the dissent in that case, that as a matter of law, the thief's negligent use of the stolen car broke the chain of causation between the primary negligence of the owner of the car and the subsequent accident to plaintiff. However, in Ney v. Yellow Cab Co., First Dist., 1952, supra, 348 Ill.App. 161, 108 N.E.2d 508, the court reaffirmed the foreseeability rule as applied in the Ostergard case and expressly held that the issue of the car owner's liability, or more precisely the question of proximate cause, was for the jury's determination. Whether a reasonable man should have foreseen that leaving his car on the street unattended, with the key in the ignition "would probably result in someone stealing it, and, while in flight, driving it negligently into plaintiff's automobile" and whether the thief's "response to the situation created" by the negligent parking of the car was normal or "extraordinary * * * so as to be or not be the proximate cause of the injury" that followed were questions of which "reasonable men might differ" and so "for the jury". 108 N.E.2d 511; see, also, Morris v. Bolling, 1948, supra, 31 Tenn.App. 577, 218 S.W.2d 754, 758.

The above mentioned split in authority in Illinois has now been resolved since the Supreme Court of Illinois, during the pendency of this appeal, has decided the case of Ney v. Yellow Cab. Co., 2 Ill.2d 74, 117 N.E.2d 74, affirming the judgment of the First District Appellate Court in Ney v. Yellow Cab Co., supra, 348 Ill.App. 161, 108 N.E.2d 508.

The precise question here presented has not been decided in this state. However, the subject of intervening acts has been considered by this court in several recent cases. In Eads v. Marks, 39 Cal.2d 807, at page 812, 249 P.2d 257, at page 260, this court said: "Where the intervening act is reasonably foreseeable, the chain of causation is not broken, and the original actor remains liable. Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872; Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132."

In McEvoy v. American Pool Corp., 32 Cal.2d 295, 298–299, 195 P.2d 783, 786, the following rules from the Restatement of Torts with respect to proximate causation were cited with approval. Section 447: " 'The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act.' " Section 449: " 'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' " Section 453, comment (a): " 'If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor's liability. If, however, the negligent character of the third person's intervening act or the *reasonable foreseeability of its being done* is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.'" (Emphasis added.)

In the McEvoy case, Jack McEvoy was employed by the defendant corporation as a service man. In making his weekly calls for the servicing of swimming pools, he used his own car, being paid for its use by the company. His work required that he carry in his car "highly dangerous" chemicals as part of the service equipment. One night while off duty his car was struck by a hit-and-run driver and overturned, the impact causing certain glass jars to break, with the result that the chemicals therein burned his mother, who was riding with him. A nonsuit was granted in her action against the company. In reversing the judgment this court said at page 299 of 32 Cal.2d, at page 786 of 195 P.2d: "In the light of the foregoing [the above Restatement rules] we cannot say, as a matter of law, that defendants are relieved from liability for negligence by the intervening conduct of their employee or the hit-and-run driver * * * the jury could have found that defendants owed a duty to persons in plaintiff's situation, and they cannot escape responsibility for their failure to perform that duty merely because of intervening acts the likelihood of which they reasonably should have foreseen. In regard to Jack's conduct in leaving the chemicals in the car, there was evidence that defendants failed to give him adequate notice of the extremely dangerous character of the liquids and that he was unaware that they were dangerous. The jury could have found that defendants had knowledge that their employees did not remove the glass jars from their cars at night before driving for pleasure and that defendants should have foreseen the likelihood of such conduct on the part of Jack on the night of the accident. As for the intervening negligence of the unknown driver, the jury could have found, in view of the frequency of automobile accidents, that defendants should have foreseen that a third person might cause the type of accident which occurred."

The principles of the McEvoy case on the questions of intervening negligence and causation were followed in Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575. There Sloss, a used car dealer, during sale negotiations with a 19-year old boy, Jay Fetters, allowed him to drive an old defective automobile over a weekend. Sloss knew that Jay had no driver's license. While driving in the country that Sunday afternoon with some other young people, Jay in an attempt to avoid colliding with another vehicle, ran his car off the highway and skidded into a telephone pole, causing injuries to plaintiffs, who were riding as guests in Jay's car. In affirming a judgment in plaintiffs' favor against Sloss, this court said at page 405 of 38 Cal.2d, at page 579 of 240 P.2d: "Jay's negligent driving was unquestionably a cause of plaintiffs' injuries. Sloss' negligence was also a cause of those injuries, *if it was a substantial factor in bringing them about.* McEvoy v. American Pool Corp., 32 Cal.2d 295, 298, 195 P.2d 783; Rest., Torts, § 431. This *question of fact* the trial court resolved in plaintiffs' favor. * * * *The negligent conduct of Jay did not relieve Sloss from liability, for the likelihood of negligent operation of the vehicle was one of the hazards that Sloss could reasonably foresee.* Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 220, 157 P.2d 372, 158 A.L.R. 872; McEvoy v. American Pool Corp., supra, 32 Cal.2d 295, 298, 195 P.2d 783; Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781; Opple v. Ray, 208 Ind. 450, 456, 195 N.E. 81; see Rest., Torts, § 447."

In the light of the foregoing principles, plaintiff properly maintains that whether the leaving of the key in the ignition switch of the Stanleys' unlocked car parked on a downtown street was negligence, and if so, whether it was a proximate cause of plaintiff's injuries were questions on which reasonable minds might differ, and so were for the jury's determination. The fact that

Rawlings' negligent operation of the car was itself a proximate cause and was preceded by his criminal act of theft was not determinative under the circumstances. Ross v. Hartman, supra, 78 U.S.App.D.C. 217, 139 F.2d 14, 16. The accident here happened within approximately three miles from the place where the Stanleys' unlocked car was parked and about fifteen minutes after the negligent parking. The leaving of keys in an unlocked car on a public street in a city's populous district might reasonably be regarded as almost an invitation to a thief to take it, and its subsequent negligent operation by the thief in the course of flight might reasonably be held a foreseeable risk which the owner of the car assumed in consequence of his negligent act. Rest., Torts, §§ 448, 449. Any language in the cases of Hale v. Pacific Tel. & Tel. Co., 42 Cal.App. 55, 59, 183 P. 280, and Frace v. Long Beach City High School Dist., 58 Cal.App.2d 566, 572, 137 P.2d 60, indicating a contrary view should be disapproved. See "Proximate Cause in California" by William L. Prosser, 38 Cal.L. Rev. 369, 372.

The general rule of tort liability is applicable in this case: that if an injury occurs from two causes, both due to the negligence of different persons, but together constituting an efficient cause, all persons whose acts contribute to the injury are liable therefor, and the negligence of one does not excuse the negligence of the other. 38 Am.Jur. sec. 70, p. 726; Morris v. Bolling, supra, 31 Tenn.App., 577, 218 S.W.2d 754, 758. Having created the risk by the negligent parking of his car, the owner may fairly be held responsible for the harm caused thereby rather than be absolved, as a matter of law, from all liability to the innocent victim of his original wrongdoing. Ross v. Hartman, supra, 78 U.S.App.D.C. 217, 139 F.2d 14, 16. Such conclusion accords with the general rule that ordinarily the "issue of proximate cause is essentially one of fact." Mosley v. Arden Farms Co., supra, 26 Cal.2d 213, 219, 157 P.2d 372, 375, and follows the sound reasoning of Ross v. Hartman, supra, 78 U.S.App.D.C. 217, 139 F.2d 14, certiorari denied 321 U.S. 790, 64 S.Ct. 790, 88 L.Ed. 1080; Schaff v. R. W. Claxton, Inc., supra, 79 U.S.App.D.C. 207, 144 F.2d 532; Ney v. Yellow Cab Co., supra, 2 Ill.2d 74, 117 N.E.2d 74; and other like cases above cited wherein the question here presented has been adjudicated.

It is significant to note that the majority opinion apparently concedes that an owner may be held liable under some circumstances for the negligent driving of the automobile by a thief resulting from the negligent leaving of an unlocked car upon the street. It mentions the situation where an unlocked car is left in front of a school, Restatement, Torts, sec. 302, illus. 7 and the situation where a car is left unlocked with an intoxicated passenger therein. Morris v. Bolling, supra, 31 Tenn.App. 577, 218 S.W.2d 754. But if any of these situations presents a question of fact for the jury, it would seem to follow that a similar question of fact is presented where the car is left unlocked on a public street during rush hours in the business district of a populous city. In any event, the result of the trial court's rulings here was to prevent the amendment of the complaint or the introduction of any evidence to show the circumstances. It therefore appears that even under the theory of the majority, the challenged judgment cannot be affirmed.

I would reverse the judgment.

CARTER, J., concurs.

Rehearing denied; CARTER and SPENCE, JJ., dissenting.

43 Cal.2d 1

GALLUP et al.

v.

SPARKS-MUNDO ENGINEERING CO. et al.

BROWN v. C. O. SPARKS, Inc., et al.

L. A. 23070, 23071.

Supreme Court of California.
In Bank.
June 7, 1954.

As Modified July 2, 1954.

Actions were brought by mother of deceased driver of ambulance and owner of ambulance against truck driver, his employers, and owner of truck to recover for death of driver of ambulance in collision with truck at intersection, and to recover for damage to ambulance. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgments adverse to certain of the defendants, and they appealed. The Supreme Court, Bray, J. pro tem., held that question whether driver of ambulance reasonably believed that he was responding to an emergency call, so that he was entitled under statute to ignore traffic signals, was for jury.

Judgment in favor of owner of ambulance affirmed, and judgment in favor of mother of driver of ambulance affirmed as reduced.

Prior opinion 263 P.2d 104.

1. Automobiles ⚷175(1)

Question whether ambulance is driven in response to an emergency call, so that driver is permitted to ignore traffic signals if siren is sounded and red warning light is shown, depends on the nature of the call received. Vehicle Code, §§ 44(e), 454.

2. Automobiles ⚷175(1)

In determining whether driver of ambulance is permitted to ignore traffic signals, on ground that he is responding to an emergency call, the situation to be considered is the situation as presented to the mind of the driver, and it is immaterial whether or not there was in fact an emergency. Vehicle Code, §§ 44(e), 454.

3. Automobiles ⚷175(1)

Driver of an ambulance, in order to be entitled to ignore traffic signals, on ground that he is responding to an emergency call, must have reasonable grounds to believe that there is an emergency. Vehicle Code, §§ 44(e), 454.

4. Automobiles ⚷245(80)

In actions against truck driver, his employers, and owner of truck, to recover for death of driver of ambulance, which collided with truck at intersection, and to recover for damage to ambulance, question whether driver of ambulance reasonably believed that he was responding to an emergency call, so that he was entitled to ignore traffic signals, was for jury. Vehicle Code, §§ 44(e), 454.

5. Evidence ⚷271(18)

In actions against truck driver, his employers, and owner of truck, to recover for death of driver of ambulance, which collided with truck at intersection, and to recover for damage to ambulance, wherein there was a question whether ambulance driver reasonably believed that he was responding to an emergency call, so that he was entitled to ignore traffic signals, ambulance company's "trip ticket" and corresponding page of "log book" were properly admitted in evidence under the Uniform Business Records as Evidence Act, though they showed that call being made by ambulance driver was an emergency call and were self-serving. Vehicle Code, §§ 44(e), 454; Code Civ.Proc. § 1953f.

6. Evidence ⚷271(18)

Fact that a business record is self-serving does not make it inadmissible under the Uniform Business Records as Evidence Act. Code Civ.Proc. § 1953f.

7. Evidence ⚷351

Fact that business records were kept and introduced in evidence by party relying on them does not make the Uniform Business Records as Evidence Act inapplicable. Code Civ.Proc. § 1953f.

8. Automobiles ⚷243(4)

In actions against truck driver, his employers, and owner of truck, to recover for death of driver of ambulance, which collided with truck at intersection, and to recover for damage to ambulance, wherein question arose whether driver of ambulance reasonably believed that he was responding to an emergency call, so that he was entitled to ignore traffic signals, and wherein there was evidence that restraint straps and three-man crew were in the ambulance when the collision occurred, testimony that restraint straps and three-man crew were taken in an ambulance whenever an emergency was involved was properly admitted. Vehicle Code, §§ 44(e), 454.

9. Automobiles ⚷243(1)

In actions against truck driver, his employers, and owner of truck, to recover for death of driver of ambulance, which collided with truck at intersection, and to recover for damage to ambulance, wherein question arose whether driver of ambulance reasonably believed that he was responding to an emergency call, so that he was entitled to ignore traffic signals, in making call out of town, court properly rejected evidence to show that various emergency ambulance facilities were available at town where driver of ambulance was making call, since such evidence was irrelevant on question whether driver of ambulance reasonably believed that he was making an emergency call. Vehicle Code, §§ 44(e), 454.

10. Negligence ⚷121(1), 136(14)

Disobedience of a statute, for which criminal sanctions are imposed, is not negligence as a matter of law under all circumstances, and a presumption of negligence arises which can be rebutted by evidence of justification or excuse.

11. Automobiles ⚷246(58)

In actions against truck driver, his employers, and owner of truck, to recover for death of driver of ambulance, which collided with truck at intersection, and to recover for damage to ambulance, wherein there was evidence from which it could be inferred that driver of ambulance was privileged under statute to ignore traffic signals because he reasonably believed that he was responding to an emergency call, court properly refused to give requested instruction setting forth portions of statute relating to official traffic signals and stating that violation of such provisions constitute negligence as a matter of law. Vehicle Code, §§ 44(e), 454, 476(f).

12. Automobiles ⚷246(25)

In actions against truck driver, his employers, and owner of truck, to recover for death of driver of ambulance, which collided with truck at intersection, and to recover for damage to ambulance, giving of instruction which permitted recovery even though jury concluded that driver of ambulance failed to stop at red signal and was not responding to an emergency call if light changed as ambulance was entering intersection and to stop would be futile or more hazardous than crossing intersection or would interfere with traffic, was not error. Vehicle Code, §§ 44(e), 454.

13. Death ⚷83

In a death action by an heir, the heir cannot recover expenses incurred by deceased as result of fatal injury. Code Civ. Proc. § 377; Civ.Code, § 956.

14. Death ⚷84

Where there was no evidence, in action by mother for wrongful death of son, that mother incurred or paid medical expenses of treating son for fatal injuries, mother was not entitled to recover for those medical expenses. Code Civ.Proc. § 377; Civ.Code, § 956.

◆

Parker, Stanbury, Reese & McGee and Wm. C. Wetherbee, Los Angeles, for appellants.

Russell H. Pray, William C. Price, Long Beach, Samuel P. Block, Compton, Flaum & Hecker, Beverly Hills, and Henry F. Walker, Los Angeles, for respondents.

BRAY, Justice pro tem.

These two actions, which have been consolidated for trial and appeal, arise from a collision between a truck driven by one of the defendants and an ambulance driven by decedent, who died as a result of injuries sustained in the accident. In one action Mrs. Gallup, the mother of decedent, seeks recovery for his death, and, in the other, L. B. Brown, the owner of the ambulance, undertakes to recover damages for harm done to that vehicle. Defendants in both actions are the driver of the truck, two corporations which employed him, and another corporation which owned the truck. The jury returned verdicts for plaintiffs against all defendants, and judgments were entered accordingly. Defendants on this appeal do not claim that the evidence is insufficient to show that the driver of the truck was negligent but assert that the trial court erred in instructing the jury and in ruling upon the admissibility of evidence.

The collision occurred in Los Angeles about 10 p. m. on January 17, 1951, in clear weather at the intersection of Atlantic Boulevard, which is a northeast-southwest arterial, and Washington Boulevard, which runs east and west. Both boulevards were marked for four lanes of traffic, two in each direction. The intersection was well lighted and was controlled by tri-light traffic signals which showed green, amber and red lights. On the night of the accident the traffic signals were operating normally, and the amber lights were adjusted to shine for a period of three to four seconds before the red lights appeared. The ambulance was proceeding in a northerly direction along Atlantic, and the truck, loaded with 17 tons of sand, was going west on Washington. Two other vehicles on Washington were halted waiting for the stop signal to change. The truck, after passing to the right of these vehicles and entering the intersection, struck the right front door of the ambulance, and the ambulance was propelled sideways for a distance of about 35 feet.

There is a conflict as to whether the ambulance went against a stop signal. According to the testimony most favorable to plaintiffs, the ambulance, with two sirens sounding and three red warning lights flashing, entered the intersection as the traffic light changed from green to amber. There is evidence, however, that it entered the intersection when the signal was red.

[1-3] The first question is whether decedent was privileged to proceed against red traffic lights on the trip involved here. A driver of an ambulance of the type driven by decedent is permitted to ignore traffic signals if a siren is sounded, a red warning light is shown, and the vehicle is driven in response to an emergency call, provided the driver exercises due care and does not use the privilege arbitrarily. Vehicle Code, §§ 44(e), 454. Whether a vehicle is driven in response to an emergency call depends on the nature of the call received and the situation as presented to the mind of the driver and not upon whether there is an emergency in fact. Coltman v. City of Beverly Hills, 40 Cal.App.2d 570, 572, 105 P.2d 153; Head v. Wilson, 36 Cal.App.2d 244, 252, 97 P.2d 509. The driver, of course, should have reasonable grounds to believe that there is an emergency.

[4] There is evidence in the present case which will support a finding that decedent reasonably believed he was responding to an emergency call. At the time of the accident the ambulance was responding to a telephone message received by decedent on behalf of his employer, who operated an ambulance service. The call was made by an employee of the Samaritan Institute in Los Angeles, an institution which treated alcoholics and which had been doing business with the ambulance service for several years. The manager of the ambulance company had instructed decedent that all calls from the institute, unless containing contrary directions, should be treated as emergencies and that restraint straps and a three-man crew should be taken in response to such calls. No contrary directions were given in the call placed on the night of the accident. Restraint straps were taken on the trip, and the ambulance crew was made up of two attendants and decedent, who was "top man" of his crew. There is testimony that a three-man crew and restraint straps were taken in ambulances operated by this company whenever a patient was potentially violent, that some alcoholics are violent, and that a potentially violent patient would be considered an emergency case. Before going on the call decedent prepared, in duplicate, a "trip ticket" which was a memorandum relating to the nature of the trip about to be taken. The original of this writing was placed in the ambulance

where it was found after the collision, and the carbon copy was transcribed into the "log book" or permanent record of the company by one of its employees on the night of the accident. The manager of the ambulance company identified the "trip ticket" and the corresponding page of the "log book," told how they were prepared, and testified that they were made out in the regular course of business. Among the notations appearing on these documents was the letter "E" which the manager identified as the customary designation of an emergency call.

Defendants assert that certain undisputed evidence shows that, as a matter of law, decedent was not responding to an emergency call, and they argue that the trial court therefore erred in refusing a requested instruction to this effect and in giving instructions which permitted the jury to find that he was acting in response to such a call. The facts relied upon are that the Samaritan Institute was devoted exclusively to the treatment of alcoholics, that the employee of the institute who placed the call stated only that there was a "pick-up" at an address in Pomona and said nothing as to the condition of the patient or as to whether the case should be treated as an emergency, and that it was 20 miles from the place of business of the ambulance service to the address in Pomona and 30 miles from that address to the institute. It is defendants' position that the character of the institute requires an inference that the patient was merely an alcoholic, and that this, considered together with the facts that the language of the call did not indicate the existence of an emergency and that a trip of 50 miles was necessary to deliver the patient, shows that decedent reasonably could not have believed that an emergency existed. In our opinion, however, these matters only present a conflict with the other evidence and do not compel the conclusion urged by defendants.

[5, 6] We do not agree with defendants' contention that the "trip ticket" and corresponding page of the "log book" were improperly admitted in evidence. Section 1953f of the Code of Civil Procedure, which is part of the Uniform Business Records as Evidence Act, provides, "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." In the present case, as we have seen, the challenged documents were prepared in the regular course of business on the night of the accident, and the manager of the ambulance company identified them and told how such records were made. Defendants nevertheless claim that the "trip ticket" and page of the "log book" do not come within the statute because the letter "E" appearing on them, used by the company to designate an emergency call, assertedly represents a conclusion which the entrant would not have been permitted to give as a witness at the trial. However, decedent made the entry on the "trip ticket," which was copied into the "log book," and he, of course, could have testified at the trial as to whether he believed that an emergency call had been received. The fact that the notation was self-serving, in a sense, does not make it inadmissible. Most business records are necessarily so. That the record was self-serving does not make it inadmissible. See Davis v. Fanny Briggs Carr, Inc., 105 Cal. App. 777, 779, 288 P. 710. This fact was one for the jury to consider in weighing its effect. The notation was no stronger than the decedent's testimony as to his belief would have been. It was then for the jury to determine from all the evidence whether such belief was reasonable. For discussion of the application of the Uniform Business Records as Evidence Act, see People v. Gorgol, 122 Cal.App.2d 281, 265 P.2d 69; Doyle v. Chief Oil Co., 64 Cal.App.2d 284, 148 P.2d 915.

[7] The fact that the records were kept and introduced in evidence by a party relying upon them does not, of course, make section 1953f inapplicable. See Robinson v. Puls, 28 Cal.2d 664, 668–669, 171 P.2d 430.

[8] The testimony to the effect that restraint straps and a three-man crew were taken in an ambulance whenever an emergency was involved was also properly admitted. This testimony, considered together with the evidence that such straps and a three-man crew were used on the particular trip involved here, permits an inference that decedent, who was in charge of the crew, believed that there was an emergency and bears upon the reasonableness of that belief.

[9] It is claimed that the trial court erred in rejecting offers to prove that Pomona was an established municipality of from thirty to forty thousand population and that various emergency ambulance facilities were available there. The offered evidence, however, was irrelevant and properly excluded. The only issue to which it could be pertinent was whether decedent reasonably believed that he was responding to an emergency call, but there was no attempt to show that decedent knew the offered facts or knew whether the ambulance facilities in Pomona were available at the time of the call.

[10, 11] The trial court refused an instruction requested by defendants which, after setting forth portions of section 476 of the Vehicle Code relating to official traffic signals, stated that violation of these provisions constituted negligence as a matter of law. Instead, the court gave all the portions of section 476 requested by defendants plus other pertinent portions, particularly subdivision (f) * and then instructed to the effect that only a rebuttable presumption of negligence arose from any violation of section 476. It is settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances but that a presumption of negligence arises which can be rebutted by evidence of justification or excuse. Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1; Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 588–590, 177 P.2d 279; Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 609, 177 P.2d 293; Fuentes v. Panella, 120 Cal.App.2d 175, 260 P.2d 853. In the present case, as we have seen, there is evidence from which it could be inferred that decedent was privileged under section 454 of the Vehicle Code to ignore traffic signals, and the requested instruction would have precluded consideration of this evidence. It follows that the court acted properly in refusing this instruction and in treating justification as a question of fact. As said in Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d 581, 591, 177 P.2d 279, 285, this instruction "invaded the province of the trier of fact by not tendering for consideration the issue as to whether the circumstances were such as to excuse violation." By correct instructions given, the court left the question of fact of violation to the jury.

[12] One instruction given by the court permitted recovery by plaintiffs even though the jury concluded that decedent failed to stop at a red signal and was not responding to an emergency call. This instruction stated that entering an intersection against a stop signal is not conclusive of negligence, and it then explained, "This is so because the controlling device may change to give the stop sign either just as a vehicle is entering the intersection or when it is so close that an attempt to stop would be futile, or would be more hazardous than crossing the intersection, or would be more liable to result in interference with other traffic. The fact that the law recognizes these possibilities, however, does not justify a driver in approaching an intersection at a careless rate of speed. He, too, is bound to know that the signal, being automatic, will not heed his approach and that it may change before he reaches the intersection. The ordinarily careful driver will adjust his speed to that possibility. Failure to obey a traffic signal may or may not be the proximate result of a negligent speed on approach. When there is a question

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* Subdivision (f) reads: "No person shall disobey the directions of this section except when it is necessary for the purpose of avoiding a collision or *in case of other emergency* or when otherwise directed by a police or traffic officer, or as permitted under Section 454." (Emphasis added.)

whether a driver was negligent in entering an intersection against an automatic stop signal, all the surrounding circumstances should be considered with a view to judging whether his conduct was justifiable, excusable and in the manner of an ordinarily prudent person * * *." There is no claim that the record does not contain evidence of the type of justification referred to in the instruction, but defendants assert that the instruction is not proper in any case where an amber signal warns that a red stop signal is about to appear. The fact that an amber warning is given, however, does not mean that there can never be justification for entering an intersection against a red light, and the instruction merely recognizes some of the circumstances which might justify such conduct. See Fuentes v. Panella, 120 Cal.App.2d 175, 182–183, 260 P.2d 853; Vehicle Code, § 476(f).

The final question relates to whether medical expenses are recoverable in an action for death brought by an heir. The parties stipulated that the costs of medical care given to decedent prior to his death were $639.25 and that this amount was reasonable for the services rendered, but defendants reserved the objection that such expenses were not properly allowable in a wrongful death action. In this connection the trial court instructed that, if the jury found in favor of decedent's mother, she was entitled to recover the reasonable value of the medical care in an amount not to exceed the expenses, if any, incurred by her. On the issue of the right under death statutes of an heir to recover for medical expenses incurred between the injury and the death of the deceased, there is, as said in Hansen v. Hayes, 175 Or. 358, 154 P.2d 202, 216, a "clean-cut conflict of authority." (See that case for discussion of that conflict.) In California there is some confusion on the subject. Prior to its amendment in 1949, section 377 of the Code of Civil Procedure provided that in an action for the wrongful death of an adult brought by his heirs or personal representatives "such damages may be given as under all the circumstances of the case, may be just." Under the section as it then read, the courts recognized that medical expenses could not be recovered in a wrongful death action because they were incurred merely in an endeavor to save life prior to death and not as a result of death. See Salmon v. Rathjens, 152 Cal. 290, 301, 92 P. 733; Nitta v. Haslam, 138 Cal.App. 736, 746, 33 P.2d 678; Fitzgerald v. Quinn, 131 Cal.App. 457, 461, 21 P.2d 656. The case of Cleary v. City R. Co., 76 Cal. 240, 241, 18 P. 269, contains language indicating that such expenses were recoverable by the heirs in an action for death, but this language conflicts with views expressed in the cases cited above and in any event must be disregarded in an action under section 377 as it now reads.

[13] In 1949 section 377, Code of Civil Procedure, was amended to provide, among other matters not pertinent here, that the damages recoverable in an action under that section "shall not include damages recoverable under section 956, Civil Code." That section, added the same year, provides that when a person entitled to maintain an action for physical injury resulting from a wrong dies before judgment, the damages recoverable for such injury "shall be limited to loss of earnings and expenses sustained or incurred as a result of the injury by the deceased prior to his death * * *." Thus a reading of the two sections together shows that the heir in a death action cannot recover expenses sustained or incurred by the deceased as a result of the injury. It has been so held in Follansbee v. Benzenberg, 122 Cal.App.2d 466, 265 P.2d 183. It might be noted that the court in that case, although denying the personal representative in the suit brought under section 377, Code of Civil Procedure, a recovery for medical expenses, did allow the widow, individually, such recovery independently of that section based upon the statutory liability of the wife for her husband's medical expenses. It referred, by analogy, to the common-law right of action of the parent of a minor child to recover medical expenses in an action for the negligent death of that child, based upon the liability of the parent for those expenses.

[14] It should be pointed out here that if there is any common-law right of a moth-

er of an adult child (irrespective of section 377 which prohibits recovery), to recover medical expenses, plaintiff has failed to bring herself within that right for the reason that the record fails to show that she either incurred liability for or paid them. No evidence upon this subject was introduced at the trial. The parties stipulated, subject to defendants' objection that they were not recoverable, that $639.25 was incurred (by whom is not stated) for medical expenses and was the reasonable value thereof. In all actions under the common-law theory, it was necessary to prove that the plaintiff had incurred and paid such expenses. See Salmon v. Rathjens, supra, 152 Cal. 290, 301, 92 P. 733, 738, where in an action by children, one adult, the other minor, for the wrongful death of their father, the court said: "* * * certainly plaintiffs cannot recover for such charges [medical expenses] where they have never been paid by them, and plaintiffs are in no way liable therefor, and have incurred no loss on account thereof." Not only was there no evidence that plaintiff either incurred or paid the medical expenses, but in her brief plaintiff claims that the expenses were paid by the employer of deceased and that such employer may under sections 3856 and 3857 of the Labor Code be awarded reimbursement from plaintiff's judgment therefor. There is nothing in the record to show that the employer paid these expenses. Moreover, one case has questioned whether an employer has a lien for medical expenses against a judgment obtained in a wrongful death action. See Fitzgerald v. Quinn, supra, 131 Cal.App. 457, 461, 21 P.2d 656. In any event, it is obvious that if the plaintiff in a death action cannot recover these expenses, the employer of the deceased who is not even a party to the action cannot do so in that action. Accordingly, the trial court erred in permitting the jury to include an award for such expenses, and, unless decedent's mother consents to a reduction of the judgment in her favor by the agreed sum of $639.25, a reversal will be necessary, since it is impossible to determine whether the verdict awarding her $13,153.71 contained an allowance for the medical expenses, or, if so, in what amount. If a new trial is to be held, however, it should be limited to the issue of damages. There is no merit to defendants' claim that the entire judgment must be reversed on the theory that the error prejudiced the jury by calling attention to decedent's pain and suffering. No evidence concerning his pain and suffering was introduced, and the jury was instructed that those factors could not be considered in determining the amount of damages.

The judgment in favor of plaintiff L. B. Brown is affirmed. Mrs. Gallup having filed written consent to the reduction of the judgment, the judgment in her favor is reduced to $12,514.46 and as reduced is affirmed. See Rules on Appeal, rule 24(b). Plaintiffs are awarded costs on appeal.

SHENK, Acting C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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43 Cal.2d 33

KINGSBURY
v.
ARCADIA UNIFIED SCHOOL DIST.

L. A. 23074.

Supreme Court of California.

June 11, 1954.

Action against school district to recover architect's fees due under contracts with the district. The Superior Court, Los Angeles County, Harold B. Jeffery, J., entered judgment from which both parties appealed. The Supreme Court, Schauer, J., held, inter alia, that where school district's contract for architectural services provided that payments to architect "on account of" his fee should be made pursuant to designated steps in completion of project and provided that upon abandonment of the project by the district after preparation of preliminary drawings and specifications, architect should be paid a sum sufficient to "increase" the total amount paid on the fee to an amount which bore the same proportion to the fee as services performed by architect prior to abandonment bore to entire services architect was required to perform, progress payments did not constitute payment in full.

Affirmed.

Prior opinions 263 P.2d 324, 263 P.2d 330.

1. Schools and School Districts ⚷85

Where school district's contract for architectural services provided that payments to architect "on account of" his fee should be made pursuant to designated steps in completion of project, and that, upon abandonment of project by district after preparation of preliminary drawings and specifications, architect should be paid a sum sufficient to "increase" total amount paid on the fee to an amount which bore the same proportion to the fee as services performed by architect prior to abandonment bore to entire services architect was required to perform, progress payments did not constitute payment in full.

2. Schools and School Districts ⚷85

Under school district's contract for architectural services, actual execution of construction contract was not a condition precedent to district's liability to pay architect the same proportion of his total fee as existed between services rendered before cancellation and total services called for by the contract.

3. Schools and School Districts ⚷85

Where complaint, in action against school district for architect's fee due under contract, alleged that school district abandoned project, and answer admitted such allegation, architect was entitled to recover under contract provision that he should be paid the same proportion of his total fee as existed between services rendered prior to discontinuance and total services due under the contract.

4. Schools and School Districts ⚷121

In action against school district for architect's fee due under contract, evidence was insufficient to support district's contention that cessation of architect's services was by mutual agreement.

5. Appeal and Error ⚷1010(1)

Where contract in suit and evidence supported interpretation of trial court, Supreme Court would adhere to such interpretation.

6. Schools and School Districts ⚷121

Where abandonment clause of contract between school district and architect conformed to minutes of meeting of district's board of trustees in permitting termination of architect's services at end of any step, admission, in action to recover architect's fee, of such minutes would not assist in interpretation of contract, even if it were ambiguous, and exclusion of such minutes was not error.

7. Appeal and Error ⚷173(16)

Where answer of school district, in 1951 action for architect's fee due under contract with district, admitted that district abandoned construction in 1948, thus making payable thereafter the balance owing to architect under abandonment provision of contract, district could not successfully urge on appeal that record contained, or that court erroneously excluded, evidence which would support inference contrary to its admission and to court's finding that cause of action was not barred by four year statute of limitations. Code Civ.Proc. § 337, subd. 1.

8. Schools and School Districts ⚷121

In action against school district for architect's fee due under contract entitling architect to 8% of construction cost and providing that, in event of abandonment of project, architect was to receive that percentage of his total fee which would be in accordance with percentage of work completed by architect, evidence showed that architect had completed 75% of his work at time of district's abandonment of project and sustained court's finding that architect was entitled to $72,000 fee, less $33,000 already paid.

9. Interest ⚷47(2)

Where amount due architect under contract with school district was neither certain nor capable of being made certain by calculation, except after production of expert's testimony as to both cost of construction and percentage of total work performed by architect, in view of fact that contract entitled architect, in case of abandonment of project by district, to that proportion of his total fee which work he completed bore to total work to be performed by him under the contract, architect was not entitled to interest from date of filing of action, on amount recovered. Civ.Code, § 3287.

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Harold B. Pool, Los Angeles, for plaintiff and appellant.

Harold W. Kennedy, county counsel, William E. Lamoreaux, deputy county counsel, Los Angeles, for defendant and appellant.

SCHAUER, Justice.

From a judgment rendered by the court, sitting without a jury, awarding additional architect's fees for services rendered by plaintiff's decedent, both parties appeal. Defendant attacks the judgment in its entirety, while plaintiff's appeal is "based solely on that part of the judgment wherein" recovery of interest is denied. For clarity, we shall hereinafter refer to the decedent as the architect. We have concluded that the judgment should be sustained in all its aspects.

The issue presented is the interpretation of two contracts under which the architect rendered services. Under the first contract, made on December 1, 1943, and hereinafter called the 1943 contract, defendant school district employed the architect in connection with the proposed construction of an intermediate school building. For reasons not reflected in the record, the building was never constructed. Under the terms of the contract, as amended on February 6, 1946, the district paid to the architect a total of $33,000 for his services. Judgment was recovered for an additional $39,000.

Under the second contract, made on August 24, 1948, and hereinafter called the 1948 contract, the district paid to the architect $1,400 for services rendered in connection with the proposed construction of classroom additions which project was also abandoned. Judgment was recovered for an additional $875.

1943 Contract.

The chief controversy concerns the payment provisions of the 1943 contract. So far as here material that contract reads as follows:

"The District agrees to pay the Architect an amount equal to eight per cent (8%)[1] of the construction cost or costs of the 'Building' * * * when services as hereinafter stipulated have been rendered * * *

"*ARTICLE 3. PAYMENTS.* Payments to the Architect *on account of* [italics added] his fee shall be made as follows:—

"a) Upon completion of the preliminary drawings and specifications * * * an amount of Four Thousand Dollars ($4,000.00).

"b) Upon completion of a formal application to the proper governmental authorities in such form as may be required, on the basis of preliminary sketches and specifications, an additional amount of One Thousand Dollars * * *

"c) Upon completion of the working drawings and specifications, and their acceptance by the District * * * an amount sufficient to increase the payments to a total of Nineteen Thousand Six Hundred Dollars ($19,600.00).

"d) Upon the completion of a formal application to the proper governmental authorities in such form as may be required, an amount sufficient to increase the payments to a total of Twenty One Thousand Dollars * * *

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[1] The evidence indicates that with "some variation * * * the standard architects' fee in Southern California is 8% of the cost of the construction."

"e) Upon the acceptance of the working drawings and specifications by the State Division of Architecture, an amount sufficient to increase the payments to a total of Twenty Two Thousand Four Hundred Dollars ($22,400.00).

"f) Upon completion of fifty percent (50%) of the construction work, an amount sufficient to increase the payments to ninety percent (90%) of the fee based upon the contract cost of the work.

"g) Upon completion of the construction work and its acceptance by the District * * * an amount sufficient to increase the payments to one hundred percent (100%) of the fee based upon the total completed construction cost of the work.

"h) Should the work, as agreed upon, terminate with the services as stipulated under paragraph 'a' of ARTICLE 1 [preparation of preliminary drawings and specifications], then the payments as provided for under paragraph 'a' of ARTICLE 3 shall constitute the complete reimbursement to the Architect * * *

"If, at any future time, the District desires to resume the work [beyond preparation of preliminary drawings and specifications] * * *, then the amount of the payments made under paragraph 'a' of ARTICLE 3 shall be applied against the payments becoming due for the above services as stipulated in paragraphs 'b', 'c', 'd', 'e', 'f', and 'g' of ARTICLE 3. * * *

"*ARTICLE 9. ABANDONMENT OF PROJECT AND CANCELLATION OF AGREEMENT.* If the District determines at any time, not to proceed with the construction of the 'Building', or after the begining of the construction work, to suspend indefinitely and/or abandon the construction work and shall require the Architect to suspend the performance of his services, or for reasons stipulated in ARTICLE 8 [inefficiency of Architect] decides to cancel or terminate this AGREEMENT, there shall be due and payable within thirty (30) days after notice has been given in writing to the Architect of said suspension and/or abandonment or decision upon the part of the District to terminate or cancel this AGREEMENT, a sum of money sufficient to *increase* [italics added] the total amount paid to the said Architect on the fee to an amount which shall bear the same proportion to the fee as the amount of services performed and/or provided by the Architect prior to the time of such suspension and/or abandonment or termination of this AGREEMENT shall bear to the entire services the Architect is required to perform and/or provide * * * Upon payment to the Architect of the amount or amounts provided under this ARTICLE the District may terminate and cancel this AGREEMENT.

"*ARTICLE 10. SUPERVISION AND SUPERINTENDENCE OF THE WORK.* * * * The Architect and the Engineers engaged by him shall supervise the work of construction covered by the working drawings and specifications prepared * * * within the scope of this AGREEMENT * * *"

In the contract the architect also agreed "to hire the services of a qualified Structional Engineer, and of a Mechanical and Electrical Engineer to collaborate jointly with him in the execution of his professional services."

In February, 1944, defendant accepted the preliminary drawings and specifications prepared by the architect and paid him $4,000 as specified in paragraph (a) of Article 3. On February 6, 1946, pursuant to a request by the architect for an amendment to the contract "to allow for an increase of payment since the original contract was estimated on a very low building cost basis," a written amendment to the contract was entered into, under which the payment provided in paragraph (c) of Article 3 was increased from $19,600 to $33,000, that provided in paragraph (d) was increased from $21,000 to $34,000, and that provided in paragraph (e) from $22,400 to $35,750.

On June 5, 1946, defendant district accepted the final plans and specifications, prepared by the architect in collaboration with the structural engineer[2] employed by him, and on June 19, 1946, the district paid the architect $29,000, thus bringing the total payments to $33,000 as provided in amended paragraph (c) of Article 3.

Nothing further was done by the architect under the contract, and on January 14, 1949, he died. The court found that "subsequent to the year 1947, the exact date of which was not proved at the trial, the defendant abandoned or suspended indefinitely the construction of said building * * * [T]he defendants did not notify plaintiff in writing of such action." It was further found that "$72,000.00 is the amount which would bear the same proportion of the full fee as the amount of services performed by the said [architect] Paul Kingsbury prior to such abandonment would bear to the entire services to be performed under said * * * contract as computed in accordance with [Article 9] * * *, and said sum is the reasonable value of the services rendered * * *"; that deducting from such $72,000 the $33,000 which "defendant has paid on account thereof," left owing the balance of $39,000 for which judgment was rendered.

[1, 2] Defendant contends that the respective lump sum payments specified in Article 3 constituted payment in full for each of the services described in connection with such payments, and that therefore the $33,000 received by the architect paid him in full for all services he rendered under the contract. In particular, it relies upon the provision in the last paragraph of Article 3 that if the district terminated the work after preparation of preliminary plans, then the payment made for such plans "shall be applied against the payments becoming due *for the above services* as stipulated in" (italics added) paragraphs (b) through (g) of Article 3. However, as pointed out by plaintiff, the only provision in the contract which would specifically exempt the district from further payment in case of termination of the work is that set forth in paragraph (h) of Article 3, wherein it is declared that if the termination occurs with preparation of the preliminary plans, then payment for such plans "shall constitute the complete reimbursement to the Architect," and if it was intended that upon a later termination of the work the progress payments provided in paragraphs (b) through (g) should constitute like "complete reimbursement to the Architect" then it is reasonable to assume that the contract would have so provided. Moreover, it is declared in the opening sentence of Article 3 that the payments to the architect *"on account of* his fee shall be made as follows" (italics added), thus indicating that such payments were not intended as in full for the services rendered at the various stages of the work. Further, the fact that the contract was amended "to allow for an increase of payment since the original contract was estimated on a very low building cost basis," would suggest that the progress payments were related to the total fee, which was to amount to 8% of construction cost, rather than being simple flat fees which would constitute full payment for services rendered at each of the work stages, and, in addition, the provisions of Article 9 declare that upon the contingencies therein mentioned "there shall be * * * payable within thirty (30) days after notice * * * in writing to the Architect of * * * abandonment or decision * * * to terminate or cancel this AGREEMENT, a sum of money sufficient to *increase* [italics added] the total amount paid" to the proportions of the total fee as specified. Evidence as to the construction cost upon which the 8% fee was to be computed was offered by plaintiff, and the contract contains no provision requiring that, as suggested by defendant, the actual execution of a construction contract was a condition precedent to its liability to pay the proportionately accruing percentages of the fee.

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[2] The engineer testified that he or his office "personally drew the structural engineering plans" for the project here involved, and consulted with the architect "in reference to the drawing of the other plans * * * Throughout the entire project."

[3, 4] Defendant next urges that the abandonment provisions of Article 9 of of the contingencies specified therein occurred." However, in paragraph V of the cause of action covering the 1943 contract, plaintiff alleged that "late in the year 1948, the exact date of which is not known to plaintiff herein, but is known to the defendant, the defendant abandoned the construction of said building and notified the said Paul Kingsbury of such abandonment," and defendant in its answer expressly admitted "all the allegations" contained in such paragraph. Since one of the "contingencies" set forth in Article 9 is a determination by the district "at any time not to proceed with the construction of the 'Building'," it is apparent that plaintiff alleged and defendant admitted facts establishing that that contingency occurred, and thereby bringing into effect the proportionate payment provisions of Article 9. Defendant suggests, also, that "cessation of the architect's services was by mutual agreement," rather than by determination by the district alone and that therefore further payment cannot be claimed. The record is devoid of evidence to support such a suggestion; the fact that minutes of the district's Board of Trustees indicate that following acceptance by the district of the final plans and specifications on June 5, 1946, the architect was employed to perform other services for the district was not shown to have any bearing whatsoever upon the contract here involved.

[5] Inasmuch as it is evident that the contract and the evidence as hereinabove set forth support the interpretation placed thereon by the trial court this court will adhere to that interpretation. (See Quader-Kino A. G. v. Nebenzal (1950), 35 Cal. 2d 287, 294, 217 P.2d 650; Edwards v. Billow (1948), 31 Cal.2d 350, 359, 188 P.2d 748, and cases cited therein.)

[6] Defendant further contends, however, that the court erred to its prejudice in excluding evidence of minutes of two meetings of its Board of Trustees which it urges aid in interpreting the 1943 contract. The minutes of the first of such meetings, of November 17, 1943, state that the architect was authorized "to prepare preliminary plans" for the intermediate school involved in the 1943 contract and "also to submit at its next meeting a contract which would provide for the employment of the services of an architect by steps or stages with the provision that said services could be terminated at the end of any of the steps * * *" At the second of such meetings, on December 1, 1943, it is stated by the minutes that the architect presented the contract, which "contained the provision requested by the Board, viz: the employment of the services of an architect by steps or stages with the provision that said services could be terminated at the end of any step." The court rejected the evidence with the statement "I don't think there is any ambiguity [in the contract]." Regardless of whether or not the contract be considered as ambiguous with respect to the payment provisions here in controversy, its abandonment clause conforms to the minutes in permitting termination of the architect's services "at the end of any step," and admission of such minutes would not therefore appear to assist in interpretation of the contract.

[7] Next, defendant urges that, as pleaded in its answer, action upon the 1943 contract was barred by the four-year limitations statute embodied in subdivision 1 of section 337 of the Code of Civil Procedure. This action was filed in 1951. Therefore, since, as already noted hereinabove, defendant in its answer expressly admitted that it abandoned construction "late in the year 1948," thus making payable thereafter the balance owing to the architect under the abandonment provisions of Article 9, it is apparent defendant may not now urge either that the record contains (or that the court erroneously excluded) evidence which would support an inference contrary to both its admission and to the court's finding that the cause of action "is not barred."

[8] Finally, defendant urges that the findings that the architect earned $72,000

under the terms of the contract as construed by the court and that therefore $39,000 remains owing, are without support in the evidence. This contention is likewise without merit. Plaintiff's expert witness, a qualified architect, testified that he had examined the plans prepared by the deceased architect, Mr. Kingsbury, and that 75% "is a close estimate as to the percentage of the" architect's work completed when, as here, he has prepared the final drawings and specifications pursuant to a contract which also included supervision of the construction. Further, the court received in the record a stipulation between the parties that plaintiff's experts would testify that the reasonable cost of construction of the building, if constructed, would have been $1,200,000. Since under the contract plaintiff's total fee if his work had been completed would have been 8% of the $1,200,000 (i. e., $96,000), and since 75% thereof (representing the percentage of the work actually completed) amounts to $72,000, of which admittedly only $33,000 has been paid, the court's finding that a balance of $39,000 remains owing is supported by the evidence.[3]

1948 Contract.

Under the 1948 contract, the architect's total fee for preparing the plans and supervising construction of certain classroom additions, was fixed at 6½% of the construction cost. Payment of the fee was also to be made as the work progressed, as follows:

(a) Upon completion of the preliminary drawings, 1% of the estimated cost of the building.

(b) Upon acceptance of the final plans by defendant, an additional 3½% of the estimated cost.

(c) Upon acceptance of the final plans by the State Division of Architecture, an additional ½% of the estimated cost.

(d) Upon completion of 50% of the construction work, an additional ½% of the actual contract cost of the building.

(e) Upon completion of construction work and its acceptance, the final 1% of the contract cost.

This contract differs from the 1943 contract in one material element: It contains no provision that (as is provided in paragraph h of Article 3 of the 1943 contract) "Should the work * * * terminate with the * * * [preparation of preliminary drawings and specifications] then the payments as provided for * * * [such preliminary drawings and specifications] shall constitute the complete reimbursement to the Architect." It does, however, contain an abandonment clause substantially identical with that set forth in Article 9 of the 1943 contract and it is under this abandonment clause that plaintiff claims.

The 1948 contract also provided that "Solely for the purpose of determining the payments to the ARCHITECT on account of the services stipulated * * * prior to the letting of the Contract * * * for the construction * * *, the amount of One Hundred and Fourty Thousand Dollars * * * shall be the estimate used as a payment basis."

The architect completed the preliminary "sketches, drawings and specifications" for the subject building. Defendant accepted them and paid the architect $1,400, under paragraph (a) of the payment provisions. Thereafter, as pleaded by plaintiff, expressly admitted by defendant, and found by the court, "defendant abandoned said construction and work thereunder and notified" the architect of the abandonment.

Here again plaintiff's expert witness testified that in preparing the preliminary plans and specifications the architect had completed 25% of his work under the contract. Thus, under the abandonment clause which was applicable by the terms of this contract, and as found by the court, the architect had earned a total of $2,275 (i. e., 25% of 6½% of $140,000), which, after deducting $1,400 already paid by defendant, left owing the $875 for which judgment was rendered. Defendant's attacks on this portion of the judgment have been answered adversely by what has already been said hereinabove with respect to the 1943 contract.

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[3] It may be noted that the structural engineer employed by the architect to assist in preparing the plans here involved, testified that 25% of the total architect's fee is, in the witness' experience, allotted to the structural engineer, and that the reasonable value of the services rendered by the witness on this project was $18,000.

Plaintiff's Appeal: Interest Prior to Judgment Date.

[9] Plaintiff, in reliance upon section 3287 of the Civil Code,[4] urges that the judgment should have included interest from the date of filing of this action. However, since the amount due under the contracts here involved was neither certain, nor capable of being made certain by calculation, except after the production of expert testimony as to both cost of construction (shown by stipulation, as to the 1943 contract) and percentage of total work performed (as to both contracts), it appears that the court was justified in not awarding interest. (Lineman v. Schmid (1948), 32 Cal.2d 204, 209–213, 195 P.2d 408, 4 A.L.R.2d 1380.) Some indication of the uncertainty of the amount due exists in the fact that during the trial plaintiff amended the complaint with respect to the 1948 contract by reducing from $7,000 to $2,275 the amount alleged as the full fee earned by the architect, and from $5,600 to $875 the sum alleged as the unpaid balance owing. The various cases cited by plaintiff (Erickson v. Stockton, etc. R. R. Co. (1905), 148 Cal. 206, 82 P. 961; Olcovich v. Grand Trunk Ry. Co. (1918), 179 Cal. 332, 176 P. 459; Engelberg v. Sebastiani (1929), 207 Cal. 727, 279 P. 795; Courteney v. Standard Box Co. (1911), 16 Cal.App. 600, 117 P. 778; Brandenstein v. Jackling (1929), 99 Cal.App. 438, 278 P. 880; Lasky v. American Indemnity Co. (1929), 102 Cal.App. 192, 282 P. 974), turned upon facts differing from those here involved, and no useful purpose would be served by discussing such cases in detail.

For the reasons hereinabove stated the judgment is affirmed.

EDMONDS, CARTER and SPENCE, JJ., and BRAY, J. pro tem., concur.

COLE et al. v. RUSH et al. *

L. A. 22864.

Supreme Court of California.
In Bank.
June 4, 1954.

Rehearing Granted June 30, 1954.

Wrongful death action against saloon keepers by widow and minor children of saloon patron who allegedly was fatally injured in fall while engaging in fisticuffs in saloon when he became belligerent after he had become intoxicated in the saloon. The Superior Court, Los Angeles County, Philbrick McCoy, J., sustained demurrer without leave to amend and entered judgment for defendant, and plaintiffs appealed. The Supreme Court, Carter, J., held that, where complaint alleged that saloon keepers knew that patron became belligerent when intoxicated, and that widow had previously requested saloon keepers not to give, sell, or furnish intoxicating beverages to patron in sufficient quantity to allow him to become intoxicated, but that saloon keepers had refused to accede to such request, trial court abused its discretion in sustaining demurrer without leave to amend.

Judgment reversed.

Schauer, Traynor, and Edmonds, JJ., dissented.

Prior opinion, 262 P.2d 623.

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[4] Civil Code, section 3287: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

* Opinion vacated 289 P.2d 450.

1. Negligence ⚷4

Negligence is measured by what person of ordinary prudence would or would not do under the same or similar circumstances.

2. Negligence ⚷62(3)

Negligence may be proximate cause of an injury to another, even though act of third person intervenes, if person of ordinary prudence could reasonably anticipate probability of third person's intervening conduct.

3. Negligence ⚷10

Individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally committed.

4. Intoxicating Liquors ⚷306

Where in wrongful death action by widow and minor children of saloon patron against saloon keepers, complaint alleged that patron was fatally injured in fall while engaging in fisticuffs in saloon when he became belligerent after he had become intoxicated in saloon, that saloon keepers knew that patron became belligerent when intoxicated, and that widow had previously requested saloon keepers not to give, sell, or furnish intoxicating beverages to patron in sufficient quantity to allow him to become intoxicated, but that saloon keepers had refused to accede to such request, trial court abused its discretion in sustaining demurrer without leave to amend.

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John C. Stevenson and Lionel Richman, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent.

CARTER, Justice.

Plaintiffs, Dorothea Cole, the surviving widow of James Bernard Cole, deceased, and Joyce Elaine Cole and Kenneth Foye Cole, the minor children of the decedent, brought this action to recover damages for loss of comfort, support, etc., suffered by them because of the wrongful death of their husband and father. Defendant Frank Van Stone, individually, and doing business as Tropic Isle Cafe, demurred to plaintiffs' first amended complaint on the grounds that the complaint failed to state facts sufficient to constitute a cause of action against him; that the complaint showed, on its face, that the injuries complained of were caused and contributed to by the fault and negligence of the decedent; that it could not be determined in what manner any acts of the defendant constituted the proximate cause of the injuries; and that the complaint showed that the acts of the decedent were an intervening and superseding cause of the decedent's death. Upon plaintiffs' statement that they could not further amend, the trial court sustained the demurrer without leave to amend and judgment for defendant was entered thereon.

Plaintiffs alleged, in part, that defendant owned and operated an establishment known as the Tropic Isle where intoxicating liquors were sold to the public for consumption; that on October 13, 1950, James Bernard Cole was a patron of the Tropic Isle and that the defendant sold, furnished, etc., to James Bernard Cole, alcoholic beverages which Cole drank; that immediately prior to going on the defendant's premises, Cole was not intoxicated by reason of the use of any alcoholic beverage but that after he drank the beverages furnished to him at the Tropic Isle, he became intoxicated. It was further alleged that James Bernard Cole was a frequent patron of the Tropic Isle; that defendant well knew that Cole was normally of quiet demeanor but that when he became intoxicated he became belligerent, pugnacious and quarrelsome and that this was well known to the defendant; that prior to the date in question, plaintiff Dorothea Cole had requested defendant not to give, sell or furnish intoxicating beverages to James Bernard Cole in a sufficient quantity to allow him to become intoxicated but that defendant refused to accede to such request. It was alleged that because of such intoxication on the day in question and as a proximate result of the liquor sold to him, James Bernard Cole became belligerent, pugnacious and quarrelsome and engaged in fisticuffs with one Franklin Leonard; that

James Bernard Cole was struck by Leonard and fell to the pavement, striking his head against the concrete, by reason of which he suffered a subarachnoid hemorrhage, traumatic, and died immediately. It was also alleged that at the time of his death, James Bernard Cole was an able-bodied man, 39 years of age, and was regularly engaged as a warehouseman earning $4,000 per year.

California has no civil damage, or Dramshop Act. Fleckner v. Dionne, 94 Cal.App.2d 246, 249, 210 P.2d 530. The question is whether, at common law, the surviving spouse and children of a decedent had a cause of action against one who, with notice, sold intoxicating beverages to a patron, and whether the selling, or the drinking, of the liquor was the proximate cause of the subsequent injuries.

Plaintiffs contend that the two California cases relied upon by defendant are distinguishable from the one under consideration.

In the case of Hitson v. Dwyer, 61 Cal.App.2d 803, 143 P.2d 952, 955, plaintiff alleged that while a patron of the bar, and in an obviously intoxicated condition, he was served intoxicating liquor as a result of which he fell from the movable stool on which he was sitting; that he was dragged from his position on the floor by the defendants, and as a result of which, he suffered a fracture and other injuries of the shoulder and body. He contended that the defendants, knowing his condition, negligently failed to take precautions to protect him. Plaintiff relied in part upon the Alcoholic Beverage Act, Deering's Gen.Laws, 1937, Act 3796, § 62, Stats. 1935, p. 1123, which makes it a misdemeanor to sell alcoholic beverages to an "obviously intoxicated person". The court held that it could not be said that the purpose of the act was to protect an obviously intoxicated person, as the act itself declared, section 1, that the purpose was to promote "* * * in the highest degree the economic, social and moral well-being and the safety of the State and of all its people". It was also held that "The principle that a violation of a statute or ordinance is negligence *per se* is subject to the limitation that the act or omission must proximately cause or contribute to the injury. Burtt v. Bank of California National Association, 211 Cal. 548, 296 P. 68; Lawrence v. Southern P. Co., 189 Cal. 434, 208 P. 966. Unless the alleged violation of the Beverage Act by defendants constituted the proximate cause of plaintiff's injuries such violation is wholly immaterial to a disposition of this appeal." The court continued to state the "general rule" as follows: "Rather we find the general rule to be as stated in the case of Hyba v. C. A. Horneman, Inc., 302 Ill.App. 143, 23 N.E.2d 564, 565: 'The common law gave no remedy for the sale of liquor, either on the theory that it was a direct wrong or on the ground that it was negligence which would impose a legal liability on the seller for damages resulting from intoxication' ", and that the rule found support in the case of Lammers v. Pacific Electric Ry. Co., 186 Cal. 379, 199 P. 523, wherein the court held that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. "Therefore, in the absence of a showing to the contrary, the proximate cause is not the wrongful sale of the liquor but the drinking of the liquor so purchased."

The case of Fleckner v. Dionne, 94 Cal.App.2d 246, 210 P.2d 530, 531, was an action brought, in part, against the owners of a tavern. It was alleged that these defendants had sold intoxicating liquors to one Dionne, a minor, knowing that he was already intoxicated and knowing that he would drive his car in an intoxicated condition which could, and would, result in harm to others using the highway; that Dionne, in an intoxicated condition, did drive his car so negligently and recklessly that he caused it to collide with the car in which plaintiffs were riding to their injury and damage; that all of said injury and damage was the direct and proximate result of the "unlawfulness, negligence, recklessness of the defendants" in selling the intoxicating liquor to the obviously intoxicated minor, Dionne.

The court cited both the Lammers and Hitson cases and held that in both of them the language in re proximate cause was not necessary to the decision since in the

Lammers case the statement "it has been uniformly held, *in the absence of statute to the contrary,* that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication" was qualified by the words "in the absence of statute to the contrary" and in the Hitson case the actionable wrong was the dragging of plaintiff across the floor. (Emphasis added.)

The court cited Seibel v. Leach, 233 Wis. 66, 288 N.W. 774, where the action was for property damage and personal injuries brought by a third person against the defendant tavern owner for selling intoxicants to one Leach who drove his car in such a manner as to cause plaintiff's injuries and damage. In the Wisconsin case, the court relied upon Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210, which was an action brought by a widow whose husband had been sold intoxicants by tavern owners after she had given them notice not to let her husband have any more liquor. After leaving the tavern, her husband lost control of his car and was fatally injured. The court there held that there was no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee, Black, Law of Intoxicating Liquors, ch. 13, sec. 281; Buntin v. Hutton, 206 Ill.App. 194; Healey v. Cady, 104 Vt. 463, 161 A. 151; Coy v. Cutting, 138 Kan. 109, 23 P.2d 458; State v. Johnson, 23 S.D. 293, 121 N.W. 785, 22 L.R.A.,N.S., 1007; Kraus v. Schroeder, 105 Neb. 809, 182 N.W. 364, 365. The California court concluded that in the absence of civil damage legislation in this state, and with such views as have been expressed by our courts on the subject (Lammers and Hitson cases) coinciding with the holdings in other jurisdictions where the questions have been passed upon, "we are satisfied that the sustaining of the demurrer of respondent Pangracs was correct."

Mr. Justice Dooling dissented. He admitted frankly that the cases from other jurisdictions were all to the effect that in the absence of statute no remedy existed against the dispenser of liquor for injuries resulting to third persons from the acts of intoxicated persons. "However, considered as questions of the law of negligence and proximate cause, I cannot bow to the reasoning of those decisions when carried to the full extreme of holding that under no circumstances can one who dispenses liquor to another knowing that he is becoming intoxicated be liable to a third person later injured by the intoxicated person's conduct; and I can see no reason for perpetuating in the law of this state the error of the courts of other jurisdictions.

[1, 2] "Negligence is measured by what a person of ordinary prudence would or would not do under the same or similar circumstances and *it is thoroughly settled that negligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct.* McEvoy v. American Pool Corp., 32 Cal.2d 295, 299 et seq., 195 P.2d 783; Mosley v. Arden Farms Co., 26 Cal.2d 213, 218 et seq., 157 P.2d 372, 158 A.L.R. 872; Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001." (Emphasis added.)

Both the Fleckner and Hitson cases alleged no more than negligence in serving liquors; in the present case, plaintiff wife alleges that "on occasions too numerous to name (she) requested defendants and each of them not to give, sell or furnish intoxicating beverages to James Bernard Cole sufficient to allow him to become intoxicated" but that defendants refused to desist from selling Cole intoxicating beverages; and that defendants had *specific knowledge* that when Cole became intoxicated he was invariably belligerent and quarrelsome. In the Hitson case, the plaintiff was suing for his own injuries received while *he* was intoxicated; in the Fleckner case, a third person was suing for injuries received by reason of the driving of an automobile by an intoxicated person. In neither case were the surviving spouse and dependent children suing for loss of consortium and support; and in neither case did the defendant tavern owner have prior specific notice and knowledge of the effect of liquor on the patron to whom the intoxicants were sold.

In Woollen and Thornton "Law of Intoxicating Liquors" (Vol. II, sec. 1029, p. 1837) it is said: "The right of persons injuriously affected by the sale of intoxicating liquors to recover damages *is not entirely restricted to the right given them by statute.* In several jurisdictions it has been held that when, by the continued sale of intoxicating liquors, a person has been unable to perform the duties owing by him to another, under the common law, the seller was liable in damages to persons to whom the duty was owing for any loss that he thereby sustained (Holleman v. Harward, 119 N.C. 150, 25 S.E. 972, 974, 34 L.R.A. 803: "It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action.") However, *it may be stated as a general rule, that unless the rights of persons having peculiar interests in the buyers of intoxicating liquors, such as a wife in her husband, or parent in the child, are invaded by the sales of intoxicating liquors and the seller of such liquors has notice of the injurious effects of the liquors so sold upon the buyer,* Holleman v. Harward, supra; Hoard v. Peck, 56 Barb. (N.Y.) 202 (opium); Struble v. Nodwift, 11 Ind. 64, the right to recover damages for injuries resulting from the sales of intoxicating liquors is purely statutory, and the action is governed entirely by the provisions of the statute." (Emphasis added.)

In Peck v. Gerber, 1936, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996, in which it appears that the plaintiff was assaulted in the saloon by another customer, the latter being a regular customer who was *known* to the saloonkeeper to be a trouble-maker, the court held the saloonkeeper liable, because he was negligent, and expressed the view that he did not use the care required of the ordinarily prudent man in maintaining order for the safety of his guests. The court stated that the standard of care does not vary, but that the ordinarily prudent man exercises care commensurate with the dangers to be avoided and the likelihood of danger to others. There is, apparently, no statute in Oregon on which recovery could have been predicated. Other cases in which the saloonkeeper was held liable under somewhat similar circumstances are Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803, and Molloy v. Coletti, 114 Misc. 177, 186 N.Y.S. 730. In Curran v. Olson, 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733, where the factual situation was different, the court said: "* * * the bartender knew, or might have known by the exercise of the slightest care, what the alcohol was to be used for, and could have prevented the injury to the plaintiff."

In Cherbonnier v. Rafalovich, 9 Cir., 88 F.Supp. 900, the court granted leave to plaintiff to plead over to allege, if he could, that the saloonkeeper had knowledge of the patron's violent disposition while under the influence of intoxicating beverages. Here, the court pointed out, 88 F.Supp. at page 903, that: "The present trend is apparently toward holding the defendant saloonkeeper liable for lawless acts occurring in the saloon. It is said in 30 Am.Jur. 574 that: 'The better reason appears to favor placing on the proprietor the duty of seeing to it that the patron is not injured either by those in his employ or by drunken or vicious men whom he may choose to harbor. Further, a guest or patron of such a place has a right to rely on the belief that he is in an orderly house and that the operator, personally or by his delegated representative, is exercising reasonable care to the end that the doings of the house shall be orderly'".

It would seem from the foregoing that the rule of the common law with respect to intoxicating beverages is not quite so clearly defined in favor of non-liability as would appear from statements found in other cases and textbooks.

Plaintiffs next contend that the rule of the common law with respect to habit forming drugs should be controlling here. At common law, it was held that a wife could bring an action against one who sold habit forming drugs to a husband with knowledge that the drug was intended to satisfy a craving induced by habitual use, Hoard v. Peck, 56 Barb. (N.Y.) 202; Holleman v. Harward, 119 N.C. 150, 25 S.E. 972; Flandermeyer v. Cooper, 85 Ohio 327, 98 N.E. 102, 40 L.R.A.,N.S., 360 (morphine); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998, L.R.A.1917D, 732 (opium); Tidd v. Skinner, 225 N.Y. 422, 122 N.E. 247, 3 A.L.R. 1145 (morphine).

In Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341 (in Arizona there is no civil damage act), it was held that defendant vendor of intoxicating liquors was liable to the plaintiff wife after selling such liquors over her protest and with knowledge that the plaintiff's husband was an habitual drunkard and had reached such a state that his power to drink or not as he chose had been destroyed. The court concluded that the defendants had breached a duty owing to the plaintiff for which the plaintiff should be compensated in damages.

A note in Southern California Law Review (14:91) points out that at common law, a vendor was liable to one spouse for a sale to the other spouse, or to a parent for a sale to a minor child of habit forming drugs to the extent of the damages suffered by the loss of consortium or the services of the victim of the drugs, if the vendor knew or had reason to know that the drugs were to be used for a purpose harmful to the purchaser. The doctrine stems from the husband's common law cause of action against one who injures the husband's wife and thereby causes the husband expense and loss of consortium, Golden v. R. L. Greene Paper Co., 44 R.I. 231, 116 A. 579, 21 A.L.R. 1517; and from the wife's similar cause of action. Emerson v. Taylor, 133 Md. 192, 104 A. 538, 5 A.L.R. 1049; Nash v. Mobile & Ohio R. Co., 149 Miss. 823, 116 So. 100, 59 A.L.R. 680, recognized subsequent to her right to sue in her own name as created by the various Married Women's Acts, see California Code of Civ. Proc. § 370. The doctrine would now seem to have acquired the dignity of a status distinct from its parent action, Restatement, Torts, §§ 696, 697, 705; 17 Am.Jur., Drugs & Druggists, 864, § 34, especially in view of its application to parent and child.

The author of the article points out that there should be no reason to distinguish between habit forming drugs and intoxicating liquors since both have two important characteristics in common: (1) Their use in substantial quantities causes injury to the mind and body; and (2) after reaching a certain point in their use, a person can no longer control his appetite for them. (As to the general pharmacological problem, see The Action of Alcohol on Man [1923], Ernest H. Starling; The Opium Problem [1928], Charles E. Terry and Mildred Pellens; U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs [1938].)

In the Pratt case, supra, the court said [55 Ariz. 535, 104 P.2d 151]: "A careful study of the cases following the principle laid down in Hoard v. Peck, supra, will show that the reasoning upon which they were based is that there are certain substances which, if used habitually, destroy the volition of the user to such an extent that he has no power to do aught but consume them when they are placed before him; that the consumption and the sale of such substances are, therefore, merged and become the act of the vendor; the sale is, therefore, the proximate cause of the loss of consortium, and the consumer cannot, having lost his volition to act, be guilty of contributory negligence. The best known of these substances is opium and its various derivatives, but it is a well-known scientific fact that many other things, under certain circumstances, will produce the same result. Cocaine is an instance among the drugs, and it is equally well established that the excessive use of intoxicating liquor may, and frequently does, have the same effect. We think it would be a narrow and illogical limitation of the rule to hold that because one habit-forming substance is a 'drug' in the technical sense of the term, and another is a 'liquor', different rules should be applied to the sale and use thereof. In fact, there is no specific holding applying such limitation in any of the recorded cases, and in Holleman v. Harward, supra, the court intimated strongly that under certain circumstances intoxicating liquor might fall within the same rule as laudanum as a habit-forming substance. Of course, since there is not the same presumption that the use of liquor will eventually cause the loss of volition that there is with a habit-forming drug, it is incumbent upon plaintiff to prove that to the knowledge of defendant such a stage has been reached by the consumer, but if this fact is once established, in all reason and logic the right of action should be the same in one case as in the other. We are satisfied from our examination of the cases that the language of the Restatement, supra [Torts, vol. 3, p. 696], 'c. The expression "habit-forming drugs" as used in this section does not include intoxicating liquor', was not meant as a declaration that the decided cases *exclude* liquors from the rule, for no such cases have been cited to us, but rather is merely a recognition of the fact that the precise issue had not yet been presented to and determined by any court." The court frankly admitted that: "Every requested application of the principles of the common law to a new set of circumstances is originally without precedent, and some court must be the first one to make the proper application.

"In answer to the second contention [judicial legislation], we are not asked to make a law. We are asked to declare what the common law is and always has been, and a declaration by us that it has always *permitted* such an action, even though none has ever actually been brought, is no more legislation than would be a declaration that it does not.

"So far as the bringing of unwarranted actions is concerned, if the facts do not show the action is justified, we must assume that the trial court and jury will properly apply the law, and we may not refuse to declare it correctly merely because there are some who may attempt to apply it to cases where the facts do not sustain it.

"On a careful review of all the authorities and a consideration of well-known scientific facts, we think that under the rationale of the rule laid down in Hoard v. Peck, supra, and the cases following it, the sale of intoxicating liquors under the circumstances indicated above is subject to the same rule as the sale of what is, in the strict sense of the word, a habit-forming 'drug', and that under such circumstances an action for the sale of the former should be upheld as allowed by the common law as well as the latter."

In Swanson v. Ball, 67 S.D. 161, 290 N.W. 482, 483, there was no dramshop act involved. The court there was concerned with facts substantially the same as the ones here under consideration. Plaintiff's husband was alleged to have died after drinking liquor sold to him by defendants who admitted receiving both oral and written notice from plaintiff to refrain from doing so. Defendants appealed from an order overruling their demurrer to plaintiff's complaint. The court, in affirming, said: "We are not impressed with the argument presented in which the appellant has attempted to differentiate between the opium drug in the case of Moberg v. Scott, supra [161 N.W. 998], and the intoxicating liquor in the instant case. This court through its former decisions, which we have just referred to, has quite conclusively established that a complaint such as we are considering states a cause of action. The right of the wife to the consortium of the husband is one of her personal rights and we believe that the allegations of the complaint are sufficient in both statements, as to facts and form, to permit a trial upon its merits." The court also held that the wife had a cause of action "independent of any specific statute".

[3] So far as the rationale of the decided cases is concerned—that the consumption and not the sale of the liquor is the proximate cause of the injury received by the third person—it appears clear that under the circumstances of this case, the sale and consumption were so merged as to become one act and under the rule that individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally committed it is unrealistic to say that the act of the deceased in drinking the liquor and thereafter becoming belligerent and pugilistic was not a foreseeable conse-

quence of the sale by defendant. See 23 So.Cal.L.Rev. 420, 421. This court has held many times that negligence may be the proximate cause of an injury even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct, McEvoy v. American Pool Corp., 32 Cal.2d 295, 299, 195 P.2d 783; Mosley v. Arden Farms Co., 26 Cal.2d 213, 218, 157 P.2d 372, 158 A.L.R. 872; Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001 and others.

[4] We therefore hold that it was an abuse of discretion for the trial court to sustain the demurrer without leave to amend. We do not decide, however, that the complaint was not subject to special demurrer, and the trial court may in its discretion require the clarification of uncertainties or ambiguities in the complaint.

The judgment is reversed.

SHENK and SPENCE, JJ., and BRAY, J. pro tem., concur.

SCHAUER, Justice.

I dissent.

In this wrongful death action plaintiffs, who are the surviving widow and minor children of James Bernard Cole, deceased, seek to recover damages for the allegedly negligent furnishing of intoxicating liquor to the deceased, which plaintiffs claim proximately caused his death. I believe that the courts of this state cannot tenably, nor should they, hold that the complaint states a cause of action.

The material allegations of the complaint (first amended) are that defendants own an operate an establishment known as the Tropic Isle in which they sell intoxicating liquors to the public for consumption on the premises; on October 13, 1950, James Bernard Cole was a patron of the Tropic Isle and defendants sold him alcoholic beverages which he drank; immediately before he entered the Tropic Isle "Cole was not intoxicated," but he became intoxicated on the beverages sold him at the Tropic Isle; Cole had patronized the Tropic Isle on numerous occasions and was well known to defendants, who also knew that he was "normally of quiet demeanor but that when * * * intoxicated he became belligerent, pugnacious and quarrelsome"; on numerous prior occasions plaintiff widow had requested defendants "not to sell or furnish intoxicating beverages to said James Bernard Cole sufficient to allow him to become intoxicated thereon," but defendants refused to comply with such requests; because of Cole's intoxication on the day involved and as a proximate result of the beverages sold to him by defendants Cole became belligerent, pugnacious and quarrelsome and engaged in fisticuffs with one Leonard; Cole was struck by Leonard and fell "to the pavement, striking his head against the concrete, by reason of which * * * Cole suffered a subarachnoid hemorrhage, traumatic, and died immediately"; at the time of his death Cole "was an able-bodied man of the age of 39 years," earning approximately $4,000 a year.

Defendant Frank Van Stone demurred to the complaint on the grounds that it failed to state facts sufficient to constitute a cause of action against him; that the complaint showed on its face that decedent's injuries were caused and contributed to by fault and negligence on decedent's part; that it could not be determined in what manner any acts of the defendant were the proximate cause of the alleged injuries; and that the complaint shows on its face that the acts of the third party, Leonard, were an intervening and superseding cause of decedent's death. Following the hearing upon the demurrer and the statement of counsel for plaintiffs that "he cannot further amend," the court sustained the demurrer without leave to amend, and judgment was entered accordingly.

There is eminent authority for the proposition stated in 30 American Jurisprudence 573, section 607, that "The common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a legal liability on the seller for damages resulting from the intoxication." (See e. g., Hitson v. Dwyer (1943), 61 Cal.App.2d 803, 808, 143 P.2d

952; Fleckner v. Dionne (1949), 94 Cal. App.2d 246, 210 P.2d 530; Lammers v. Pacific Electric Ry. Co. (1921), 186 Cal. 379, 384, 199 P. 523; Tarwater v. Atlanta Co., Inc. (1940), 176 Tenn. 510, 144 S.W.2d 746; 48 C.J.S., Intoxicating Liquors, §§ 430–431, pp. 716–718.) However, many states have adopted statutes, known as "civil damage acts," giving a right of action against persons furnishing intoxicants. California has no such statute.

Plaintiffs "recognize that it is the general rule of law that it is the consumption of the intoxicating liquor which is the proximate cause of any subsequent injury by reason of such intoxication rather than the sale of intoxicating liquor" (citing Hitson v. Dwyer (1943), supra, and Fleckner v. Dionne (1949), supra), but urge that "knowledge on the part of the defendants of the propensities of Cole to seek a quarrel when intoxicated, and * * * their wilful refusal to heed the pleas of the wife, and their wilful insistence in selling intoxicating liquor to Cole and allowing him to be intoxicated" are distinguishing factors which support the charge of negligence here and establish the sale of the liquor as the proximate cause of the injury. In my opinion, such a view, in the absence of legislative action, is not tenable.

In the first place, it appears that in Fleckner v. Dionne knowledge on the part of the tavernkeeper was also involved. The allegations of the complaint there were that on the evening in question defendant Dionne, a minor, was a patron of the tavern and was sold and given intoxicating liquors and allowed to consume them in the tavern; that the defendant tavernkeeper *knew* that Dionne was a minor and sold the liquors to him while he was already under the "severe influence of intoxicating liquors"; that he knew also that Dionne had upon or near the premises an automobile and would thereafter drive it; that defendant *knew* and should have known and foreseen that the driving of the automobile by him in his then intoxicated condition could and would result in harm and damage to others upon the highway; that Dionne while so intoxicated negligently drove his automobile into an automobile in which plaintiffs were riding and injured them; that the sale and serving of the liquor to Dionne by defendant constituted a "negligent disregard of the rights of plaintiffs" which joined with Dionne's negligence in proximately injuring plaintiffs. Defendant's general demurrer was sustained with leave to amend, and on plaintiffs' failure to amend judgment was entered in defendant's favor. The District Court of Appeal affirmed the judgment, relying upon the Hitson and Lammers cases, supra, as well as upon various out-of-state decisions, and this court denied a hearing. Thus it would seem that the knowledge alleged in the Fleckner case was much more specific and extensive than that in the instant case. Here it is only alleged that defendant knew of the belligerent disposition of the deceased when he was intoxicated.

In the next place, it is established in Hitson v. Dwyer (1943), supra, 61 Cal.App.2d 803, 143 P.2d 952, that one who suffers injuries by reason of his own intoxication may not recover from the tavernkeeper by reason of the sale of the liquor to the plaintiff. In Hitson plaintiff alleged that while obviously intoxicated and sitting on a movable stool at defendants' bar he wrongfully was served intoxicating liquor, and as a result he fell from the stool to the floor, and was thereafter dragged by defendants from his position on the floor; that as a result of the fall or the dragging or both, plaintiff was injured. It was held that so far as concerned the fall and any injuries suffered therefrom, the proximate cause was the drinking of the liquor rather than the wrongful (i. e., in violation of the alcoholic beverage act) sale thereof to an obviously intoxicated person, and any wrong was nonactionable. This court denied a hearing. If the man who is injured by reason of his intoxicated state may not himself recover from the one who provided the liquor, then it would seem to follow that under the generally accepted principles governing wrongful death actions, his survivors may not recover in this, which is such an action. (See 8 Cal.Jur. 988–989, § 41, and cases there cited; 30 Am.Jur. 575, § 610; Demge v. Feierstein (1936, 222 Wis. 199), 268 N.W. 210, 212 (liquor sale); Scott v. Greenville

Pharmacy, (1948, 212 S.C. 485), 48 S.E.2d 324, 326, 11 A.L.R.2d 745 (barbiturate sale).)

It also seems to me that other cases, from other jurisdictions, relied upon by plaintiffs are clearly distinguishable on their facts, even if it be assumed that upon similar facts action would lie in California. For example, Cherbonnier v. Rafalovich (9 Cir., 1950), 88 F.Supp. 900 (a one-judge District Court opinion), was an action against saloonkeepers by one of their patrons who, while he was eating in the saloon and cafe, was attacked by another patron, one Hobson, who was drunk. Although dismissing the complaint for failure to state a cause of action in that it was not alleged that defendants knew Hobson was of a violent disposition or had threatened harm to plaintiff before he was served the last of the intoxicating drinks, the court did observe that "The present trend is apparently toward holding the defendant saloonkeeper liable for lawless acts occurring in the saloon," and quoted from 30 American Jurisprudence 574, section 609, the statement that "The better reason appears to favor placing on the proprietor the duty of seeing to it that the patron is not injured either by those in his employ or by drunken or vicious men whom he may choose to harbor. Further, a guest or patron of such a place has a right to rely on the belief that he is in an orderly house and that its operator * * * is exercising reasonable care to the end that the doings in the house shall be orderly." Rommel v. Schambacher (1887), 120 Pa. 579, 11 A. 779, 6 Am.St.Rep. 732; Curran v. Olson (1903), 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733; and Peck v. Gerber (1936), 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996, additionally relied upon by plaintiffs, also involve the liability of the saloonkeeper as a proprietor for not using reasonable care in maintaining order for the safety of his guests. However, as is indicated in the opinions in the cited cases as well as in the annotation in 106 Am.L.R. 1003, following the report of Peck v. Gerber (1936), supra, and as recognized by the court in the Cherbonnier case, the liability of a saloonkeeper in this line of cases appears to be related to that of innkeepers and restaurateurs for injuries to guests or patrons by other guests or persons not connected with the management, and is an exception to the general common law rule of non-liability of the vendor of intoxicating liquor, and furnishes no precedent whatsoever for imposing liability on the saloonkeeper under the circumstances alleged in the complaint in this case.

In Pratt v. Daly (1940), 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341, plaintiff wife was permitted to recover damages resulting from defendants' sale of intoxicating liquor to her husband with knowledge of the fact that the husband was an *habitual drunkard.* Arizona had no civil damage statute. The court there, after discussing the rule as stated in Restatement of the Law of Torts, volume 3, section 696, that "One who, without a physician's direction, sells or otherwise supplies to a married woman a habit-forming drug with knowledge that it will be used in a way which will cause harm to any of the legally protected marital interests of the husband is liable for harm caused by such drug to those interests unless the husband consents to the wife's acquisition or use of the drug" and that the same rule applies to a sale to the husband in an action by the wife under similar circumstances (see also 130 A.L.R. 352–365), then goes on to observe (55 Ariz. 535, 104 P.2d 147, at pages 347, 348 of 130 A.L.R.): "Of course, since there is not the same presumption that the use of liquor will eventually cause the loss of volition that there is with a habit-forming drug, it is incumbent upon plaintiff to prove that to the knowledge of defendant such a stage has been reached by the consumer, but if this fact is once established, in all reason and logic the right of action should be the same in one case as in the other * * *. The allegation of the complaint is that the husband of plaintiff was an 'habitual drunkard,' and that the fact was well known to defendants. The term 'habitual drunkard' has been defined repeatedly, and in almost all of the definitions the principal element emphasized is that such a person has lost the will power to resist the temptation when the liquor is offered him." By contrast, the plaintiffs in the case now before us allege no such lack of volition on the part of the decedent, but, rather, that he was an "able-bodied man" who was not intoxicated immediately before he entered defendant's establishment on the day in question. Other cases indicating the court's awareness of the element of volition or of competency are Seibel v. Leach (1939, 233 Wis. 66), 288 N.W. 774, in which the court remarked that "Under the common law it is not an actionable wrong to sell or to give intoxicating liquors to an able-bodied man," and affirmed a judgment dismissing the complaint; and Scott v. Greenville Pharmacy (1948, 212 S.C. 485), supra, 48 S.E.2d 324, 327, in which it was pointed out that the complaint failed to describe plaintiff's deceased husband "as being without mind or lacking in volition," in buying and consuming barbiturate capsules during a period of about a year, at the end of which time he committed suicide by hanging himself, and judgment for defendant, who sold the barbiturates, following the sustaining of his demurrer was affirmed.

It appears to me that for this court to undertake to create a cause of action for plaintiffs where none exists either by statute or by common law is a clear invasion of the powers and function of the Legislature. As declared by the court in State for Use of Joyce v. Hatfield, 1951, 197 Md. 249, 78 A.2d 754, 757, in affirming the judgment on demurrer in defendants' favor in a wrongful death action in which plaintiff widow whose husband was killed by an intoxicated driver sought damages from tavern owners who had sold the liquor, "It would be worse than futile for us to attempt to convince plaintiff by reason, where all other courts have failed and the accumulated mass of authority carries no weight at all. In the circumstances of this case, if we were convinced (as we are not) of the soundness of plaintiff's reasoning, we should virtually usurp legislative power if we should declare plaintiff's contentions to be the law of Maryland. In the course of the last hundred years there probably has seldom, if ever (except during prohibition), been a regular session of the General Assembly at which no liquor laws were passed. On few subjects are legislators kept better informed of legislation in other states. In the face of the flood of civil damage laws enacted, amended and repealed in other states and the Volstead Act—and of the total absence of authority for such liability, apart from statute—the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would." (See also Henry Grady Hotel Co. v. Sturgis (1943, 70 Ga.App. 379), 28 S.E. 2d 329, 333: "At common law there was no right of recovery for the selling or furnishing of intoxicating liquor to an intoxicated person. [Citation.] Whatever the reasons for such a rule, and whether we agree or disagree with them, the courts have no authority to grant recoveries or authorize actions unknown to the common law. That is a matter for the Legislature. As was said in Seibel v. Leach [1939, supra], 233 Wis. 66, 288 N.W. 774, 775, 'Courts may in proper instances apply old rules to newly created conditions, but they cannot create new rules for conditions already regulated. The common law rule holds the man who drank the liquor liable and considers the act of selling it as too remote to be a proximate cause of an injury caused by the negligent act of the purchaser of the drink.'") The same view is strongly expressed in the dissenting opinion of Chief Justice Ross of Arizona, in Pratt v. Daly (1940), supra, 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341, 350.

As weighing against the wisdom and fairness of the act of this court in creating a cause of action upon the allegations of the complaint now before us, the following matters may be pointed out: Plaintiff alleges that her requests to defendant were that he not "give sell or furnish intoxicating beverages to said James Bernard Cole sufficient to allow him to become intoxicated thereon," but does not suggest in what manner defendant could know the quantity of liquor which would cause such intoxication; moreover it is a matter of common knowledge that the amount or kind of liquor which will cause intoxication varies with drinkers and occasions, as well as does the behavior which the liquor will induce in the imbiber. (See Science News Letter for October 11, 1952, p. 233.[1]) Requiring a tavernkeeper, a hotel proprietor, or a private host—and there is no respectable basis for distinguishing among them as to liability—to ascertain at his peril the amount of liquor which a customer or guest could safely imbibe on any particular occasion seems unreasonable. In fact, it requires the proprietor or host to be clairvoyant. It is not shown that even a medical doctor could have this knowledge or furnish the information.

Furthermore, if defendant had refused to provide the liquor deceased sought, it could easily have been secured elsewhere. And would it not be just as reasonable to charge negligence to a wife who knows her husband's drinking proclivities and fails to keep him at home to indulge in them (or to accompany him) where she can care for and protect him from harm until he has recovered instead of permitting him to possibly endanger the public while he is intoxicated, as it is to claim negligence on the part of defendant here? Does not the wife owe as great a duty as the proprietor or host? Certainly if a vendor of liquor is to be held responsible by this court in the absence of specific legislation, then a host who provides liquor on a social occasion, presumably to an acquaintance, probably a well known acquaintance, should much more clearly be liable for furnishing too much. And what of the liability of a cafe owner or a social host who serves particular food to a guest who orders it with the announcement that he is allergic to it or that his doctor has told him not to eat it, but that he intends to indulge himself anyway, if the guest thereafter becomes ill and dies as a result of his self-indulgence? And what of the liability of any seller or giver of other instrumentalities (such as automobiles, bicycles, firearms, machinery, etc.) to one whom there might be reason for believing might misuse such instrumentality?

Entirely aside from direct constitutional proscriptions against invasion of the legislative function by the judiciary through court created liabilities, an undesirable element of this method of law revision is that the newly propagated measure is not subject either to gubernatorial veto or to referendum by the people.

It is my view that we should follow the law, not create it; if we follow it the judgment must be affirmed.

TRAYNOR, Justice.

I dissent.

It appears from the face of the complaint that plaintiffs' cause of action, if any, is barred by the contributory negligence of decedent. It is not alleged that decedent's volition was so far impaired that he could not refrain from drinking to the point of intoxication. Moreover, he knew as well as defendant did that he became belligerent, pugnacious and quarrelsome when intoxicated. Accordingly, even if it is assumed that defendant was guilty of actionable negligence in serving decedent the drink that made him intoxicated, decedent was equally guilty of negligence in drinking it.

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[1] "If someone tells you he can drink a quart or more of 100-proof liquor a day, do not believe him. He might, if he is a chronic alcoholic, be able to drink a fifth of 100-proof liquor in 24 hours, but no more.

"Studies showing this are reported by Drs. Henry W. Newman, Roger H. L. Wilson and Edith J. Newman of Stanford University School of Medicine, San Francisco, *Science* (Sept. 26).

"Earlier, Dr. Henry Newman had reported on the basis of dog studies that an average-weight man might consume a quart of 100-proof liquor in 24 hours. The amount is slightly less. He and his colleagues find from direct experiments on three men and one woman that it is 760 milliliters, or about four-fifths of a quart.

"The woman and one man were chronic alcoholics, the other two men were moderate drinkers. In the studies, each got either diluted alcohol or 'an acceptable alcoholic beverage' every hour for several days. Tests of the alcohol level in the blood or saliva gave figures from which the scientists could determine exactly how much alcohol each of the four persons tested could handle in their bodies in 24 hours.

"For the woman, this was slightly less than a pint, 383 milliliters, and for the two moderate men drinkers, the figures were 608 and 524 milliliters, both somewhat under a quart. The male alcoholic in the study consumed the highest amount, 760 milliliters."

I would affirm the judgment.

EDMONDS, J., concurs.

125 Cal.App.2d 855

PEOPLE v. NORRIS.

Cr. 5128.

District Court of Appeal, Second District, Division 2, California.

June 14, 1954.

Prosecution for first degree robbery. From judgment of guilt rendered by Superior Court, Los Angeles County, A. A. Scott, J., after trial by court without jury, and from order of that court denying his motion for new trial, defendant appealed. The District Court of Appeal, McComb, J., held that the complaining witness' identification in court of defendant as the man who robbed him with a knife was sufficient to sustain the conviction, that rebuttal evidence that a prize fight which defendant had testified he had been watching on television at the time of the robbery did not occur until a week after the robbery was properly admitted, and that the court's failure specifically to find that defendant had been armed with a knife did not invalidate the conviction.

Affirmed.

1. Robbery ⇨24(3)

Complaining witness' identification in court of defendant as man who robbed him with a knife was sufficient to sustain conviction for first-degree robbery.

2. Criminal Law ⇨683(4)

In prosecution for robbery, rebuttal testimony that prize fight which defendant had testified he had been watching on television at time of robbery did not occur until week after robbery was properly admitted.

3. Criminal Law ⇨698(1)

Defendant's right to object to introduction of rebuttal testimony was waived by his failure to object at trial.

4. Robbery ⇨28

In prosecution for robbery, trial court by finding that defendant was guilty of robbery in first degree made implied finding that he was armed with knife at time of commission of offense, as disclosed by evidence on trial, and this finding sustained judgment of guilt. Pen.Code, §§ 211, 211a.

5. Criminal Law ⇨980(1)

Statute providing in effect that if defendant pleads guilty of offense charged in indictment, information or complaint which also charges he was armed at time of commission of offense or arrest, court before pronouncing judgment must determine whether or not he was armed as alleged, applies only where guilty plea has been entered. Pen.Code, § 969c.

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Minsky & Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Dep. Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery in the first degree after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

Viewing the evidence in the light most favorable to the people (respondent) the facts are:

On June 6, 1953, defendant, armed with a knife, together with two other men took from the complaining witness, Theodore Bradley, his wallet without his permission.

[1] *Questions:* First: *Was there substantial evidence to support the judgment of guilty?*

Yes. The record discloses that Mr. Bradley identified defendant as the man who had robbed him of his wallet while armed with a knife. This evidence is sufficient to sustain the conviction. (People v. Tedesco, 1 Cal.2d 211, 219 [1], 34 P.2d 467.)

There is nothing inherently improbable in the testimony of Mr. Bradley. Therefore further discussion of the evidence would serve no useful purpose.

People v. Braun, 14 Cal.2d 1, 92 P.2d 402, relied on by defendant, is not applicable to the facts of the present case for in such case the appellate court reversed the conviction upon the ground of misconduct of the district attorney and not upon the weakness of the identification of the defendant.

People v. Graziano, 83 Cal.App.2d 701, 189 P.2d 518, relied on by defendant, is likewise inapplicable to the facts in the instant case for the reason that in such case the appellate court held that the evidence did not connect the defendant with the crime with which he was charged.

People v. Thorp, 104 Cal.App. 379, 285 P. 916, and People v. Goltra, 115 Cal.App. 539, 2 P.2d 35, are also not here in point for the reason that in such cases the defendant was not identified in the courtroom. In the instant case he was.

[2, 3] Second: *Did the trial court err in receiving evidence in rebuttal to defendant's testimony that at the time the crime was committed he was at home watching a prize fight between Jimmy Carter and Arrougo?*

No. After defendant had given testimony in support of his alibi in accordance with the facts set forth in the foregoing question the trial court permitted the prosecution in rebuttal to show that the prize fight which defendant alleged he was witnessing over his television set on the evening of the robbery did not in fact take place until one week after the date of the robbery. Such evidence was clearly permissible in rebuttal to defendant's testimony.

In addition, such evidence was received without objection upon the part of defendant who thereby waived his right to object to the reception of such evidence on appeal. (Yule v. Miller, 80 Cal.App. 609, 616 [5], 252 P. 733; see also cases cited in 16 West's Cal.Dig. (1951) Crim.Law, ⚿698(1), p. 120.)

[4] Third: *Is the judgment of conviction illegal and void because the trial court did not make a determination that defendant was armed with a deadly weapon?*

No. Section 211 of the Penal Code provides: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 211a of the Penal Code reads: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

In the present case the trial judge found defendant guilty of robbery in the first degree. During the trial the evidence disclosed that defendant was armed with a knife at the time of the robbery. Therefore, the court, by finding that defendant was guilty of robbery in the first degree, made an implied finding that he was armed with a knife at the time of the commission of the offense. This was a sufficient finding to sustain the judgment of guilty.

There is no merit in defendant's contention that the trial judge committed error in not specifically finding in accordance with the provisions of 969c of the Penal Code that defendant was armed with a deadly weapon at the time of the commission of the offense. Section 969c, relied on by defendant, is applicable only where a defendant has entered a plea of guilty. It reads in part:

"* * * If the defendant pleads guilty of the offense charged the question whether or not he was armed as alleged must be determined by the court before pronouncing judgment."

[5] It has no application where, as in the instant case, defendant has entered a plea of not guilty and been duly tried pursuant to the charge set forth in the information filed by the district attorney.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

125 Cal.App.2d 644

CURRIN v. CURRIN.

Civ. 19966, 20088.

District Court of Appeal, Second District,
Division 1, California.
June 1, 1954.

Wife brought action for divorce, and husband filed a cross-complaint for divorce. The Superior Court of Los Angeles County, M. E. Lewis, Jr., and Paul Nourse, J., entered judgment and order granting husband divorce and custody of child but granting wife right to have custody of child during the months of June, July, and August of each year, and both wife and husband appealed. The District of Appeal, White, P. J., held that Superior Court did not abuse its discretion in awarding custody of child to husband and in giving wife custody of child during months of June, July, and August of each year.

Affirmed.

1. Divorce ⚷298(1)

Though wife had right to invoke constitutional guarantee against self-incrimination in divorce suit when she was questioned concerning alleged adultery, she did not have plenary right to custody of child when she refused to answer questions pertaining to alleged adultery and her fitness to have custody of the child.

2. Parent and Child ⚷2(3.3)

Mother, in order to be entrusted with rearing of children, should be possessed of such character and conduct that by the force of her example, she can train the children in the paths of morality, righteousness, and rectitude.

3. Infants ⚷19

Trial judge, who has heard the evidence and has observed witnesses, their demeanor, attitude, candor, or lack of candor, is best qualified to pass on and determine factual issues presented by their testimoney, especially where custody of minor children is involved.

4. Infants ⚷19

An appellate tribunal is not authorized to retry issue of custody of minor children, nor to substitute its judgment for that of duly constituted arbiter of the facts.

5. Infants ⚷19

Only on clear and convincing showing of abuse of discretion on part of trial court in determining custody of minor children will the order of the trial court be disturbed on appeal.

6. Divorce ⚷298(4)

Where wife was guilty of indiscriminate, profligate, and shameless association with corespondent, even after commencement of divorce action, and wife invoked constitutional guarantee against self-incrimination when she was questioned concerning alleged adulteries with corespondent, trial court did not abuse its discretion in giving husband custody of child.

7. Divorce ⚷223

Where wife, who paid her counsel $500 on account of her appeal from judgment in favor of husband in divorce action, and who paid cost of transcript on appeal, borrowed money from her father to do so, and it did not appear that her father was pressing her for payment of such amounts, trial court did not abuse its discretion in denying wife's application for attorney's fees and costs on appeal, after directing husband to pay $250 additional fees to wife's counsel.

8. Contracts ⚷93(2)

Estoppel ⚷78(1)

Generally, when a person with capacity of reading and understanding an instrument signs it, he is, in absence of fraud and imposition, bound by its contents and is estopped from saying that its provisions are contrary to his intention or understanding.

9. Divorce ⚷184(6)

Verity of testimony of husband in divorce suit that he did not read an earlier divorce complaint filed on his behalf was for trial court to determine.

10. Courts ⚷23

Jurisdiction can not be conferred on court by stipulation or agreement of the parties.

11. Domicile ⚷11

Where evidence concerning domicile is in conflict, the decision rests exclusively with trier of facts unless it can be said that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached by the trier of the facts.

12. Divorce ⚷301

In divorce action, evidence sustained finding that domicile of minor child of the parties was within the state, though husband had surreptitiously removed the child from the state. Welfare and Institutions Code, § 17.1(a, b).

13. Divorce ⚷312.6(5)

The District Court of Appeal is unable to disturb conclusion of trial judge on issue of custody of child in divorce action, unless it is clearly shown that action of trial court amounts to an abuse of discretion.

14. Divorce ⚷312.6(8)

Fact that District Court of Appeal, if sitting as trial court, would have arrived at a different conclusion than the trial court on issue of custody of child in divorce action, would not warrant a substitution of the judgment of the District Court of Appeal for the judgment of the trial court.

15. Divorce ⚷296

Though trial court in divorce action granted custody of child to husband on ground that wife was guilty of indiscriminate, profligate, and shameless association with corespondent, even after commencement of divorce action, court did not abuse its discretion in granting wife the right to have custody of child during the months of June, July, and August of each year.

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Albert D. White, Roy J. Brown, Long Beach, for plaintiff.

Edwin C. Iliff and Lane & Lane, Long Beach, for defendant.

WHITE, Presiding Justice.

This action was commenced when plaintiff wife filed a complaint for separate maintenance grounded on the charge of extreme cruelty. Subsequently, she filed a second amended complaint wherein she sought a divorce or, "in the event that the court should determine that plaintiff is not entitled to a divorce, that plaintiff may live separate and apart from defendant".

Defendant husband filed an answer in which he denied the allegations of extreme cruelty set forth in the plaintiff's amended complaint. He also filed a cross-complaint alleging that plaintiff was guilty of extreme cruelty toward him, and had committed adultery with one Dr. Gregory Hoskins, who was named as corespondent. Plaintiff filed her answer to said cross-complaint as did the corespondent. The latter denied committing adultery with plaintiff, appeared and defended *in propria persona* at the trial of the action.

Both plaintiff and defendant prayed for the custody of the minor child of the parties, Rodney Alan Currin, born March 3, 1950.

(For purposes of convenience plaintiff and cross-defendant will hereinafter be referred to as plaintiff and defendant, and cross-complainant as defendant.)

The record reveals that plaintiff and defendant were married July 3, 1947, at Long Beach, California. Defendant is a Lieutenant-Colonel in the United States Marine Corps and plaintiff is the daughter of a United States Navy Captain, retired. The parties separated on December 24, 1951, at which time the minor son was approximately 1 year and 8 months of age. The boy was in the custody of plaintiff from the date of his birth until he was 2 years old, when, on or about March 1, 1952, defendant appeared at plaintiff's apartment in Long Beach where she and the minor son were living, and asked to take the boy for a ride. Plaintiff consented and defendant left with the child and the latter has never been returned to his mother. On the occasion last mentioned defendant took the child across the country and left him in the custody of the former's brother and sister-in-law in North Carolina, where the child was at the time of the trial. Plaintiff repeatedly urged defendant to return the child to her but such requests were ignored. After leaving the child in North Carolina defendant returned to California.

Following trial before the court judgment was entered denying plaintiff a divorce on her complaint and awarding defendant a divorce upon the ground of extreme cruelty as alleged in his cross-complaint. Custody of the minor child was awarded to the defendant, the court finding, "that plaintiff and cross-defendant is not a fit and proper person to have the care, custody and control of the minor child of the parties hereto and that defendant and cross-complainant is a fit and proper person to have the care, custody and control of the minor child of the parties hereto, and the same is hereby granted to him; that plaintiff and cross-defendant shall have the right of reasonable visitation to see said child at all reasonable times and places, and said plaintiff and cross-defendant shall have the right to have said child visit her at her place of residence within the territorial limits of the United States in the months of June, July and August, commencing after the end of the school term in June of each year, and defendant and cross-complainant shall pay the cost of transportation and maintenance of said child to and from the residence of plaintiff on each of said occasions, and pay plaintiff and cross-defendant, during said period of visitation, for child support, a sum of money at the rate of Seventy-five ($75.00) Dollars per month; that until further order of Court said minor child shall remain in the State of North Carolina with the brother and sister-in-law of defendant, Lucius Currin, Jr., and Pauline Currin, at Oxford, North Carolina, except for that period of time said child is visiting plaintiff and cross-defendant in the months of June, July and August at the residence of plaintiff and cross-defendant; that said persons, to wit: Lucius Currin, Jr. and Pauline Currin, are fit and proper persons to have the physical care and custody of said minor child."

Plaintiff appeals from that portion of the judgment awarding to defendant the care, custody and control of the minor child of the parties, and also from an order subsequently made denying her an award of costs with which to prosecute her appeal.

Defendant appeals from that part of the judgment wherein plaintiff was awarded the right to have said child visit her at her place of residence within the territorial limits of the United States in the months of June, July and August, commencing after the end of the school term in June of each year; from that part of the judgment wherein the defendant was ordered to pay the cost of transportation of said child to and from the residence of the plaintiff for each of said visits, and to pay the plaintiff during said periods of visitation, for child support, a sum of money at the rate of $75 per month. Defendant also challenges as unsupported by evidence the court's finding that he was a resident of the State of California at the time this action was commenced. This contention is advanced in support of defendant's claim that the court was without jurisdiction over the minor child of the parties.

It was stipulated that both appeals be consolidated and that "all briefs on file may be considered as pertaining to all appeals".

The court made two sets of findings, one based on plaintiff's second amended complaint and the answer thereto, while the other applied to defendant's cross-complaint and the answer to it.

Before proceeding to a discussion of the contentions advanced on appeal by the respective parties, we shall set forth as much of both sets of findings as appear material to a disposition of all the grounds urged on the appeals of both parties.

The court found,

"V. That the defendant is a fit and proper person to have the care, custody and control of the minor child of the parties hereto, and that the plaintiff is not a fit and proper person to have the care, custody and control of the minor child of the parties hereto.

"VI. That it is not true that the defendant inflicted upon plaintiff a course of grievous mental or physical suffering, and said defendant is not guilty thereof.

"VII. That the defendant was, at the time of the commencement of this action, and now is, a resident of the County of San Diego, State of California.

* * * * * *

"VI. That on or about March 1, 1952, and prior to the commencement of this action, the minor child of the parties hereto was removed from the State of California, the legal residence and domicile of the defendant, to the State of North Carolina, and that at all times thereafter, up to and including the time of the trial of this action, said child was residing in the State of North Carolina, in the physical care of the brother of the defendant, Lucius Currin, Jr. and his wife, Pauline Currin, in and at Oxford, North Carolina, which persons now are, and at all times heretofore have been in all respects fit and proper persons, and whose home is a fit and proper environment for the care, raising and training of said child, and conductive to its best interests.

* * * * * *

"VIII. That since the marriage of the parties hereto, and prior to the filing of the cross-complaint herein, plaintiff and cross-defendant has inflicted upon defendant and cross-complainant a course of great and grievous extreme mental cruelty all without just cause, reason or provocation therefor, and in the following particulars, to wit:

"(a) On numerous occasions from February, 1951, up to the time of the separation of the parties hereto on December 24, 1951, plaintiff socially associated with, had engagements with, and received as a visitor in her home, one Gregory Hoskins, the corespondent herein, without the consent, knowledge, connivance or procurement of defendant.

"(b) That on or about April 14, 1951 the said corespondent Gregory Hoskins was invited to and into the home of the plaintiff, and either at the time of his admission therein by plaintiff, or shortly thereafter, was in an intoxicated condition, and plaintiff permitted and allowed the said corespondent Gregory Hoskins to occupy her bedroom for some two hours, attired only in his underwear and concealed the fact of the presence of said Gregory Hoskins in said home from the defendant, at a time when the defendant arrived thereat during the course of said visit of said Gregory Hoskins.

"(c) That on at least two occasions in the month of January, 1952, plaintiff invited and permitted said Gregory Hoskins to remain over night in her apartment on Roycroft Avenue, in the City of Long Beach, State of California, there then and there being no other person present except the minor child of the parties hereto.

"(d) That on or about January 14, 1925 plaintiff occupied the same room with corespondent Gregory Hoskins in the Ramona Motel, at Hemet, California, throughout the night, there then and there being no other person or persons present, at a time when plaintiff was living in the City of Long Beach, State of California, and had left the minor child of the parties hereto in the care of her mother, Renee Hibbs.

"(e) That on or about January 23, 1952 the plaintiff stayed from approximately 1:00 A.M. until approximately 9:00 A.M. with the said Gregory Hoskins in his apartment on Shaw Avenue, in the City of Long Beach, State of California, there being no other person or persons present.

"(f) That on or about January 15, 1952 the plaintiff and corespondent Gregory Hoskins occupied one room together throughout the night, there being no other person or persons present, at the Mountain Inn, Idyllwild, California.

"(g) That on or about April 10, 11 and 12, 1952 plaintiff and corespondent Gregory Hoskins jointly occupied a room at the Holiday Villa in Palm Springs, California, alone and not in conjunction with any other person or persons.

"That all of the conduct of the plaintiff hereinabove stated, except that referred to in Section (g) of Paragraph VIII, occurred prior to the filing of the complaint herein, without the then knowledge of defendant, and the plaintiff deliberately and intentionally concealed the same from defendant, the defendant discovering the same by means and methods other than through the plaintiff or the corespondent."

Plaintiff's Appeal

Plaintiff urges that the foregoing findings "are totally insufficient to support the finding of unfitness". That there is nothing in any of the findings to show how or in what manner such conduct on her part with the corespondent was brought to the attention of the then 1½ or 2-year-old child so as to have affected him or his morals adversely. With this contention we cannot agree. The problem presented to the trial court called for a determination of whether the proven conduct of plaintiff, consisting as it did of indiscriminate, profligate and shameless association with the corespondent, even after commencement of the divorce action, was such as to endanger the child's welfare, were the latter to be placed in the mother's custody. As was cogently stated in his "Memorandum of Judgment" by the trial judge, "In making this decision, the Court believes, from the evidence, that the plaintiff and cross-defendant is good to the child and perhaps a good mother, but under the present environment, and romantic intentions of the plaintiff and cross-defendant, which are so obvious, the Court believes, *for the present, at least,* the custody of the minor child should be awarded to the cross-complainant * * *." (Emphasis added.)

Should plaintiff change her moral concepts, which not only included her association with the corespondent, but the use of vile and filthy language toward defendant and plaintiff's brother, than she can apply to the court for modification of the custody order.

[1, 2] It is also noteworthy that on several occasions throughout the trial both plaintiff and the corespondent refused to testify on the ground that their answers to interrogatories concerning their claimed adulteries, cohabitation at various motels and in their respective homes, might tend to incriminate them. While the plaintiff had the right to invoke the constitutional guaranty against self-incrimination she did not have a plenary right to the custody of the child when she refused to answer questions pertaining to her unfaithfulness to her marriage vows and her fitness to have the custody of the child. We are not here confronted with a situation of one immoral act but with a continuous course of unmoral, if not immoral conduct. To be entrusted with the rearing of children a mother should be possessed of such character and conduct that by the force of her example she can train them in the paths of morality, righteousness and rectitude.

[3–6] Furthermore, we are here confronted with a question of the discretion vested in the trial court. At the trial both parties appeared as witnesses and were examined and cross-examined at some length. In decisions too numerous to mention, it has been said that the trial judge having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony. And this is especially true where the custody of minor children is involved. An appellate tribunal is not authorized to retry the issue of custody, nor to substitute its judgment for that of the duly constituted arbiter of the facts. Only upon a clear and convincing showing of abuse of discretion will the order of the trial court in such matters be disturbed on appeal. We find no such showing here.

Finally, plaintiff asserts abuse of discretion upon the part of the trial court in denying her application for attorneys fees and costs on appeal. The record reflects that a full and complete hearing was had upon said application and it is unnecessary to here set forth in detail the testimony adduced at such hearing. Suffice it to say that the financial worth of both parties was inquired into as well as the amounts theretofore paid by defendant to plaintiff for attorneys fees and costs. At the conclusion of the hearing, the court filed with its Minute Order, a "Memorandum of Decision", reading in part as follows:

"* * * It is undisputed that prior to the issuance of the Order to Show Cause relative to said fees and costs, plaintiff had paid to her counsel the sum of $500.00 on account of the appeal. It further appears that after the issuance of the Order to Show Cause she paid the cost of the transcript on appeal. The plaintiff borrowed both sums from her father. It does not appear that her father is pressing her for payment of the amounts borrowed by her. If her appeal is meritorious she will be entitled to judgment against the defendant for the amount paid by her for the transcripts on appeal and the same will be true if his cross-appeal lacks merit.

"Therefore, I see no reason for awarding costs at this time insofar as the defendant has appealed from the order which awards the plaintiff custody of her child during the summer vacation months and he refuses to comply with the decree granting her that custody during the pendency of the appeal, it will be necessary for the plaintiff's counsel to appeal to the Appellate Court for relief. I think therefore that additional fees are warranted in the sum of $250.00 and the defendant is ordered to pay directly to plaintiff's counsel the sum of $250.00, the said sum to be paid out of the proceeds of the sale of his interest in the real property in Coronado as described in the interlocutory decree."

[7] It is conceded that an award of attorneys fees and costs on appeal is a matter committed to the sound discretion of the trial court. Under the facts here present, as set forth in the aforesaid "Memorandum of Decision" of the trial court, we cannot say that the latter abused its discretion or erred in denying plaintiff's application.

Defendant's Appeal

Defendant challenges the jurisdiction of the court over the minor child of the parties to this action. Concededly, the legal residence and legal domicile of plaintiff mother was in the State of California. Defendant father contends that his was in the State of North Carolina. If the court below was correct in determining that defendant father was a resident of the State of California at the time of the commencement of this action, then it necessarily follows that California was the legal residence and domicile of the child, and that the court was clothed with jurisdiction to made its order in re custody of said child.

Regarding his domicile and residence defendant testified that he had been on continuous duty in the Marine Corps for approximately twelve years; that when he went on active duty, his home was in North Carolina; that he was 34 years of age at the time of this trial; that at all times his military records showed that his home was in North Carolina; that he voted at elections only on two occasions, both of which were in the State of North Carolina; that he considered himself a resident of North Carolina at all times, and had been a continuous resident of that state since birth; and that he never had any intent, at any time, to establish his residence in the State of California, or anywhere else except in North Carolina.

[8, 9] On the other hand there was evidence that in 1952 defendant filed a divorce complaint against plaintiff in the County of San Diego, California, alleging therein, under oath, that he had been a resident of the State of California for more than one year prior to the filing of said action. In this regard defendant testified he did not read the divorce complaint and did not remember having verified it. However, the general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents and is estopped from saying that its provisions are contrary to his intentions or understanding, Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 470, 471, 34 P. 84; Nichols v. Hitchcock Motor Co., 22 Cal.App.2d 151, 153, 154, 70 P.2d 654. Furthermore, the verity of defendant's testimony in this regard was for the trial court to determine.

It was also shown in evidence that defendant purchased a home at Coronado in San Diego County, California. The fact that defendant was not continuously in California during the time in question loses considerable significance in regard to his legal residence and domicile when it is remembered that his position in the Marine Corps required him to reside in various places, both within and without the United States. A perusal of the record indicates that within the time here in issue, the defendant was in California more often and for longer times than he was at his claimed residence in North Carolina, where he went only to visit relatives. If the age-old phrase "actions speak louder than words" be resorted to, it could appear that by purchasing a home in California and later instituting a divorce action in this state defendant thereby evidenced an intention to make the latter state his legal abode.

Added to the foregoing, insofar as the domicile of the minor child is concerned, is the fact that while the child was not physically present in California at the time the present action was commenced, he was, after the separation of the parties and at the time he was surreptitiously removed from this state by defendant, living with plaintiff mother in this state. Under the provisions of subdivisions (a) and (b), section 17.1 of the Welfare and Institutions Code of California, after separation of the parents, the child takes the domicile of the parent with whom it lives. It is also significant that while denying he was a resident of California, defendant not only admits in his pleadings, but affirmatively alleges that his wife had the required domicile to maintain this action. And during the trial he asserted that he did not question the claimed legal residence of plaintiff or the jurisdiction of the court to grant a divorce.

[10] While jurisdiction cannot be conferred by stipulation or agreement of the parties, it would seem rather anomalous to hold that while the parties to a marriage are living harmoniously within its borders, a state would acquire jurisdiction to grant a divorce only at the behest of one of the parties, in this case the wife.

[11, 12] While the evidence affecting domicile of defendant was in conflict, such a situation is not uncommon, and the decision in such cases rests exclusively with the trier of facts unless it can be said that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. Such is not the situation confronting us in the case at bar. We are persuaded that the instant case comes within the purview of the reasoning adopted in the case of Sampsell v. Superior Court, 32 Cal.2d 763, 773, 777, 778, 780, 781, 197 P.2d 739. We have examined the cases cited by the defendant, but under the facts and circumstances present in the case now engaging our attention, we are satisfied they do not militate against the conclusion we have arrived at, that the court correctly held it had jurisdiction over the minor child of the parties hereto.

Finally, defendant urges that if it be held that the trial court had jurisdiction over the minor child of the parties, it abused its discretion in granting plaintiff the right to have custody of the child during the months of June, July and August of each year, and in ordering that the defendant provide transportation for the child to and from plaintiff's residence, together with the sum of $75 per month for the child's maintenance while he was with the mother during said summer months.

[13, 14] Here again, we are confronted with the question of the discretion of the trial judge which we have heretofore discussed, and of our inability to disturb his conclusion on the issue of custody unless it clearly be shown that the action of the trial court amounted to an abuse of that discretion. The fact that if sitting in the trial court we would have arrived at a different conclusion does not warrant a substitution of our judgment for that of the court who heard the witnesses, observed their demeanor on the witness stand and the manner in which they testified.

In arriving at the motives which actuated the trial judge in making the order here under attack, we are aided by his "Memorandum of Judgment" wherein, with reference to plaintiff mother, he said: "After reviewing all the evidence the Court has arrived at the opinion *that for at least at the time being,* it would be for the best welfare and interest of said minor child that it remain with its paternal uncle and aunt in North Carolina where it has a good home. In making this decision, the Court believes, from the evidence, *that the plaintiff and cross-defendant is good to the child and perhaps a good mother,* but under the present environment, and romantic intentions of the plaintiff and cross-defendant, which are so obvious, the Court believes that for the present, at least, the custody of the minor child should be awarded to the cross-complainant." (Emphasis added.)

[15] Since the custody order may be modified at any time upon proper showing it may well be that the trial judge did not want to take plaintiff mother entirely out of the life of her child. Perhaps the court had in mind a letter written by defendant to his son under date of January 25, 1951, introduced into evidence, wherein he said: "Your mother (plaintiff) has shown her great and tender love for you by nursing you, by dressing and undressing you, by changing your diapers regularly and promptly, by maintaining a clean and comfortable room for you * * * by bouncing up night and day whenever you cried. These are but a few of the many, many things your darling and loving mother has done to reflect her tender and maternal love for her precious son." Also, the testimony of the defendant at the trial where he stated: "Plaintiff usually fed him (the child) properly in most instances", and "there were periods when I felt she showed genuine affection for Rodney". That the trial judge by his order held out a reward to plaintiff mother in the event of her reformation did not strain the quality of mercy nor amount to any abuse of discretion.

For the foregoing reasons, the portions of the judgment, and the order from which these appeals were taken are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

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125 Cal.App.2d 667

VISHNER v. VISHNER.

Civ. 20150.

District Court of Appeal, Second District,
Division 1, California.
June 1, 1954.

Action by wife for divorce and to cancel property settlement agreement. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered order denying suit money. Wife appealed. The District Court of Appeal, Doran, J., held that limiting testimony at hearing in regard to suit money to question whether reconciliation had taken place since husband had obtained interlocutory divorce decree, and denying suit money on ground that there had been no such reconciliation was reversible error.

Order reversed.

1. Divorce 🔑209, 221

The right to attorney fees and alimony pendente lite is dependent upon statutory provisions. Civ.Code, § 137.3.

2. Divorce 🔑225, 226

In wife's action for divorce and to cancel property settlement agreement, trial court erred in limiting testimony at hearing regarding suit money to question whether reconciliation had taken place since husband had obtained interlocutory divorce decree in prior action, and in denying suit money on ground that there had been no reconciliation. Civ.Code, § 137.3.

3. Divorce 🔑171

Where husband had obtained interlocutory divorce decree in prior action, such decree did not constitute bar, under doctrine of res judicata, which would prohibit court from allowing suit money to wife in her action for divorce and to cancel property settlement. Civ.Code, § 137.3.

Stanley Fleishman, Nolan H. Tepper, Hollywood, for appellant.

Ellis D. Reiter, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order "denying appellant suit money to prosecute her action for divorce and to cancel a property settlement agreement". Appellant's brief further states: "Appellant's action was filed less than one month after appellee had obtained a default interlocutory decree of divorce. Appellant's action for divorce was premised on a reconciliation having occurred after the entry of appellee's interlocutory decree and her action to set aside the property settlement agreement was based on fraud, undue influence, lack of consideration and the living together of the parties subsequent to the making of the property settlement agreement".

The parties hereto were married on July 25, 1952 and separated about November 3, 1952 after having entered into a property settlement agreement on October 4, 1952. On December 12, 1952 respondent husband instituted an action for divorce or annulment. The appellant wife did not file a timely answer and on April 6, 1953 the husband obtained an interlocutory decree of divorce, which did not incorporate the property settlement agreement.

On May 6, 1953 appellant wife filed an independent action for divorce and cancellation of the settlement agreement, requesting suit money. Respondent husband then filed a cross-complaint for declaratory relief concerning legal rights and duties under the settlement agreement. In connection with the wife's divorce action, an order to show cause in re attorney fees, costs and alimony pendente lite, was obtained. On the hearing thereof, Commissioner Brock limited the testimony to the question whether the parties had become reconciled after the husband's interlocutory divorce had been obtained, and after taking the case under submission, found that no reconciliation had taken place. The order denying relief states: "On April 8, 1953, an interlocutory decree of divorce was entered in an action brought by the defendant herein (husband) * * * in which no provision was made for alimony or support. There is no obligation on the part of the defendant herein to support the plaintiff or to pay counsel fees for her to prosecute the present action". No inquiry or determination was made concerning the husband's ability to pay, nor as to what amount was reasonably necessary to enable the wife to maintain the action.

It is appellant's contention that "In spite of the fact that appellee had obtained an interlocutory decree of divorce against appellant approximately one month prior to the time she filed her complaint, her action falls within Civil Code Section 137.3. * * *: 'During the pendency of any action * * * for divorce * * * upon an order to show cause or motion and if such relief is requested in the complaint * * * the court may order the husband * * * to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees * * *".

The position taken in respondent's brief is that "The Interlocutory Decree procured by respondent in the previous divorce proceeding between these parties is *res judicata*", and that the trial court, having found that no reconciliation took place, was correct in refusing to require the husband to pay attorney fees, etc. It is conceded, however, that "if a property settlement has not had judicial approval and is attacked as being void or having been obtained through fraud or undue influence, the Court may award counsel fees and Court costs. Undoubtedly this general proposition is correct in an appropriate case. However, in each of the cases cited by Appellant, we have the order made in the original proceeding, or in a 'pending' action."

In limiting the testimony at the hearing of the order to show cause to the question whether a reconciliation had taken place since the granting of the interlocutory decree in the husband's action, and denying the wife attorney fees, etc. on the ground that there had been no reconciliation, reversible error was committed.

[1] The right to attorney fees and alimony pendente lite is dependent upon the statutory provisions of Civil Code Section 137.3, hereinbefore quoted. In this section the phraseology is all inclusive, and provides that the trial court may order a husband to pay such amount as may be reasonably necessary, "during the pendency of *any action* for divorce". (Italics added.) No distinction is there made between a first or subsequent action for divorce, and the code section says nothing whatsoever concerning the matter of reconciliation.

[2] The wife's present action for divorce and to cancel a property settlement agreement falls within the statutory phrase "any action". Therefore, in denying the wife relief on the ground that "reconciliation" must first be established, the trial court read into the statute something which is not there. The merits of the wife's action were not then in issue, and, as the courts have often said, "The sole object of the order complained of is to furnish the wife with the means to show that she is entitled to the relief sought." Locke-Paddon

v. Locke-Paddon, 194 Cal. 73, 227 P. 715, 718.

The Locke-Paddon case just referred to, like the present litigation, involved an action by a wife seeking to set aside a property settlement agreement, and the reviewing court there refused to approve the appellant's contention "that the trial court had no power to award alimony *pendente lite,* counsel fees, and court costs in the face of the contract settling the property rights of the parties * * *."

The agreement in the present action, validity of which is attacked by the wife, purports to settle "all property rights and differences", but, as appellant points out, there is nothing therein "waiving appellant's right to suit money". Nor was the property settlement agreement submitted to, or approved by the court in the husband's divorce action, and was not incorporated in the interlocutory decree.

Research by the respective parties hereto has failed to produce a reported case involving the exact point here presented. However, as said in appellant's brief, "The situation here is strongly analogous to the situation where a wife seeks to set aside an interlocutory decree of divorce under Code Civ.Proc. § 473. It is settled law that in such a situation she is entitled to attorney fees and court costs. (Grannis v. Superior Court, etc., 143 Cal. 630, [77 P. 647]; Nelson v. Nelson, 1936, 7 Cal.2d 449 [60 P.2d 982])". Also Bernard v. Bernard, 79 Cal. App.2d 353, 179 P.2d 625.

Regardless, however, of any analogy between the cited cases and the present litigation, it is clear that the present action by the wife falls within the specific language of the statute which provides for an allowance of suit money "during the pendency of any action for divorce", regardless of the final determination of merit in such action. The trial court was therefore in error in making such allowance dependent upon a preliminary showing of reconciliation.

[3] There is no merit in respondent's contention that the former interlocutory decree, under the doctrine of *res adjudicata,* constitutes a bar which prohibits the court from making the allowance provided for in the statute.

The order appealed from is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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125 Cal.App.2d 674

FORREST v. FORREST et al.

Civ. 19803.

District Court of Appeal, Second District, Division 1, California.

June 2, 1954.

Wife's divorce action, wherein wife moved for award of alimony pendente lite. The Superior Court, Los Angeles County, Lewis Drucker, J., denied the request and wife appealed. The District Court of Appeal, Mosk, J. pro tem., held that evidence on issues of wife's needs and husband's ability to pay supported finding that wife would be able to live in her accustomed manner pending trial without alimony.

Order affirmed.

1. Divorce ⚷235

Trial court has wide discretion in making award of permanent alimony for support of wife.

2. Divorce ⚷240(2)

As used in Civil Code provision for allowance of alimony, having regard for the "circumstances" of the respective parties, quoted word includes practically everything which has a legitimate bearing upon the present and prospective matters relating to lives of both parties. Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstances".

3. Divorce ⚷240(2)

In awarding permanent alimony, court should consider needs of the parties and their abilities to meet such needs, earning ability and actual earnings and property owned and obligations to be met by each. Civ.Code, § 139.

4. Divorce ⚿235, 286

Granting and refusing alimony is a matter which lies largely in trial court's discretion, and reviewing courts will interfere only where it is made clearly and affirmatively to appear upon the face of the entire record that discretion has been abused.

5. Courts ⚿26

Discretion may be said to be abused, in a legal sense, when in its exercise a court exceeds the bounds of reason, all of the facts and circumstances before it being considered.

6. Divorce ⚿209

In general there is no legal requirement that a wife, living either together with or separate from her husband, must make formal demand upon him for support as a prerequisite to her right to alimony pendente lite.

7. Divorce ⚿209

The purpose of allowances to a wife for alimony pendente lite is to enable her to live substantially in her accustomed manner pending the disposition of the action.

8. Divorce ⚿214(4)

That trial court, in passing upon wife's request for alimony pendente lite, considered, in determining whether alimony would be necessary to enable wife to live in her accustomed manner, fact that wife, who had been living apart from husband, had made no demands upon him for support, did not establish that trial court's refusal to award alimony was based on erroneous principle that a demand for support was a necessary prerequisite.

9. Divorce ⚿214(3)

In wife's divorce action, wherein wife requested alimony pendente lite, evidence on issues of wife's needs and husband's ability to pay supported finding that wife would be able to live in her accustomed manner pending the trial of the action without award. Civ.Code, § 141.

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S. Dell Scott, North Hollywood, for appellant.

Armond M. Jewell, Los Angeles, for respondent.

MOSK, Justice pro tem.

Plaintiff appeals from refusal of the court below to award alimony *pendente lite* after hearing on her order to show cause. The court concluded the proceeding by ordering "The matter of support of plaintiff is continued to time of trial". An order was made for attorney's fees and court costs, from which no appeal was taken.

The estranged husband and wife herein had been married for eighteen years prior to their separation on September 1, 1947. Suit for divorce was filed by the appellant on October 31, 1952.

In the five year interim appellant cared for an aged, invalided mother, for which service a brother paid her board and room. In addition, she received an income of $65 gross, $50 net, per month from real property which had been given to her by respondent. She did not seek any support from respondent during that period, except for a request for some funds on a few isolated instances. On one occasion she made a $700 loan to him.

The respondent admittedly is an alcoholic, presently unemployed. His only income is $33 per month interest on a loan. He testified he had $7 cash on hand. For some years prior to the separation he had been an insurance agent. Upon the death of his father, he sold the agency, but acquired through inheritance substantial stock in the company. This was sold early in 1952 for $100,000, payable $30,000 down, the balance at the rate of $10,000 per year for seven years. A parcel of residential property producing no income is held in the names of both parties as joint tenants.

None of the $30,000 remains, $10,000 of it having been given to a friend as a loan for the construction of a home on which ultimately a 4% interest-bearing trust deed is to be given respondent. Fees to respondent's attorney in the sums of $500 for this proceeding and $1000 for representation on a tax problem were also paid.

In addition to insisting on his inability to respond to an alimony award and appellant's lack of need, respondent urged bad faith of appellant as a bar to an order. The court held the evidence insufficient to make any finding on that subject.

Appellant contends in this appeal that she established all of the elements necessary to an alimony *pendente lite* award, that the court abused its discretion in denying the relief sought, and that the court erroneously required recurring demands by a wife on a husband as a condition precedent to a support order.

The plaintiff must show her needs and the ability of the defendant to pay. The circumstances of the parties, including the property which each possesses, their respective incomes and earning abilities, as well as their needs, are to be considered in determining the amount and the necessity of temporary alimony. Whelan v. Whelan, 87 Cal.App.2d 690, 197 P.2d 361.

[1–3] The case of Hall v. Hall, 42 Cal.2d 435, 267 P.2d 249, 253, succinctly states the applicable law as follows: "The principles which the trial judge must apply in awarding alimony are few and necessarily general in nature. An allowance for support must be made 'having regard for the circumstances of the respective parties'. Civil Code, § 139. In making that award the trial court has a wide discretion. Baldwin v. Baldwin, 28 Cal.2d 406, 413, 170 P.2d 670. 'Circumstances' includes 'practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties.' Lamborn v. Lamborn, 80 Cal.App. 494, 499, 251 P. 943, 945. '[I]t refers to the needs of the parties and the abilities of the parties to meet such needs; and in measuring such circumstances, consideration should be given to property owned and obligations to be met as well as to ability to earn and actual earnings.' Becker v. Becker, 64 Cal.App.2d 239, 242, 148 P.2d 381, 383."

[4] The granting and refusing alimony in actions for divorce is a matter which lies largely in the discretion of the trial court. Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the entire record in the case that this discretion has been abused. Baldwin v. Baldwin, supra. Lincoln v. Superior Court, 22 Cal.2d 304, 313, 139 P.2d 13.

[5] Discretion may be said to be abused, in a legal sense, when in its exercise a court exceeds the bounds of reason, all of the facts and circumstances before it being considered. Kalmus v. Kalmus, 103 Cal.App.2d 405, 230 P.2d 57.

In rendering its decision on the order to show cause, the trial court made reference to the evidence indicating appellant had not sought support from respondent for the several preceding years. Appellant maintains the court thus in effect held that demands by an estranged wife are requisite for an award *pendente lite*. She earnestly argues that the rule may become: "to the more demanding wife belongs the alimony *pendente lite*". If that were implicit in the court's determination, appellant's contention would indeed merit favorable review.

[6] In general there is no legal requirement that a wife, living either together with or separate from, her husband must make formal demand upon him for support. This rule may be qualified in unusual circumstances, but ordinarily issues of that type will not be ascertained on *pendente lite* proceedings. Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877.

[7] As stated in Whelan, 87 Cal.App. at page 692, 197 P.2d at page 363, the purpose of allowances to a wife for alimony *pendente lite* is to enable her to live substantially "in her accustomed manner" pending the disposition of the action. The same language is used in Falk v. Falk, 48 Cal.App.2d 780, 788, 120 P.2d 724.

[8] In his inquiry into appellant's activities since her separation from defendant in 1947, and in commenting on her ability to live those several years without contribution from respondent, the trial court merely was determining her accustomed manner of living. That appellant was gainfully occupied and able to exist after separation without calling upon her spouse for assistance may be considered by the court in ascertaining her needs.

The weighing of those facts, along with all of the others in evidence, carries no implication of the necessity for persistent demands by a wife. Nor is there any suggestion to reward the demanding, acquisitive wife, or conversely to penalize the industrious, resourceful and self-reliant wife. Such an inequitable doctrine can be read into the court's discussion only by the most tenuous interpretation.

It was not improper to consider that a wife, having made her own way for five years before the divorce action was filed, can continue to do so "in her accustomed manner" for the remaining months before the trial and disposition of the case on its merits. Whether she has the present ability to do so is a question for the trier of fact.

[9] On the question of appellant's needs, the record indicates she had been receiving her board and room and a cash income of $50 per month. This certainly does not provide a luxurious livelihood, but it apparently sufficed for the preceding years. While appellant testified a change in the mode of caring for her mother was required and desirable in the future, the court was not convinced this was imminently essential. See Busch v. Busch, 99 Cal.App. 198, 278 P. 456.

The respondent's ability to pay alimony *pendente lite* is nebulous. He is unemployed and because of alcoholism has had no gainful employment in many years. Fortunately he possesses insight into this problem and has voluntarily been institutionalized on several occasions. At the time of this hearing, he was seeking physical rehabilitation at a sanitarium through psychotherapy and the use of antabuse.

The only immediate expectancy of respondent consists of the payments of $10,000 per year for seven years on the unsecured contract of sale of stock. This is admittedly separate property. The instant order to show cause hearing was held on November 24, 1952. The court pointed out that the next installment payment was due the following April, which in the normal course of events would be near the date of trial. Respondent testified he anticipated living on his credit until that time.

It is clear that a court may require the husband's separate estate to contribute all or part of an award of alimony *pendente lite*. Civil Code, § 141.

But it is not necessarily an abuse of discretion to decline to do so, and in this instance, under all the circumstances, we perceive no abuse of discretion. The evidence supports the trial court's finding that the appellant will be able to live in her accustomed manner pending the trial of the action. At the forthcoming trial, the questions of future needs, ability of the husband to provide, good faith of the wife, and the other issues raised, may be explored at length.

The order is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

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125 Cal.App.2d 661

BASIN OIL CO. OF CALIFORNIA et al.

v.

CITY OF INGLEWOOD et al.

Civ. 20145.

District Court of Appeal, Second District,
Division 1, California.
June 1, 1954.

Action in interpleader by oil company to determine fee ownership of certain lands, which had been conveyed by defendant's predecessors in interest to municipality for use as streets and on which oil company held lease. The Superior Court, Los Angeles County, Jesse J. Frampton, J., rendered judgment for municipality and defendants appealed. The District Court of Appeal, Mosk, J. pro tem., held that properly construed, deed, which conveyed property to municipality for use as public street but which contained no limitation on estate conveyed, conveyed a fee.

Judgment affirmed.

1. Deeds ⟹93

The cardinal requirement in the construction of deeds, as in the construction of other instruments, is that the intention of the parties, as gathered from the whole instrument, must govern.

2. Deeds ⟹90, 120

The whole instrument must be read together to determine the effect of the deed, and the habendum clause may be resorted to as a limitation upon the estate granted.

3. Deeds ⟹120

If a deed discloses an intention to pass particular title, the court will give effect to such intention notwithstanding inaccuracy of expression or inaptness of words.

4. Contracts ⟹143

It is impossible to lay down an invariable and universal rule of construction, and every transaction must be considered individually.

5. Deeds ⟹93

It is not intent of the grantor that governs in ascertaining the extent of the estate conveyed, but the joint intent of the grantor and the grantee, and whether grantee is a public agency or a private person must be given consideration.

6. Municipal Corporations ⟹658

If a grantor conveys, without condition or reservation, a strip of land to a municipal corporation for road purposes, he loses any right of dominion over the land, for the reason that the public body must of necessity control the use and operation of the road.

7. Municipal Corporations ⟹658

Properly construed, deed which conveyed to municipality certain land to be used as a public street, but which contained no limitation upon the estate conveyed, conveyed a fee. Civ.Code, §§ 1069, 1105.

Blek & Wilcox, by C. F. Wilcox, Inglewood, for appellants.

Clyde Woodworth, Inglewood, and John F. Bender, Compton, for respondents.

MOSK, Justice pro tem.

On November 15, 1909, appellants' predecessors in interest executed and delivered a document to the respondent City of Inglewood providing in part as follows:

"That said undersigned first parties, in consideration of the sum of One Dollar to them in hand paid, the receipt of which is hereby confessed and acknowledged, and also in consideration of the benefits to be derived by said first parties from the acceptance by second party of this deed and of the land hereby offered for dedication as part of a public street, do hereby grant unto said second party those certain parcels of land, situated in the City of Inglewood, County of Los Angeles, State of California, more particularly described as follows, to-wit: * * *." (Thereafter followed the legal description.)

"To Have and to Hold unto the said second party for public street or right-of-way and to form a portion of that public street now named and known as Centinela avenue."

On August 17, 1945, the Basin Oil Company of California, a corporation, entered into a community oil lease covering lands described in the foregoing instrument. As a result of Basin's operations, there accrued certain royalties to the owner of the fee.

Being unable to ascertain the true fee owner, Basin filed its complaint in interpleader naming as defendants the City of Inglewood and the several landowners whose property abutted the property involved herein. The City cross-complained to quiet title, to which cross-complaint appellants George W. Matson and Rose Matson answered.

No testimony was taken at the trial, it being stipulated by the parties that the sole question involved was a determination of whether the instrument granted to Inglewood fee title in the land or merely an easement.

The trial court rendered judgment for Inglewood, thus ascertaining that the instrument was in fact a deed conveying a fee, and from that ruling the Matsons have appealed.

The primary expression of purpose for which the property passed to the City is contained in the habendum clause. The granting clause makes reference to the "land hereby offered for dedication as part of a public street", but it seems clear that the phrase was set forth as part of the consideration of the transaction—the benefit accruing to the grantors—and not as a condition subsequent, covenant or limitation on the estate. We therefore are concerned here with the language of the habendum clause.

Traditionally deeds were rigidly divided into habendum and granting clauses, and where appropriate, into reddendum clauses. The common-law rule provided that the granting clause must prevail over the habendum or any later clause if any repugnancy existed. Devlin, The Law of Real Property and Deeds, 3rd Ed., p. 310 ff; Boyer v. Murphy, 202 Cal. 23, 29, 259 P. 38; Eldridge v. See Yup Company, 17 Cal. 45, 52.

[1, 2] The modern tendency, almost universally accepted, is to abandon the strict common-law rule of construction. The cardinal requirement in the construction of deeds now, as in the construction of other instruments, is that the intention of the parties as gathered from the whole instrument must govern. Boyer v. Murphy, supra. See discussion in 84 A.L.R. 1063; Barnett v. Barnett, 104 Cal. 298, 37 P. 1049; Faivre v. Daley, 93 Cal. 664, 29 P. 256; Pavkovich v. Southern Pacific R. Co., 150 Cal. 39, 87 P. 1097; Jacobs v. All Persons, etc., 12 Cal.App. 163, 106 P. 896. Thus if it should appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum may prevail. Boyer v. Murphy, supra; Burnett v. Piercy, 149 Cal. 178, 192, 86 P. 603; Montgomery v. Sturdivant, 41 Cal. 290. As stated in Parks v. Gates, 186 Cal. 151, at page 154, 199 P. 40, at page 41:

> "Under the rules of construction, the whole instrument must be read together to determine the effect of a deed, and the habendum may be resorted to as a limitation upon the estate granted."

[3] If an intention to pass particular title is disclosed, the court will give effect to such intention notwithstanding inaccuracy of expression or inaptness of the words used. Olson v. Cornwell, 134 Cal.App. 419, 427, 25 P.2d 879.

[4] Analysis of cases on this subject makes it abundantly clear that it is impossible to lay down an invariable and universal rule of construction. Faivre v. Daley, supra, 93 Cal. at page 671, 29 P. at page 258. Every transaction must be considered individually.

In the instant case, the grant considered alone was unlimited and unqualified. A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended. Civil Code, § 1105.

On the other hand, reasonable minds could scarcely disagree that the intention of the contracting parties was for the property to be used as a public street. Thus there is posed the issue of whether an intention to proscribe the use may result in reducing the estate granted from a fee to an easement. The word "easement" is nowhere used in the instrument.

There are some cases holding that the limitation on use may also limit the estate transferred. A deed conveying "'for road and watering purposes, all of the following described tracts'" was held to convey only an easement in West Texas Utilities Co. v. Lee, Tex.Civ.App., 26 S.W.2d 457.

But the vast majority of cases hold the transfer of a fee title is not vitiated solely for the reason that the deed contains a clause declaring the purpose for which it is intended the granted premises shall be used. This is particularly indicated where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature for the general public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. Kilpatrick v. Mayor, etc., of Baltimore, 81 Md. 179, 31 A. 805, 27 L.R.A. 643; Greene v. O'Connor, 18 R.I. 56, 25 A. 692, 19 L.R.A. 262.

The words "and to no other use, intent or purpose, whatsoever" have been held not to convert what would otherwise be an absolute grant into one that is conditional. Delaware Land & Development Co. v. First and Central Presbyterian Church, 16 Del. ch. 410, 147 A. 165, 171.

Appellant relies upon the case of Marshall v. Standard Oil Co., 17 Cal.App.2d 19, 61 P.2d 520. But the decision there noted that the deed contained reservations in the granting, not the habendum clause, and in that respect differed from most cases on this subject. Said the court, 17 Cal.App.2d at page 23, 61 P.2d at page 522: "This distinction is made clearly to appear from the following excerpts which we quote from 9 California Jurisprudence, page 274: 'An expression of the purposes of the conveyance as to the use of the property conveyed, "as for the purpose of a public road", or "for a county high-school ground and premises", or for certain religious and educational purposes, are generally held to be directory only, and not to qualify or limit a grant which is in absolute form. But this principle is not applicable where the qualifying words are in the granting part of the deed, and so clearly connected with the word "grant" as naturally to suggest that the intention was merely to convey the right to use the property for a certain purpose.'"

Marshall differs materially from the instant case, too, in that it was not a suit to ascertain respective interests in the property, but was brought to restrain the violation of the exclusive purposes described in the deed. The word "exclusively", said the court, 17 Cal.App.2d at page 25, 61 P.2d at page 522, 523, has a definite and certain meaning, and under the circumstances of that case gave rise to an injunction against the use of premises for purposes other than those specified in the deed.

While the court found only an easement in Pellissier v. Corker, 103 Cal. 516, 37 P. 465, it was a transaction between two adjacent landowners and their intent not to convey title in fee seemed incontrovertible. To the same effect is Parks v. Gates, supra.

The case of Cooper v. Selig, 48 Cal.App. 228, 191 P. 983, 984, is more in point. Property therein was deeded to the city "'for the purposes of a public road of said city'". The court reviewed many cases and concluded that such expressions, 48 Cal.App. at page 233, 191 P. at page 986, "do not qualify or limit a grant which is in absolute form, or operate to reduce the conveyance to that of an easement only."

[5, 6] It is not the intent of the grantor that governs in ascertaining the extent of the estate conveyed. It is the joint intent of the grantor and the grantee. Thus consideration must be given to whether the grantee is a public agency or a private person. For it is pointed out in Marlin v. Robinson, 123 Cal.App. 373, 375, 11 P.2d 70, 71, that "If a grantor conveys, without condition or reservation, a strip of land to a municipal corporation for road purposes, he loses any right of dominion over the land, for the reason that the public body must of necessity control the use and operation of the road." See also, Whitaker v. Regents, etc., 39 Cal.App. 111, at page 117, 178 P. 308.

There is no compelling reason why public street purposes cannot be served by the passing of a fee interest as well as by grant of a mere easement. The case of Las Posas Water Co. v. County of Ventura, 97 Cal.App. 296, at page 299, 275 P. 817, at page 818, discusses a deed comparable to the one at hand, and concludes: "Appellant contends that some effect must be given to the words 'as a public highway.' These words indicate the use to which the land should be put, and they are not at all inconsistent with a conveyance of the title in fee. The land could be used 'as a public highway' equally as well, whether a fee or a mere easement was conveyed."

In construing the instrument we cannot overlook the fact that if the grantors really intended to convey only an easement, they could have easily so expressed that purpose. Las Posas Water Co., supra; Cooper v. Selig, supra.

[7] Their failure to do so must be considered together with the presumption that a fee-simple title passed, Civ.Code § 1105, and the rule that a grant is to be interpreted in favor of the grantee, Civ.Code § 1069.

Therefore we reach the same conclusion as the trial court that fee title passed to the grantee, City of Inglewood, in 1909.

The judgment is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

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125 Cal.App.2d 679

TOGNAZZINI et al.

v.

TOGNAZZINI et al.

Civ. 19993.

District Court of Appeal, Second District,
Division 3, California.

June 2, 1954.

Hearing Denied July 28, 1954.

Suit to impress a constructive trust on, and for an accounting of profits from, an interest in real estate in defendants' names. Defendants cross-claimed to quiet title. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Vallée, J., held, inter alia, that evidence on issues of whether plaintiffs, as early as 1930, had been aware of facts which would have made a reasonably prudent person suspicious and whether, in the exercise of reasonable diligence, they could have discovered all they subsequently allegedly learned, supported finding that plaintiffs' action was barred by the three year statute of limitations on actions for fraud.

Judgment affirmed

1. Limitation of Actions ⇨197(2)

In action to impose constructive trust, on ground of fraud, on an interest in real estate which a defendant, after resigning as plaintiffs' guardian, purchased at partition sale, evidence on issues of whether plaintiffs, as early as 1930, had been aware of facts which would have made a reasonably prudent person suspicious and whether, in exercise of reasonable diligence, they would have learned all they subsequently allegedly learned, supported finding that plaintiffs' action was barred by the three-year statute of limitations on actions for fraud. Code Civ.Proc. § 338, subd. 4.

2. Limitation of Actions ⇨193

To avoid bar of statute of limitations on actions for fraud, it is not sufficient for a party merely to allege or prove that he did not make discovery before a certain time, and he must allege and prove when the fraud was discovered, the circumstances of the discovery, what the discovery was, and why it was not discovered sooner. Code Civ.Proc. § 338, subd. 4.

3. Limitation of Actions ⇨100(13)

For purpose of statute of limitations on fraud, which provides that statute does not run until discovery of facts constituting fraud, if the means of knowledge exist and the party is aware of facts which would make a reasonably prudent person suspicious, it will be held that there was knowledge of what could have been readily ascertained by inquiry. Code Civ.Proc. § 338, subd. 4.

4. Limitation of Actions ⇨199(2)

Under statute of limitations on fraud, which provides that statute does not run until discovery of facts constituting fraud, when facts are susceptible to opposing inferences, whether a party had notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions to be determined by the trier of fact. Code Civ.Proc. § 338, subd. 4.

5. Guardian and Ward 🔑131

In cross-action to quiet title, wherein plaintiffs interposed defense that a defendant, who had once been plaintiffs' guardian, and who, while guardian, had entered into a contract involving plaintiffs and others, whereby such defendant was to acquire plaintiffs' interest in land, had been guilty of fraud in so acting, evidence supported finding that the contract had been abandoned.

6. Appeal and Error 🔑1010(1)
Trusts 🔑263

Under statute creating a presumption of lack of consideration or undue influence in transactions between trustee and his beneficiary during existence of trust or while influence acquired by trustee remains, whether trustee's influence remains at time of transaction and whether the presumption has been dispelled are questions for the trier of fact, whose decision will not be reversed if supported by substantial evidence. Civ.Code, § 2235.

7. Guardian and Ward 🔑131

In defendants' cross-action to quiet title, wherein plaintiffs interposed defense that a defendant, who, after retiring as plaintiffs' guardian, purchased plaintiffs' interest at partition sale was guilty of fraud, evidence on issues of defendant's conduct in respect to sale and whether defendant had failed to disclose that the property had oil potentialities was sufficient to support finding that defendant had not been guilty of fraud. Civ.Code, § 2235.

Heller, Ehrman, White & McAuliffe, San Francisco, for appellants.

Twitchell & Rice and T. A. Twitchell, Santa Maria, Overton, Lyman, Prince & Vermille and Donald H. Ford, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from an adverse judgment in a suit to impress a constructive trust on, and for an accounting of profits from, an undivided one-ninth interest in Los Alamos ranch in Santa Barbara county, legal title to which is in defendants.

The basis of the suit is that in the year 1913 defendant Valerio Tognazzini, while acting as guardian of the estates of plaintiffs, who were then minors, allegedly was guilty of a breach of trust by self-dealing and failure to make full disclosure in the partition of several family realty holdings, pusuant to which Valerio received an undivided one-ninth interest in Los Alamos ranch which had been held as part of the guardianship estates.

Antonio and Maddalena Tognazzini were the parents of Valerio Tagnazzini, Virgil Tognazzini, and Clelia Hansen. Virgil and Ida Tognazzini were the parents of plaintiffs Lionel and Ellid Tognazzini.

Antonio died in 1906 the owner of three ranches; Los Alamos and Casmalia in the Santa Maria area of Santa Barbara county, and Cayucos in San Luis Obispo county. Maddalena inherited an undivided half interest and Valerio, Virgil, and Clelia each an undivided one-sixth interest in each of the ranches.

Virgil died in 1908 and his one-sixth interest descended in equal shares to Ida and plaintiffs Lionel and Ellid. Plaintiffs each then owned an undivided one-eighteenth interest in each of the three ranches. In December 1909 Valerio, with the consent of Ida, was appointed guardian of the estates of Lionel and Ellid. Ida and plaintiffs were residing in Switzerland at the time. Among the assets of the guardianship estate was plaintiffs' undivided one-ninth interest in the three ranches. Ida and plaintiffs returned to California in 1912.

About August 1912 Ida and Clelia came to the conclusion that a partition of the ranches should be effected to the end that Valerio should own one ranch, Clelia another, and Ida and plaintiffs the third. At this time Maddalena owned an undivided half interest in each ranch, Valerio and Clelia each an undivided one-sixth, and Ida and plaintiffs each an undivided one-eighteenth. Ida and Clelia engaged an attorney, Emilio Lastreto; Valerio was notified of the desire to partition; and a meeting was arranged. Ida and Clelia designated appraisers. The appraisers appraised the property at, and the parties agreed on a valuation of, $90,000 for Los Alamos, $100,000 for Casmalia, and $55,000 for Cayucos. It was decided that Ida and plaintiffs should take Cayucos because its lower valuation would result in their receiving cash of which they were in need and because they did not have the cash to take either of the higher priced ranches. Valerio and Clelia tossed a coin twice to decide who would take Los Alamos and who Casmalia. If heads came on the first toss Clelia was to take Casmalia, if tails came Valerio was to take it. Heads came but Clelia was undecided; the coin was tossed again; it came heads again and Clelia took Casmalia. That left Valerio with Los Alamos.

On February 13, 1913, a written contract drawn by Lastreto, embodying the terms of the partition, was signed by Valerio in his individual capacity and as guardian of the estates of plaintiffs, by Ida in her individual capacity and as mother of plaintiffs, and by Clelia. The contract provided that it should not be binding on plaintiffs until it should have been approved by the court.

On March 10, 1913, Valerio tendered to the court his resignation as guardian of the estates of plaintiffs. Ida petitioned for appointment, and in her petition stated: "[I]n view of the fact that it is contemplated between Maddalena Tognazzini, Mrs. Clelia Muscio (nee Tognazzini), Valerio Tognazzini, and the said minors, Lionel Tognazzini and Ellid Tognazzini, and your petitioner, Ida Tognazzini, to have a partition of the property belonging to themselves in common and in different proportions; and that in said partition proceedings, your petitioner herein desires to represent and to act for her said children, said minors, and that Valerio Tognazzini, the said guardian of the persons and estates of said minors has, at the request of petitioner herein, tendered his resignation as such guardian and petitioned the Honorable Superior Court to accept his said resignation and to appoint your petitioner, Ida Tognazzini, such guardian instead and in lieu of Valerio Tognazzini." On March 31, 1913, Valerio's resignation was accepted and Ida was appointed.

The contract was not presented to the court for approval. Instead, Ida, as guardian of the estates of plaintiffs, petitioned the court in the guardianship proceeding for an order to sell the interests of plaintiffs in the three ranches and to use the proceeds to purchase the interests of the other parties in Cayucos and to invest in securities. On June 13, 1913, an order was duly and regularly made granting the petition and ordering the interests sold. The sale was advertised, had, and duly and regularly confirmed. The interests of plaintiffs in Los Alamos and Casmalia were exchanged for corresponding interests in Cayucos plus cash; deeds were exchanged; and Maddalena conveyed her undivided half interest in each ranch. The result was that Valerio became sole owner of Los Alamos, Clelia sole owner of Casmalia, and Ida and plaintiffs sole owners of Cayucos.

In 1920 Cayucos was sold for $90,000. About 1935 Valerio conveyed to each of his children, defendants Elton Tognazzini and Aileen Tognazzini Pauley, without consideration, an undivided one-fourth interest in the minerals in and under a part of Los Alamos. In 1937 Valerio entered into a contract with his wife, defendant Tillie Tognazzini, by which she agreed to buy an undivided one-fourth interest in the minerals in and under a part of Los Alamos for $120,000. She has paid about $80,000 toward the purchase price.

This suit was commenced on September 20, 1950. The property involved is the one-ninth interest in Los Alamos which was owned by plaintiffs and which in 1913 was conveyed by Ida, as guardian of the estates of plaintiffs, to Valerio. The alleged fraud is predicated on the claim that Valerio, occupying a fiduciary relation to plaintiffs as guardian of their estates, failed to disclose to the court in the guardianship proceedings material facts within his knowledge regarding the oil potentialities of Los Alamos, thereby obtaining an unfair advantage over his wards.

[1] The court found there was no fraud and that the suit was barred by the provisions of section 338 subd. 4, of the Code of Civil Procedure. Plaintiffs assert the findings are unsupported by the evidence. We have concluded that the finding that the suit is barred is supported by the evidence.

Thirty-seven years elapsed between the partition in 1913 and the filing of this suit. Lionel attained the age of majority in 1923; Ellid in 1924.

On June 1, 1909, Ida granted an oil company an option for two and a half years to purchase her interest in Los Alamos; and Maddalena, Valerio, and Clelia jointly granted the same oil company an option to purchase their interests. The price fixed in the options was $250 an acre. Los Alamos contained about 4000 acres. It had been appraised in 1908, on the death of Ida's husband, at $30,000, or about $7.50 an acre. The options were not exercised. Ida testified she knew at the time the option was given that three oil companies had producing wells in the Santa Maria area.

Ida and plaintiffs were in Switzerland from June 1909 until August 1912. During that time Valerio and Clelia's then husband managed the ranches. On September 14, 1910, Ida wrote to Valerio acknowledging she had received a long letter from him and that she was "happy to hear that the Brookshire has good prospects also the wells in our ranches." On April 23, 1911, she wrote to Valerio saying, "Victor Pezzoni tells me that they are digging for oil in Casmalia; how are they doing? I always wait to hear of a big gusher but nothing ever comes." On August 7, 1911, she wrote Valerio asking, "[D]id you come to anything with that oil well?" Presumably her letter was answered.

After Ida returned from Switzerland she lived in San Francisco. Before the partition discussions began Ida frequently visited with Maddalena and Clelia; she saw Valerio but once, in her brother's office for the purpose of receiving money. At this meeting which was before anyone had suggested a division of the ranches, Valerio asked Ida if she would like to be guardian. She replied that it was agreeable to her. Ida suggested the partition because "She felt he [Valerio] was just not quite honest with her."

On February 19, 1913, the date of the contract for partition, an oil well, Dome No. 2, was being drilled on Los Alamos. The well was completed about April 18, 1913, but it did not at any time produce oil in paying quantities and it was later abandoned. When partition was first discussed and before any ranches were selected Valerio said to Ida and Clelia, "Do not divide the mineral rights—keep them undivided." He reported to them at that time that the Dome well was drilling but that its outcome was uncertain. On objection by Ida and Clelia, Valerio agreed to divide the entire interests. During the negotiations Ida told Lastreto they always had hopes of oil in the family. Ida, Valerio, and Clelia knew that there was prospecting for oil on Casmalia at the date of the contract. The evidence supports the conclusion that Ida knew at the time she was appointed guardian and at the time she petitioned the court to take Cayucos for herself and plaintiffs that Los Alamos and Casmalia were potential oil properties.

In 1930 a title company wrote plaintiffs requesting them to execute quitclaim deeds to Valerio to clear up a defect in the title of part of Los Alamos. Plaintiffs executed the deeds.

Maddalena died prior to 1930. Valerio and F. A. O'Connell, a lawyer, were executors of her will. In November 1930 Ida and plaintiffs consulted O'Connell about contesting Maddalena's will and suing on a claim Ida and plaintiffs asserted arose out of the 1913 contract. O'Connell showed Ida and each plaintiff the contract and told them they had no claim because Maddalena was not a party to the contract. Ida told O'Connell she had a claim against Valerio and Clelia arising out of the 1913 contract. He informed Ida and plaintiffs they had no claim—that if they had one, it was barred by the statute of limitations.

Plaintiffs and Ida employed A. W. Brouillet, a lawyer, at that time. In January 1931 a meeting was had at which Brouillet, Ida, plaintiffs, and O'Connell were present. At that meeting O'Connell and Brouillet discussed the 1913 contract, and

O'Connell told those present that the 1913 contract was not efficacious or effective because it could not have been without a court order taking care of the right of the minors to make the deed. He also told them that Maddalena had not made the deed either to Valerio or Clelia free of obligation; that each had obligated himself and herself to pay Maddalena $1,000 a year as long as she lived; that Valerio had agreed not to sell or mortgage Los Alamos without the consent of Maddalena; and that there was no obligation on the part of her estate to pay any money under the 1913 contract. He told them that if there had been any claim against Valerio or Clelia the statute of limitations had run.

In 1928 Valerio entered into an oil lease of part of Los Alamos which resulted in the discovery of oil in paying quantities about July 1, 1931. Prior to that time a number of dry holes had been drilled. In late 1931 plaintiff Ellid Tognazzini told O'Connell that he had read in a Swiss paper that oil had been discovered in Cat Canyon on Los Alamos. O'Connell later talked to plaintiff Lionel Tognazzini about the matter; Lionel said oil had been discovered in Cat Canyon; O'Connell asked what Cat Canyon was; Lionel said it was Gato Ridge, that he had read it in the public print.

In July 1932 E. J. Talbot, a lawyer representing Ida, telephoned O'Connell and said Valerio "had done" Ida out of $10,000; that there was some discrepancy in the accounting of Maddalena's estate. The two lawyers met; O'Connell explained the accounting and the 1913 contract to Talbot, and told him Valerio was under no obligation to Ida.

Valerio and O'Connell were trustees under Maddalena's will. In 1932 plaintiffs objected to their account claiming they had not accounted for all property which came into their hands under the decree of distribution and had not paid plaintiffs income due them under the trust. In 1933 plaintiffs sought the removal of Valerio as trustee of the trust. Later in 1933 plaintiffs again objected to an account of Valerio and O'Connell as trustees. The accounts were found to be true and correct and were approved.

Plaintiffs claim to have discovered the alleged fraud in this way: In June 1949 one of Valerio's present lawyers wrote to plaintiff Lionel Tognazzini indicating that a title company had raised some technical objections about the title Valerio acquired on the sale in the guardianship estate to the effect that all of Los Alamos was not included in the quitclaim deeds executed by plaintiffs to Valerio in 1930, and seeking a meeting. The lawyer met Lionel in San Francisco in June 1950 and asked that he and Ellid execute a quitclaim deed; Lionel said they did not feel they could since there was $13,000 due them. Lionel consulted Brouillet who told him to search his records. Lionel did so, and among some papers which had been delivered to him by Lastreto in 1938 he found the 1913 contract. He gave the contract to Ellid who took it to Brouillet. Each plaintiff testified he had never seen the contract before. Each also testified he first learned of the oil development on Los Alamos in 1950. Plaintiffs claim that submission of the contract to Brouillet in 1950 led to their discovery for the first time that Valerio had not in 1913 disclosed that Los Alamos had oil potentialities.

[2–4] An action for relief on the ground of fraud must be commenced within three years, but the cause of action is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. Code Civ.Proc. § 338, subd. 4. It is not sufficient for a party merely to allege or prove that he did not make the discovery before a certain time. He must allege and prove when the fraud was discovered, the circumstances of the discovery, what the discovery was, and why it was not discovered sooner. Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 486, 45 P. 809; Smith v. Martin, 135 Cal. 247, 251–254, 67 P. 779; Del Campo v. Camarillo, 154 Cal. 647, 657–658, 98 P. 1049; Phelps v. Grady, 168 Cal. 73, 77–80, 141 P. 926; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 701–703, 16 P.2d 268; Kelly v. Longan, 5 Cal.2d 274, 276–277, 53 P.2d 971; Davis v. Rite-Lite Sales

Co., 8 Cal.2d 675, 681–682, 67 P.2d 1039; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 441, 159 P.2d 958; Beal v. Smith, 46 Cal. App. 271, 280, 189 P. 341; Beck v. Hoagland, 128 Cal.App. 322, 325, 17 P.2d 191; Merchants' Ice, etc., Co. v. Globe Brewing Co., 78 Cal.App.2d 618, 623, 177 P.2d 963. If the means of knowledge exist and the party is aware of facts which would make a reasonably prudent person suspicious, it will be held that there was knowledge of what could have been readily ascertained by such inquiry. In other words, under such circumstances means of knowledge are equivalent to knowledge. Smith v. Martin, 135 Cal. 247, 254, 67 P. 779; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 438, 159 P.2d 958; Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 567, 165 P.2d 260; Mortimer v. Loynes, 74 Cal. App.2d 160, 171–172, 168 P.2d 481; Crabbe v. White, 113 Cal.App.2d 356, 360, 248 P.2d 193. When the facts are susceptible to opposing inferences, whether a party had notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions of fact to be determined by the trial court. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 440, 159 P.2d 958; Bowman v. McPheeters, 77 Cal.App.2d 795, 798, 802–803, 176 P.2d 745; Blackman v. Howes, 82 Cal.App.2d 275, 278–279, 185 P.2d 1019, 174 A.L.R. 1004.

A fiduciary relation did not exist between Valerio and plaintiffs in 1930 or after that time. It is conceded that plaintiffs have been close to their mother, Ida, at all times since they attained the age of majority. The court was warranted in inferring from the facts related and from Ida's manner of testifying that the 1913 contract, the relation of the parties in 1913, and the oil potentialities of Los Alamos in 1913 had been discussed between mother and sons many times, both before and after 1930. The same means of knowledge existed in 1930 and thenceforth as existed in 1950. A fair inference from the evidence is that at least as early as 1930 plaintiffs were aware of facts which would make a reasonably prudent person suspicious and that the exercise of reasonable diligence on the part of plaintiffs in 1930 and at all times thereafter would have disclosed to them all they subsequently allegedly learned.

Applying the rules of law stated, the evidence is clearly sufficient to support the findings that after attaining the age of majority in 1923 and 1924 and at all times after 1930 plaintiffs and each of them were advised and had knowledge of the terms and conditions of the 1913 contract, and after 1930 had knowledge of the purchase by Valerio of their interests in Los Alamos in August 1913, of the consideration received by them therefrom, and the terms and conditions of the sales and purchases; that the facts and circumstances surrounding the sale of plaintiffs' interests in Los Alamos and the purchase thereof by Valerio should have been known to each plaintiff at all times after 1930 if he had used ordinary or any diligence to ascertain the same; that "at all times subsequent to 1939 the plaintiffs had in their possession" a copy of the 1913 contract; that the suit is barred by the provisions of section 338 subd. 4, of the Code of Civil Procedure; and that each of plaintiffs has been guilty of laches and unreasonable delay in bringing the suit. The evidence does not compel a conclusion as a matter of law that plaintiffs had no notice prior to the time they assert discovery of circumstances sufficient to put a prudent man on inquiry as to the facts.

The defendants filed a cross-complaint in which they prayed that their respective titles in Los Alamos be quieted. As a defense plaintiffs pleaded the same alleged fraud of Valerio as pleaded in the complaint. The court found in accord with the allegations of the cross-complaint and quieted defendants' titles as against plaintiffs.

Plaintiffs say that the statute of limitations cannot be interposed to a defense of fraud,[1] and that defendant members of Valerio's family have no greater right than he.[2] Defendants appear to concede these are correct statements of the law. These contentions compel consideration of the question whether the finding of no fraud on the part of Valerio is supported by the evidence.

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[1] In re Estate of Cover, 188 Cal. 133, 140, 204 P. 583; Cox v. Schnerr, 172 Cal. 371, 382, 156 P. 509.

Plaintiffs argue: during the negotiations which preceded the 1913 contract and at the time of its execution they were minors; Valerio occupied a fiduciary relation to them as guardian of their estates; he acquired their interests in Los Alamos against their consent; he did not obtain approval of the court to his acting as guardian and at the same time acquiring the interests of his wards; his resignation prior to the consummation of the partition did not relieve him of the prohibition against self-dealing; when Valerio acquired their interests he failed to disclose to the court or to anyone else material facts within his knowledge regarding the oil-producing potentialities of Los Alamos. They contend the evidence is uncontradicted that Valerio was guilty of a breach of his trust as guardian by dealing with himself and by gaining an unfair advantage over them.

[5] The court found that the 1913 contract was abandoned by the parties. Plaintiffs say the finding is unsupported. The evidence supports the finding. The contract said it was not binding on plaintiffs until approved by the court. It also stated that Ida was desirous of being appointed guardian of the persons and estates of plaintiffs. And it provided that the mineral rights "appurtenant to each and any of said three properties, are to follow and belong to said respective property." It was not submitted to the court for approval. Lastreto, Ida's lawyer, prepared Valerio's resignation and his request for Ida's appointment as guardian. The resignation stated that a division or partition of the ranches was desired and soon to be effected. Ida's petition stated that a partition was contemplated and that in the partition proceedings she desired to represent and act for plaintiffs. Instead of presenting the contract to the court for approval, Ida petitioned the court in the guardianship proceedings for an order to sell the interests of plaintiffs in the three ranches.

The 1913 contract contemplated deeds of gift from Maddalena to Valerio, Clelia, and Ida and plaintiffs. When Maddalena deeded to Valerio and Clelia she did not make gift deeds, but the deeds contained provisions obligating Valerio and Clelia each to pay Maddalena $1,000 a year so long as she lived and contained restrictions on their ability to convey.

The court was justified in concluding that Lastreto believed it was best to abandon the 1913 contract and to proceed as though it had never been entered into. This course assured plaintiffs the protection afforded by a sale in the guardianship proceeding and that they would obtain fair values for their interests. By that course of action they were assured that the fair market value would be determined by independent appraisers, that the bidding could be competitive, that further bids could be received at the time of confirmation, and that if no adequate bid was received the court would refuse confirmation.

It is argued that even though the 1913 contract was abandoned Valerio was not thereby relieved of the prohibition against self-dealing. The argument is based on the following statement of Scott in his work on Trusts: "After a trustee has ceased to be trustee he is not necessarily precluded from purchasing trust property. If, however, he is one of several trustees and makes an agreement with his co-trustees that he will purchase the property for himself, the fact that he resigns as trustee before completing the purchase will not preclude the beneficiaries from setting aside the sale." 2 Scott On Trusts, § 170.8. Scott cites, in support of the text, Shelton v. Homer, 5 Metc., Mass., 462, and Wright v. Morgan, 1926 Appeal Cases, 788. In Shelton v. Homer two executors of a will were serving. One resigned. Two days later he entered into a contract with the other to buy property which the will directed should be sold. The suit was by the remaining executor to specifically enforce the contract. There were no other facts. The court concluded that the contract was agreed upon before the resignation. It was held that under the will one executor could not sell the property; and that an executor may not bargain with his coexecutor for any part of the estate of the testator, then after resignation have a conveyance made to him by the other where, as a trustee, he is still in privity with the estate. Wright v. Morgan held that a trustee while acting as such cannot agree with his cotrustee to purchase property of the trust, then resign and make the purchase; that in such case the sale will be set aside. There was no court approval of the sale in either Shelton v. Homer or Wright v. Morgan.

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[2] Taylor v. Weston, 77 Cal. 534, 537, 20 P. 62; Restat.Trusts, § 286; Bogert, Trusts and Trustees, § 885.

Scott also says (§ 170.8): "Where the trust has terminated altogether, a person who was trustee is not precluded from purchasing the property which he formerly held in trust if he does not take advantage of information acquired by him as trustee to the detriment of the beneficiaries," citing Hosch v. Hosch's Ex'rs, 181 Ky. 781, 205 S.W. 963, and Ball v. Carew, 13 Pick., Mass., 28. He says further (§ 170.7): "We have seen that a trustee cannot properly purchase trust property for himself individually, even though he acts in good faith and pays a fair consideration for it. The circumstances may be such, however, that it would be advantageous to the trust estate for the trustee to purchase the property. The property may be difficult to dispose of, and the trustee may be willing to help the estate by taking it over at a fair price and at a price greater than that which any other purchaser would pay. In such a case a court having jurisdiction over the administration of the trust may approve a sale to the trustee individually. * * * Not only may the court authorize a sale of trust property to the trustee personally, but after such a sale has taken place the court may approve the sale, if it still appears that the sale is for the best interest of the trust estate. * * * The reason why the permission or approval of the court is sufficient to justify a sale of trust property to the trustee personally is that a court of equity is a court having general supervision over the administration of trusts, and if the parties are properly represented before it, it has authority to authorize what would otherwise not be permissible." See Tolley v. Hamilton, 206 Ala. 634, 91 So. 610; Greenway's Guardian Ad Litem v. Greenway, 262 Ky. 818, 91 S.W.2d 553, 557; Malone's Guardian Ad Litem v. Malone, 255 Ky. 210, 73 S.W.2d 38; Terry v. Terry, 305 Mass. 113, 25 N.E. 2d 205, 207; Hayes v. Hall, 188 Mass. 510, 74 N.E. 935; In re Fiske's Estate, 207 Minn. 44, 291 N.W. 289; In re Sprain's Estate, 199 Minn. 511, 272 N.W. 779, 111 A.L.R. 1357; Colgate's Executor v. Colgate, 23 N.J.Eq. 372, 383.

In Colgate's Executor v. Colgate, supra, 23 N.J.Eq. 372, a member of a firm engaged in the manufacture of soap died, naming another member of the firm executor with power to sell land. The executor made a contract to sell the interest of the decedent in land owned by the firm to the surviving members of the firm, of whom he was one. Suit was brought by the members of the firm for specific performance of the contract. One of the beneficiaries of the estate was an infant. The court held, 23 N.J.Eq. at page 383: "The interest of the testator in the real estate may be sold by the complainant as trustee, but it must be for its present value. And when it is necessary that lands held in trust should be sold, and the trustee is in a situation that induces him to give more than any other purchaser would give, the court may authorize a sale by him, at a full, fair price, to be approved by the court, to himself, or to some one for his benefit. This was held in Campbell v. Walker, 5 Ves. 678, and by the Supreme Court of the United States in Michoud v. Girod, 4 How. 503, [11 L.Ed. 1076]. In this case, I am satisfied that the complainant and his copartners, who own the other two-thirds of this property, can afford to give the full market value of this real estate as it stands, undivided, better than any other purchaser, who must take it subject to the right of partition and sale; and it is equitable and just, if they are willing to give the full value, that the interest of the testator should be sold to them. It is a proper case for this court to order that a sale and conveyance should be made by the complainant to or in trust for the firm of which he is a member."

The court, in In re Fiske's Estate, supra, 207 Minn. 44, 291 N.W. 289, 291, said: "Self or double dealing by a fiduciary is bad. When, with full disclosure, it has proper judicial approval, it may become good because purged of vice. 2 Scott, Trusts, § 170.7; 3 Bogert, Trusts & Trustees, § 484. There is authority for the statement that 'the trustee can properly purchase trust property for himself with the approval of the court.' 1 Restatement, Trusts, § 170, comment f.

"In order that a minor may be bound by such judicial action as that now under attack, it is not necessary that he be personally represented. Balch v. Hooper, 32 Minn. 158, 20 N.W. 124; Ladd v. Weiskopf, 62 Minn. 29, 64 N.W. 99, 69 L.R.A. 785. Here appellant was represented not only by his mother as guardian of his person, but also by respondent as guardian of his estate. Both had the benefit of independent and competent counsel, with no incompatibility of interest or division of allegiance. Their whole duty was to, and their whole interest that of, appellant [a minor] and his mother, on whose behalf they participated in the settlement and its confirmation by final decree.

"Courts must deal with the estates of minors. Their judgments in that field must have the effect of finality or they would cease to be judgments. Giving what force one will to the position of respondent as one of incompatibility of interest and division of allegiance in this matter, it yet remains that every conceivable precaution was taken to insure the utmost protection for the interests of appellant. We do not even find the semblance of a reason for having the matter relitigated. We can not allow disappointment to take the place of fraud or mistake as ground for nullification of judicial action."

Greenway's Guardian Ad Litem v. Greenway, supra, 262 Ky. 818, 91 S.W.2d 553, was an appeal from a judgment approving a sale of a minor's interest in realty to his guardian. The court stated, 91 S.W.2d 557: "Question is made concerning the right of the guardian to become a purchaser at the sale, it being argued that if she did so, her bid inured to the benefit of the infant. A number of authorities are cited as supporting this contention, and no criticism can be made of these authorities; however, it was alleged in the petition as amended that it would be to the best interest of the infant to permit the guardian to bid on the property, and permission for her to do so was granted by the court. In the case of Larrabee v. Larrabee, supra, [71 S.W. 645, 24 Ky.Law Rep. 1423] the guardian was granted permission by the court to bid on the property when sold, and it was said: 'A guardian who bids by permission of the chancellor stands with reference to the sale as any other purchaser. It was not necessary for the infant plaintiffs to have representation other than that of their guardian. They were co-plaintiffs with her, and it was not necessary for them to have any other representation in this proceeding.'"

[6] Section 2235 of the Civil Code provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Whether "the influence acquired by the trustee remains" at the time of the transaction is a question of fact. The presumption of section 2235 is disputable. Whether the presumption has been dispelled is a question for the trier of fact, whose decision will not be reversed if supported by substantial evidence. Weil v. Weil, 37 Cal.2d 770, 788, 236 P.2d 159; Luiz v. Queen of Angels Hospital, 53 Cal.App.2d 310, 313, 127 P.2d 966.

[7] The court was fully justified in concluding that Valerio was not guilty of fraud. He did not resign to accomplish the sale. He resigned because Ida, mother of plaintiffs, their natural guardian, wanted to be appointed in his stead. He resigned at the request of Ida and Lastreto. His resignation was agreed upon before the

negotiations with respect to the division of the ranches began. The division idea was not Valerio's; it was Ida's and Clelia's. Apparently Valerio had no recourse except to go along with Ida and Clelia. There is no evidence that he resigned as a part of a plan to deprive plaintiffs of their interest in Los Alamos or that his acquisition of their interests was a part of such a plan. He had no control over, and did not attempt to influence, Ida as successor guardian. The method by which the ranches were selected negatives any plan on Valerio's part to acquire Los Alamos. He was not represented by an attorney; Ida and Clelia were. Ida was also advised by a brother and an uncle. Ida and Clelia had appraisals made of the ranches. Valerio had nothing to do with the selection of the appraisers and rendered them no assistance. He accepted their valuations. Valerio at that time knew, as did Ida and Clelia, that Dome No. 2 was drilling on Los Alamos. Notwithstanding, he did not want to partition the mineral rights; Ida and Clelia insisted. After Ida selected Cayucos for herself and plaintiffs, Los Alamos went to Valerio by lot. He took what was left after Ida and Clelia had made their choices. The chief actor from the beginning of the negotiations to the completion of the sale was Lastreto acting for Ida and plaintiffs. There is no evidence that he acted for or consulted with Valerio.

The only concealment asserted against Valerio was the alleged failure to disclose that Los Alamos had oil potentialities. Plaintiffs say there were three failures: 1. He told no one of his knowledge of a report called the Arnold report. 2. He did not tell the court of the well in process of drilling. 3. He did not disclose the Cat Canyon discovery.

The Arnold report was based on a government survey made by a geologist in 1907. Valerio received a copy of the report. The report indicated it was Arnold's opinion that the prospects for oil in some areas of Los Alamos were good. Valerio became guardian in December 1909. Ida and plaintiffs were in Switzerland from 1909 to 1912. While Ida was in Switzerland Valerio wrote her to that effect; he thus passed on to her the essence of the report. The report was six years old in 1913 when Ida became guardian and oil had not been found in paying quantities although wells had been drilled. There was evidence from which the court could infer that the Arnold report was in error as to the areas he recommended for testing on Los Alamos and that numerous dry holes had been drilled prior to 1913 in the specific areas he mentioned. The court may well have concluded there was no concealment in Valerio's failure to specifically mention the Arnold report.

The next claimed concealment is that Valerio did not tell the court during the negotiations for partition that Dome Well No. 2 was in process of drilling. The court found that Ida knew on the date of the 1913 contract and on August 15, 1913, which was four days after the sale had been confirmed by the court in the guardianship proceedings, and at all times between those dates, of the prospecting for oil on Los Alamos and Casmalia. When partition was first discussed and before any ranches were selected Valerio said, "Do not divide the mineral rights—keep them undivided." At that meeting he told Ida, Clelia, and Lastreto "what the conditions were and developments on the ranches," and that Dome No. 2 was drilling. Clelia testified: "There were so many failures [dry holes] around the country, that we didn't get excited about it [the fact that Dome No. 2 was drilling]." Ida's petition for an order to sell alleged that all mining leases were to be included in the sales of the respective parcels. In her return of sale she stated that Valerio's bid was fair and just and represented the true value of the property. When Valerio bid he had filed his final account and had been discharged as guardian of plaintiffs. Disinterested appraisers were appointed by the court who appraised Los Alamos at $90,000, Casmalia at $100,000, and Cayucos at $55,000. They were business men of San Luis Obispo. Two of them were connected with the oil business. It must be presumed they knew of the drilling of Dome No. 2, and that their appraisal reflected any value based on oil potential. The sale was duly and regularly publicized by posting and publication in Santa Barbara county where the property was situated, and in San Luis Obispo county where the guardianship proceedings were pending. Anyone could have acquired plaintiffs' interests. Valerio was content to take his chances at a sale. The oil company which held a lease on part of Los Alamos did not submit a bid. Lastreto prepared all of the court papers in connection with the sale. There is no evidence that he consulted with Valerio. The sale was regularly confirmed in open court. Ida and Lastreto were present. It was Ida's duty as guardian of the estates of plaintiffs to inform the court that Los Alamos had oil potentialities if such were known to any of the parties at the time. Dome No. 2 was completed on April 18, 1913, but it did not produce oil in paying quantities. The proceedings for sale of plaintiffs' interests in Los Alamos took place between June and August 1913. In August 1913, when the proceedings for the sale of plaintiffs' interests were pending, two dry holes had been drilled on Los Alamos and three dry holes had been drilled near the Tognazzini line. The court in this suit found that the bids and sales prices were the fair market values of the properties at the time and that the sales were fair and just. The evidence supports the conclusion that there was no concealment on the part of Valerio with respect to Dome No. 2.

The next alleged concealment is that Valerio did not disclose the Cat Canyon discoveries made in 1910. One discovery was on property lying generally about 4 miles west of Los Alamos. Another was made about 2½ miles north of Los Alamos. It does not follow from the fact that oil was found on one property in the Santa Maria area that there was oil in all areas.

We conclude that the findings that at the time of the sale the presence of oil on Los Alamos was not known to Valerio; that at the time the sale was confirmed Ida was not unaware of the value of plaintiffs' interests and the court was not unaware of their value; that the price paid by Valerio was the fair market value of plaintiffs' interests at the time of the purchase; and that Valerio's conduct in purchasing the interests of plaintiffs was not fraudulent and was in all respects fair to plaintiffs,—are supported by the evidence.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

125 Cal.App.2d 656

MILLER v. CORTESE et al.

Civ. 20028.

District Court of Appeal, Second District,
Division 1, California.

June 1, 1954.

Rehearing Denied June 23, 1954.

Hearing Denied July 28, 1954.

Action to recover real estate broker's commission. From a judgment of the Superior Court, Los Angeles County, Clarence M. Hanson, J., and from an order denying motion for new trial, plaintiff appealed. The District Court of Appeal, Drapeau, J., held that where complaint for real estate broker's commission was based on written listing agreement and alleged that purchaser had been procured and that conditions of listing agreement had been fully performed, broker's assignee could not recover on unpleaded theory that owners of property had extended, modified or waived time limitation of listing agreement.

Judgment affirmed; appeal from order denying new trial dismissed.

See also 110 Cal.App.2d 101, 242 P.2d 84.

1. Brokers 🔑**54**

A real estate broker may recover his commissions under contract of employment when he procures a buyer who is ready, willing and financially able to purchase property described in agency contract pursuant to conditions specified therein.

2. Contracts 🔑**333(6)**

To invoke the doctrines of extension or modification of contracts, the essential facts relied upon to bring the situation within the operation of those doctrines must be pleaded.

3. Contracts ⚷346(10)

Plaintiff must plead the particular contract which he claims he has performed, and cannot recover on proof of another contract or the contract substituted for or constituting a modification of the contract declared on.

4. Brokers ⚷82(4)

Where complaint for real estate broker's commission was based on written listing agreement and alleged that purchaser had been procured and that conditions of listing agreement had been fully performed, broker's assignee could not recover on unpleaded theory that owners of property had extended, modified or waived time limitation of listing agreement. Civ.Code, § 1624, subd. 5.

5. Brokers ⚷43(2)

Even if real estate owner had orally agreed to extension of time limit of written listing agreement, where broker did not secure a purchaser at any time after expiration of the time limit, there was no such performance as would take oral extension out of statute of frauds and extend the contract beyond the original time limit. Civ. Code, § 1624, subd. 5.

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Jerrell Babb, Los Angeles, for appellant.

Benjamin J. Goodman, Los Angeles, for respondent.

DRAPEAU, Justice.

This is an action to recover a real estate broker's commission for $20,000. Plaintiff is assignee of the broker, Alden B. Coyne. The cause was dismissed as to defendants Cortese and Bershim and defendant Dinow filed his answer. Thereafter the latter died and the action was revived on motion and a supplemental complaint was served on Celia A. Dinow, as Administratrix of the Estate of Mike E. Dinow, deceased.

Thereafter, the trial court granted the motion of Celia A. Dinow, as Administratrix, etc., for permission to file her amended answer to the complaint and the supplemental complaint, in which she alleged several affirmative defenses to the action, to-wit: (a) Statute of Frauds, sec. 1624, subd. 5, Civil Code; (b) expiration of the broker's listing sued upon; and (c) failure of plaintiff or his assignor to procure a purchaser able, ready and willing to purchase the property.

Mr. Coyne, plaintiff's assignor, did not testify and was not represented at the trial. Plaintiff testified he bought the claim from Coyne for $100 and agreed to be responsible for certain legal services.

Plaintiff's appeal from an adverse judgment and from an order denying his motion for a new trial is presented on an engrossed settled statement.

Mr. Alden B. Coyne, plaintiff's assignor, was a real estate broker, operating under the fictitious name of California Auto Court Association. Messrs. Randolph, Hannah and Brown, also real estate brokers, were associated with Coyne. By written agreements, these three men agreed to pay to Coyne for the use of his office, 30% of any real estate commissions received by them.

On September 24, 1946, defendants executed an open listing authorizing California Auto Court Association to sell a piece of property designated as "Hollywood Colonial", for $600,000. The listing provided for a cash payment of $125,000; a broker's commission of $20,000, if the sale was made at the given price; and for a period of employment for six months from date of the listing, or until March 23, 1947.

No sale of the property was effected during the period of six months, nor at any time thereafter by plaintiff's assignor Coyne.

On August 14, 1947, after the expiration of the six month period, a real estate broker by the name of Pentecost told Mr. Randolph that he had a client named Mrs. Anderson, who was interested in buying a motel. The two men discussed a sale of "Hollywood Colonial" to her. All of her dealings were with Pentecost. She did not know Coyne or Randolph. On August 14, 1947, Mrs. Anderson gave Pentecost a check for $5,000, and on the next day an escrow was opened with the Title Insurance & Trust Company for the sale of the property in question.

The escrow instructions required a cash payment of $100,000 on a total purchase price of $400,000. On the day the escrow was opened, Mrs. Anderson told Pentecost she did not have enough money to go through with the deal. Mr. Pentecost told Randolph that Mrs. Anderson would get the cash payment from a sale of property that he had made for her. Randolph in turn told defendant Cortese that Mrs. Anderson had $100,000 to put down on the property.

The escrow instructions also provided for a broker's commission of $11,250, one-half payable to Pentecost and one-half to Randolph. No provision was made for payment of commission to Coyne or his company, and Mrs. Anderson never met Coyne at any time.

This escrow was never completed and was finally cancelled.

On September 20, 1947, while the Anderson escrow was still pending and when it became evident to Randolph and Hannah that Mrs. Anderson was not going to complete the transaction, Hannah negotiated a sale of "Hollywood Colonial" to a Mr. Fishman. An escrow for this purpose was opened with the Bank of America, at which time Randolph and the defendants Cortese, Bershim and Dinow were present. Defendants paid Hannah a broker's commission out of this escrow in the sum of $5,000. Of this Hannah paid Coyne 30%, or $1,500.

The complaint is based upon the written listing agreement of September 24, 1945. It is alleged therein that, pursuant to such listing, Coyne procured Mrs. Anderson as a purchaser for defendants' property, and that he fully performed all conditions of the agreement.

At the trial defendant Dinow objected to the introduction of any evidence by plaintiff under his plea of full performance to show the extension, modification or waiver of the listing agreement with respondent respecting the time limited therein. Motion to strike such evidence was granted by the court.

Thereupon plaintiff made an offer of proof to establish that the owners had authorized said waiver of the time limitation orally, and by their acts and conduct. This offer was rejected. Plaintiff then moved to amend his complaint to include an allegation of waiver.

In denying that motion, the trial court stated:

"The Statute of Limitations has run on that, to establish that type of contract. It would be a complete change of the theory of the case as filed, and coming at this time is too late."

Appellant submits that the trial court erred in striking the said testimony, in rejecting the offer of proof and refusing him permission to amend his complaint.

As pointed out in respondent's brief, the controlling factors in the instant case are as follows:

(a) Mrs. Anderson was procured as a possible purchaser approximately four months after the expiration of the time limit provided by the listing.

(b) The sale to Mrs. Anderson was never consummated, so that the owners did not accept the benefits of the broker's services.

(c) The sellers did not prevent the consummation of the deal, nor were they chargeable with bad faith, negligence or fraud.

(d) Appellant did not plead waiver of the time limit provided in the listing agreement, and respondent timely, and by appropriate objections, objected to the introduction of any evidence on the question of waiver.

(e) There were no negotiations between appellant's assignor and any prospective purchaser between the expiration date of the listing agreement, to-wit: March 23, 1947, and August 14, 1947, and all negotiations had lapsed for a considerable period of time.

[1–4] As stated in Baird v. Madsen, 57 Cal.App.2d 465, 472–473, 134 P.2d 885, 889: "The general rule governing in cases of this kind is that a real estate broker may recover his commissions under his contract of employment when he procures a buyer who is ready, willing and financially able to purchase the particular property described in the agency contract pursuant to the terms and conditions specified therein. * * *

"* * * in order to invoke the doctrines of extension or modification of contracts, the essential facts relied upon to bring the situation within the operation of those doctrines must be pleaded * * *. The rule in this regard is that a plaintiff must plead the particular contract which he claims he has performed; he cannot recover on proof of another contract, or of a contract substituted for, or constituting a modification of the contract declared on."

Again, in Love v. Gulyas, 87 Cal.App. 2d 608, 615, 618, 197 P.2d 405, 410, it was said:

"While courts should not be technical in the matter of pleading, a plaintiff should not be permitted to base his entire complaint on one theory, and then later adopt another theory which is not even hinted at in the pleading. The rule of extension of a broker's contract is dependent upon a waiver. * * * The complaint alleges full performance of the contract, and in no way alleges nonperformance and extension of it. * * *

"It has been held that the time set forth in a real estate broker's contract to sell real property cannot be extended by oral agreement. Hicks v. Post, 154 Cal. 22, 98 P. 878; Rice Lands & Products Co. v. Blevins, 61 Cal.App. 536, 215 P. 402. However, there is an exception to that rule where there has been a full performance by the broker. In such case, it is held that the limitation of time mentioned in the writing is waived by the seller continuing with the deal, through the same broker, after the expiration of the time expressed in the writing. See Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114; Umphray v. Hufschmidt, 73 Cal.App. 140, 238 P. 749; Estes v. Hotchkiss, 63 Cal. App. 284, 218 P. 605. The effect of such cases is that where the broker has completed his part of the contract with the consent of the seller, after the time limit has expired, his performance of the contract takes it out of the statute of frauds, and also estops the seller from relying on that statute. Here, there was no performance by the broker even after the time limit had expired, and hence there was no performance to extend the contract beyond the original time limit."

[5] Likewise here. Appellant's assignor had nothing to do with the Anderson transaction and that deal was never consummated.

For the reasons stated the judgment is affirmed. The appeal from the order denying a new trial is dismissed. (3 Cal.Jur.2d 500.)

WHITE, P. J., and DORAN, J., concur.

125 Cal.App.2d 697

McNULTY v. COPP et al.

ELDRIDGE v. AHERN et al. (two cases).

Civ. 15769–15771.

District Court of Appeal, First District,
Division 1, California.
June 3, 1954.

Rehearing Denied July 2, 1954.
Hearing Denied July 28, 1954.

Action for accounting and for damages for use and possession of realty, with which were consolidated an action between same parties for possession and damages for wrongful detention of personal property located on real property in question, and a motion for payment over of the cash appeal bond filed by present defendants in prior action involving same realty. The Superior Court, City and County of San Francisco, Henry G. Jorgenson, J., ordered the bond paid, and entered judgment for plaintiff in both actions, and defendants appealed. The District Court of Appeal, McMurray, J. pro tem., held that the judgment in prior action involving the realty was a bar to plaintiff's present action with respect to such realty, that order directing payment of full amount of cash appeal bond without allocating specifically the amount of damage occurring between date of appeal and surrender of possession, to insure payment of which the cash was deposited, was improper, and that the judgment respecting the personalty would be reversed and remanded in order that it might be determined what damages were occasioned by the wrongful detention.

Order reversed with instructions; judgment in respect to real property reversed and to be entered for defendants; judgment in respect to personal property reversed and remanded for trial.

1. Judgment 🔑540

The doctrine of res judicata precludes parties or privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction, and is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy, and doctrine also serves to protect persons from being twice vexed for same cause.

2. Judgment 🔑585(1, 4), 720

If subsequent action is in fact the same cause of action as one previously tried, involving same parties, judgment in first action is a bar in the later action, but if the subsequent action is a different cause of action, the original action only operates as a conclusive adjudication as to such issues as were actually litigated and determined therein, and fact that original action was determined on a cross-complaint makes no difference, and the doctrine of res judicata applies as fully as if a separate action had been brought by defendant against plaintiff.

3. Judgment 🔑585(4)

Where defendant in prior action obtained judgment canceling deed and quieting title, pursuant to cross-complaint charging plaintiffs with wrongful possession of the real property involved, such judgment was a bar to a subsequent action by defendant against plaintiffs for an accounting and for damages for use and possession of such realty, since same wrongful act gave rise to both actions and issues raised in subsequent action could have been litigated in prior action.

4. Action 🔑53(1)

A party may not split up the single cause of action and make it the basis of separate suits.

5. Judgment 🔑592

When a party splits a single cause of action using the same obligation as the bases of separate suits, judgment in first action may be pleaded as bar to subsequent suit based on same fundamental claim which could have been presented in the first action.

6. Ejectment 🔑1

If action to quiet title is brought by party out of possession against one claiming title who is in possession, the action is in substance one of ejectment. Code Civ. Proc. § 738.

7. Judgment 🔑590(1)

Whether or not a party is aware of the damages at the time of prosecution of prior action does not lift bar of res judicata.

8. Judgment 🔑958(1)

In determining question of application of doctrine of res judicata, court must consider the record before it.

9. Judgment 🔑713(2)

An action for return and value of possession of personal property could have been joined with prior action for cancellation of deed and to quiet title, brought on theory of wrongful possession of real property involved, but was not so inherently connected with the original action as to require application of res judicata when it was not so joined.

10. Action 🔑53(1)

Where two separate rights are violated, one dealing with real property and one with personal property, it is not incumbent on plaintiff to unite such actions.

11. Judgment 🔑588

Where defendant in prior action obtained judgment canceling deed and quieting title, pursuant to cross-complaint charging plaintiffs with wrongful possession of real property involved, such judgment was not a bar to a subsequent action by defendant against plaintiffs for wrongful detention of certain personal property located on the real property involved in the original action.

12. Judgment ⚿736

Where probate court, in entering order authorizing settlement of fire damage to personal property for total sum of $2,098.44, did not take into consideration the full value of a certain painting, which was worth $3,000, and was a total loss, because of fraudulent concealment of value and even its existence from the court by possessor thereof, the probate order was not res judicata as to the destroyed picture, and did not bar recovery therefor in an action against the possessor by the persons entitled thereto.

13. Detinue ⚿19

Damages sought for detention of personal property were not rent from defendants for their use and enjoyment of the property, but were in nature of compensation to plaintiff for wrongfully depriving her of use and enjoyment of the property, and fact that rental value of property was used as measure of damages did not make such damages rent.

14. Money Paid ⚿1
Taxation ⚿531(1)

Possessors of realty under a void claim of right were mere volunteers so far as payment of taxes, payment for repairs and expenditures for other maintenance were concerned.

15. Interest ⚿60

In action for wrongful detention of personal property, evidence, which amply supported conclusion that defendant was guilty of fraud, authorized the allowance of compound rather than simple interest. Civ.Code, § 3288.

16. Detinue ⚿19

Where evidence in action for wrongful detention of real and personal property was of such nature as to justify an inference of a fraudulent intent on part of defendant, allowance of exemplary damages was proper. Civ.Code, § 3294.

17. Appeal and Error ⚿1234(4)

Where appellants made cash deposit in lieu of undertaking, for express purpose of assuring payment of damages for use and occupation of realty from time of appeal to time possession thereof was surrendered, subsequent order for payment of the full amount, which did not allocate specifically the amount of damage occurring between date of appeal and surrender of possession, was improper.

◆

Frank J. Fontes, San Francisco, Leo R. Friedman, San Francisco, for appellants.

George Herrington, Willard S. Johnston, William H. Orrick, Jr., Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, for respondents.

McMURRAY, Justice pro tem.

Three separate appeals are involved here. The first is an appeal from an order for payment of a cash appeal bond in McNulty v. Copp, No. 15769, which bond was posted on appeal therein; the decision on the appeal in that matter is reported in 91 Cal.App.2d 484, 205 P.2d 438; it will hereafter be called the original action. The second appeal is in Eldridge v. Ahern, No. 15770, and is from a judgment for the plaintiff in an action for accounting and for damages for the use and possession of the real property involved in the original action; this second appeal will hereafter be called the real property action. The third appeal is in Eldridge v. Ahern, No. 15771, and is from a judgment for plaintiff in an action for the possession and damages for the wrongful detention of certain personal property located in the residence on certain of the real property involved in the original action; this third appeal will hereafter be called the personal property action.

Mrs. Anita McNulty, plaintiff, cross-defendant and appellant in the original action, is the same person as Anita McNulty Ahern who is one of the defendants and appellants in the real property action and also in the personal property action; the other defendant and appellant in the last two actions is William Ahern, her husband.

Mrs. Olive Copp Eldridge is Mrs. Ahern's sister and, with Herbert Copp, as executor of the estate of Henry W. Copp, deceased, was defendant, cross-complainant and respondent in the original action. Mrs. Eldridge was substituted as plaintiff for Herbert Copp, as executor, in the real property action and the personal property action and is the respondent in all actions.

All of the appeals deal either with certain real property which was the residence of Henry W. Copp, the father of Mrs. Ahern and Mrs. Eldridge, during his lifetime, or with personal property which was in said residence.

The facts here pertinent are that in January, 1945, Henry W. Copp died leaving a will by which he left his residence and an adjacent lot to Mrs. Eldridge. A few hours after his death Mrs. Ahern recorded a deed from her father to herself purporting to be signed and executed in 1933, and covering lots 4 and 5 of block 9 in the St. Francis Wood subdivision in San Francisco. Henry Copp's residence was, in fact, on lot 6 of said block; the garden adjacent to the residence was on lot 5 of the same block. Mrs. Ahern filed the original action against her sister and the executor of her father's estate seeking reformation of the deed to recite the proper lots. The executor and Mrs. Eldridge defended on the ground of fraud, and cross-complained for cancellation of the deed and for quiet title. In this action it was found by the trial court that the deed recorded by Mrs. Ahern had been obtained by a fraudulent representation to her father, who was nearly blind and depended upon Mrs. Ahern to read to him, that the execution thereof was necessary to clear a defect in the title to certain real property, and that Henry Copp had never intended to execute any deed to his residence to Mrs. Ahern. Judgment was given on the cross-complaint ordering cancellation of the deed and quieting title, and was affirmed on appeal in McNulty v. Copp, 91 Cal.App.2d 484, 205 P.2d 438. In the original action, in lieu of an undertaking on appeal, under Code of Civil Procedure section 945, Mrs. McNulty posted $9,100 in cash as provided in Code of Civil Procedure, section 1054a.

While the appeal in the original action was pending, the real property action, No. 15770, and the personal property action, No. 15771, were filed. By amendment to the answers after remittitur appellants pleaded that the original action was *res judicata* as to the subsequent actions.

Over objection by the appellants the trial court ordered that the motion for order to pay over the cash deposit in the original action be consolidated with the other two actions and, after trial, ordered the payment of the full amount of the deposit to Mrs. Eldridge and gave judgment for respondent and against appellants in the real property action and also in the personal property action for the sum of $22,042.61.

During the consolidated trial of the motion and actions it appeared that there had been a fire in the residence here involved and that certain items of personal property had been damaged. Among these items was a painting worth $3,000, according to testimony, which was so damaged as to render it valueless as a work of art. Mrs. Ahern concealed the true value of this painting from the executor and her relatives and had an artist patch up the picture so that its damaged condition would not be readily apparent to unskilled persons. The executor obtained an order in the probate court approving an insurance settlement of the total fire loss without any particular reference to this picture. The trial court allowed an amendment to conform to proof regarding this picture and found that appellants had concealed the true value of and extent of the damage to this painting from respondent and had by this fraudulent conduct damaged respondent in the amount of $2,900, the value of the painting less salvage value.

In his memorandum opinion in the real property and personal property actions the trial judge stated that Mrs. Ahern had been guilty of "deliberate oppression, falsehood, fraud and malicious conduct in the prosecution and defense of these cases" and that there should be an award of exemplary damages in the sum of $2,000, and allowed respondent to amend her complaint so to state. These statements were incorporated into the findings of fact, and the court, in addition, found that such oppression, fraud and malicious conduct applied as well to appellants' occupancy, retention and misappropriation of the real and personal property and the proceeds from the insurance of the damaged painting.

The court further found that the rental value of the furnished residence was the sum of $200 per month and (despite testimony that for 17 months the house was not in condition to rent due to the fire damage although occupied by Mrs. Ahern) assessed damages for the full period of appellants' occupancy, including the time after judgment and before appellants' relinquishment of the property after remittitur in the original action, and provided that interest on the damages, compounded annually, be paid to Mrs. Eldridge for the entire period of time in question, both as to the value of use and occupancy and the value of the painting. The court further found that the facts and law determined in the original action were res judicata as to such matters in the subsequent actions and also found that appellants were constructive trustees for respondent of all the property involved.

There are eight questions involved:

1. Was the original action res judicata in the real property action?

2. Was the original action res judicata in the personal property action?

3. Was the probate order res judicata as to the claim for the destroyed picture; was there sufficient evidence to support the award of damages for the picture?

4. Was it error to award the fair rental value of the premises during the period they were damaged by fire?

5. Are the appellants liable for damages occurring without fault; are they entitled to offset expenses in preserving, maintaining and repairing the property?

6. Was it error to allow compound interest on the unliquidated claims?

7. Was it error to award exemplary damages?

8. Was it error to order payment of the cash deposited on appeal in the original action?

[1] 1. *Was the original action res judicata in the real property action?*

The judgment in the original action was rendered on a cross-complaint which prayed for cancellation of certain deeds and for a decree quieting title to the property therein described and granted both of these prayers. In Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, at page 810, 122 P.2d 892, at page 894, it is said: "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction." And at page 811 of 19 Cal. 2d, at page 894 of 122 P.2d: "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. (Citations.) The doctrine also serves to protect persons from being twice vexed for the same cause." Here the original action and the real property action both arose from the same wrong by Mrs. Ahern; that is, the wrongful possession of the real property by her. There can be no question that had respondent in the original action sought damages for this wrongful use and occupancy of the property a judgment therefor would have been proper as well as the judgment ordering cancellation and quieting title.

[2] If the real property action is in fact the same cause of action as the original action the judgment in the first action is a bar in the later action; if, however, the real property action is a different cause of action, the original action only operates as a conclusive adjudication as to such issues as were actually litigated and determined in that action. Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916. The fact that here the original action was determined on a cross-complaint makes no difference; the doctrine of res judicata applies as fully as if a separate action had been brought by defendant against plaintiff. Lamb v. Wahlenmaier, 144 Cal. 91, 94, 77 P. 765.

Respondent vigorously contends that while she might have joined her claim for the recovery of the possession of the real property with a claim for damages for its withholding she was not required to do so, and may prosecute separate actions. In support of this position she cites: Progressive Collection Bureau v. Whealton, 62 Cal.App.2d 873, 145 P.2d 912; Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 81 P.2d 944; Denning v. Green, 119 Cal.App. 102, 6 P.2d 317; Carpenter v. Hamilton, 24 Cal.2d 95, 147 P.2d 563, 153 A.L.R. 733; Slater v. Shell Oil Co., 58 Cal.App.2d 864, 137 P.2d 713.

Progressive Collection Bureau v. Whealton, 62 Cal.App.2d 873, 145 P.2d 912, was an action for collection of rent under a contract. The appellant there contended that a previous quiet title suit wherein this rental could have been recovered was res judicata. The fact that the obligation for the payment of rent was a contract obligation readily distinguishes this case from the instant one. The primary right there violated was the failure to pay certain amounts under a contract, whereas the primary right violated in the earlier quiet title action was the assertion by the defendant of a title adverse to plaintiff, and arose independent of the contract.

Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 81 P.2d 944, was an action to recover rentals collected by defendants. A judgment in a prior action for specific performance had awarded possession to plaintiff and defendant urged that such action was a bar to further proceedings, as the claim for rent collected could have been litigated in the prior action. The court held that the action for the rents collected was not a necessary or indispensable issue in the prior action. Again, analysis reveals that the two actions arose from different rights. The action for specific performance was based upon contract provisions in a deed of trust; the action to recover rents collected by defendants was based on their wrongful act in collecting rents which belonged to plaintiff.

Denning v. Green, 119 Cal.App. 102, 6 P.2d 317, was also a case wherein, after a decree for plaintiff in a quiet title action, plaintiff sued for rents collected by defendant before the quiet title adjudication. The court denied the plea of res judicata interposed by defendant, even though in the quiet title action there appeared a finding that defendant collected and retained rentals in the sum of $920. The court said that the matter of rental not being an issue in the quiet title action, the finding was of no effect and the action was not res judicata on the matter of rental. Again, there are separate rights involved in the two actions: the first the assertion of an adverse interest in the real property by defendant, and the second the wrongful collection and retention of rents by the defendant.

The other cases relied on by respondent also involve the violation of more than one primary right, and therefore involve more than one cause of action.

[3] So far as the real property action here involved is concerned in its relation to the original action the doctrine of res judicata must apply and operate as a bar to that subsequent action. Respondent cannot treat the wrongful possession of appellants and the withholding of possession as two separate acts or as a violation of two primary rights. The original action sought to quiet title to the real property and for a writ of possession as well as for cancellation of the purported deed. Assuredly this is the type of equitable action wherein the court could and should dispose of all claims relating to this property in the one action.

The fact that appellants' wrongful withholding had existed for a very short period of time at the institution of the original action did not deprive respondent of the right to seek recovery of prospective damages for the withholding. In Abbott v. 76 Land & Water Co., 161 Cal. 42, at page 48, 118 P. 425, at page 428, it is said: "Resorting as he did to an action in equity to compel specific performance of the contract, instead of an action at law for damages, the decree in his favor of the court having the power to give him all relief that he was entitled to on account of the breach is likewise conclusive, and a bar to any subsequent action for relief based on the same contract. * * * In such a case, it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered. He is bound to prove in the first action not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to; for the judgment he recovers in such action will be a conclusive adjudication as to the total damage on account of the breach." That a contract was there involved while here there is a tort does not affect the plain meaning and application of this language.

When the purpose of the original action here is scrutinized it is apparent that the essential deliction alleged is the wrongful possession of the real property. This is so even though the cross-complaint is in the nature of a suit to quiet title, a more usual remedy than ejectment to put one in possession of property occupied by another, and also asks that the purported deed be cancelled as an ancillary remedy to the quiet title relief sought. In view of the rule stated in Abbott v. 76 Land & Water Co., supra, a consideration of the original action and the remedies sought therein and granted in the judgment raises the question as to why respondent did not seek damages for the wrongful use and occupancy of the real property. The same wrongful act—the possession under a false claim of right—gave rise to both the original action and the real property action. To allow the subsequent real property action to be prosecuted is to allow respondent to split the same cause of action.

[4] "[A] party may not split up a single cause of action and make it the basis of separate suits * * *." Wulfjen v. Dolton, 24 Cal.2d 891, 894, 151 P.2d 846, 848. This rule is merely another application of res judicata. The first judgment acts as a bar, thus prohibiting a second suit on the same cause of action or one of its indivisible parts. 40 Cal.Law Rev. 412, 419. Van Horne v. Treadwell, 164 Cal. 620, 130 P. 5, is to the same effect.

[5, 6] The case of McCaffrey v. Wiley, 103 Cal.App.2d 621, 230 P.2d 152, is particularly apposite to the question here involved. In that case the plaintiff and the defendant were both lessees of the same land from the same lessor. The defendant had in good faith entered into possession of the land and commenced farming it under the terms of his lease. Plaintiff sued in ejectment and recovered judgment. Thereafter plaintiff brought this action to recover damages for the wrongful withholding of possession for the time defendant had occupied the land. The court said at page 623 of 103 Cal.App.2d, at page 154 of 230 P.2d: "It is well settled in this state that a party may not split a single cause of action, using the same obligation as the basis of separate suits, and that where this is done the judgment in the first action may be pleaded as a bar to a subsequent suit based on the same fundamental claim which could have been presented in the first action." And in the same opinion at page 624 of 103 Cal.App.2d, at page 154 of 230 P.2d: "The matter of ejectment and the matter of damages for withholding possession are both based upon the same invasion of the same right." There is no valid distinction which can be based upon the fact that in the McCaffrey case the original action was in ejectment, while here the original action was for quiet title, since "If the action to quiet title is brought by a party out of possession against one claiming title who is in possession, the action, although specifically authorized by section 738 [Code Civ.Proc.], is in substance one of ejectment. * * *" 25 Cal.Law Rev. 565, 569.

The court in the case of McCaffrey v. Wiley, supra, 103 Cal.App.2d at page 624, 230 P.2d at page 155, also said: "In the instant case, the one primary right involved was the right of the appellant to possession of the land and there was but one violation of that duty on the part of the respondent. Both actions were based on the same invasion of the same right, and under the well established rules with respect to the splitting of actions which prevails in this state the appellant should have presented his claim for damages in the prior action, and by failing to do so he must be held to have waived it."

The very fact that section 945 of the Code of Civil Procedure provides that on appeal from a judgment or order directing the delivery of possession of real property (as was here the case), the appellant must execute an undertaking to the effect that if the judgment be affirmed he will pay the value of the use and occupancy of the property from the time of the appeal to the delivery of possession of the realty, indicates that damage for use and occupancy of real property is a necessary incident of a suit for possession of realty. In the instant matter the cash deposit in lieu of bond was made in the sum of $9,100 which, under the provisions of the above sections, was the amount fixed by the court for the undertaking. Certainly, so far as the order for payment of that deposit made herein was concerned, the greatest amount the court could order paid was for $9,100; the only action in which this deposit was available was the original action and the only damages to which it could be ordered applied were those for the use and occupation of the real property from the time of the appeal until the delivery of possession of the realty after the affirmance of the judgment.

[7] Whether or not a party is aware of the damages at the time of prosecution of the prior action does not lift the bar of res judicata. Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242.

From what has been said it is apparent that the appellants' plea of res judicata in the real property action should have been sustained.

2. *Was the original action res judicata as to the personal property action?*

By applying the rules discussed above to the action seeking damages for the wrongful detention of the personal property it can be seen that the damages sought are not occasioned by the same breach or deliction involved in the original action.

Appellants vigorously urge that the furnishings in the residence were necessarily involved in the original action, and in support, point to a statement in the judgment therein that the claim of Mrs. Ahern to the residence lots "and to the improvements thereon and the furnishings thereof, * * * is without right and * * * [that she] has no right, title or interest therein or thereto." Appellants further contend that the original action by including in the findings of fact therein the language of Henry W. Copp's will which left the residence to Mrs. Eldridge "including all furnishings therein" conclusively determined the personal property action.

In support of their position appellants cite Heffernan v. Bennett & Armour, 63 Cal.App.2d 178, 184, 146 P.2d 482, 485, to the effect that: "If and when an attack is made in the complaint on an alleged fraudulent conveyance the plaintiff may not split the cause of action and attack separately the conveyance of real estate and secondly the conveyance of personal property. If the attack is made otherwise the pleader splits his cause of action and must suffer the consequences." This undoubtedly is a correct statement of the law as applied to the facts in that case, one wherein the basic question was one of venue, but it is not persuasive in the instant case.

[8] The case of Denning v. Green, 119 Cal.App. 102, 6 P.2d 317, is more nearly in point in the instant case. There, in an action to recover rents wrongfully collected by defendant, a prior quiet title action was held not to be a bar to such recovery. The court said at page 105 of 119 Cal.App., at page 319 of 6 P.2d: "In that action [the prior quiet title action] the complaint and other pleadings do not mention rental. The complaint is the simple and ordinary form to quiet title. In the findings, however, the trial court finds that appellant collected and retained rental in the sum of $920. There is no mention of rental in the conclusions of law or in the judgment. The evidence in the former case is not before us. It thus appears, and we must conclude that the matter of rental was not an issue in the case. Matters not in issue in the previous action are not *res judicata*. 15 Cal.Jur. p. 134. The finding made upon the matter of rental was clearly outside the issues, and cannot constitute a bar to the present action." The case clearly stands for the proposition that in determining the question of the application of the doctrine of *res judicata* the court must consider the record before it.

[9-11] By analogy, in the instant case the casual references to the furnishings cannot be construed as bringing them into issue in what we have seen was in effect a suit for ejectment. There was no itemization or attempt at itemization of furnishings in the original action. Certainly the wrongful possession of the real property is the violation of a different right than that involved in the wrongful possession and detention of the personal property. Of course, there is no question that an action for the return and the value of possession of the personal property could have been joined with the original action, but it is not so inherently connected with the original action as to require the application of the doctrine of res judicata when it is not so joined. The personal property action is one that is the same as the common law action of detinue; it sounds in the wrongful possession of personal property and seeks restoration of the property as well as damages for its wrongful detention. It would be a needless and unsound extension of the doctrine of res judicata to hold that where two separate rights are violated, one dealing with real property and one with personal property, it is incumbent on the plaintiff to unite such actions. The case of Heffernan v. Bennett & Armour, supra, is clearly distinguishable. That suit was one to set aside a fraudulent conveyance of both real and personal property made at the same time and as part of the violation of the same right, that is, the conveyance was made to defraud creditors. In the instant case we have the violation of two separate rights—the one concerned with real property, the other with personal property.

The references to personal property in the pleadings in the original action do not appear to be of sufficient importance to compel the conclusion that the right to possession and damages for detention of that property were necessarily decided in the original action. Admittedly, it would have been better to have omitted all references to the furnishings from the original action, but the casual references thereto are not sufficient to show that they were a subject of litigation in that action.

Furthermore, had the original action determined the personal property action the appeal therein should have, and assumedly would have, been accompanied by an undertaking on appeal in the manner prescribed in Code of Civil Procedure, section 943. No such undertaking was posted; by failing to do so it indicates that at the time of appeal in the original action appellant considered the action to be one relating to real property only.

The plea of res judicata was properly denied in the personal property action.

[12] 3. *Was the probate order res judicata as to the destroyed picture?*

The probate court authorized the settlement of certain fire damage to personal property for the total sum of $2,098.44. It appears from evidence in the record in the personal property action that at the time of this probate appearance the executor did not know the value of a certain painting in the house. Mrs. Ahern had this painting appraised by an expert who set the value thereof at $3,000 and found it to be a total loss. Thereafter, negotiations for settlement of the loss were carried on with the insurance company and a settlement was agreed upon whereby $1,000 was accepted by Mrs. Ahern as the amount payable for the painting, but with the understanding that no one in the family should be advised thereof. The attorneys for the executor never received a copy of the $3,000 appraisal, and never knew the picture was a total loss. The petition for compromise of the claim for insurance was presented with the representation that the amount sought therefor had been paid out by Mrs. Ahern for the repair of the furniture, that it was all repaired, and the order approving the compromise directed the payment of the money to Mrs. Ahern by the executor. The trial court in the instant case believed that Mrs. Ahern had caused a fake restoration of the painting, and had concealed the fact of the extent of the loss from the executor. The trial court's conclusion from the testimony is not without respectable evidence in support.

It has been held that, where a probate order of distribution was obtained by fraudulently withholding facts from a legatee, the legatee might thereafter recover his just share in an action in other than the probate court. There the defendant was an executrix and was held to be a constructive trustee for the plaintiff. Blair v. Mahon, 104 Cal.App.2d 44, 230 P.2d 832.

How it can be urged that the matter of the damage to this painting was necessarily determined by a court which had no knowledge of the value of the painting, because of Mrs. Ahern's fraudulent concealment of its value and even its existence from the court, is a difficult proposition to understand. Appellants, of course, contend that there was no fraud practiced, but the record is adequate to support the finding of the trial court in that respect.

Appellants here were in possession of the painting by reason of a void claim. Even if they were not trustees, they were trespassers. If the property in their possession suffered loss during their unlawful holding of it, they are liable for the full amount of that loss. The wrongful possession of appellants does not entitle them to seek at this time to charge the executor of an estate with negligence when his alleged negligence was induced by wrongful actions by one of the appellants. The destruction of the painting while in possession of appellants gave respondent the right to recover the full value thereof. If the painting had been delivered to respondent in good condition, she might only recover the damages arising from the detention.

Mrs. Ahern elected to rely upon her possession as being rightful. The converse has been found. She cannot now escape the damages to the property so held by her by maintaining that the cause of damage was beyond her control.

The probate proceedings are not res judicata as to the painting, since no issue was before the probate court necessarily involving the painting.

[13] 4. *Was it error to award the fair rental value of the premises during the period they were damaged by fire?*

In view of the conclusion reached that the real property action was barred by the doctrine of res judicata, it is not necessary to determine this question relative to that portion of the damages allocable to the real property withholding. The period during which the real property was damaged by fire was within the time between the filing of the initial complaint in the original action and the trial thereof. The findings of fact, conclusions of law and judgment on the consolidated trial of the motion for payment of the cash deposit, and the real property action, do not, however, segregate the damages as to the value of the use and occupancy of the realty and the damages for the wrongful detention of the personalty. Instead, an award of $200 per month was made for the value of the use and occupancy of the furnished residence.

The damages sought for the detention by appellants of the personal property are not, as appellants seem to contend, rent from appellants for their use and enjoyment of the property, but are in the nature of compensation to respondent for wrongfully depriving her of the use and enjoyment of the property. The fact that the rental value of the property is used as the measure of damages does not make those damages rent.

Therefore, so far as the personal property action is concerned, the assessment of damages for the time the property was damaged by fire was proper.

[14] 5. *Are the appellants liable for damages occurring without fault; are they entitled to offset expenses in preserving, maintaining and repairing the property?*

What has been said regarding damages to the painting resolves the first part of this question; the same reasoning applies to the remainder of the question. Appellants by asserting a void right are mere volunteers so far as payment of taxes, payment for repairs and expenditures for other maintenance are concerned. McMillan v. O'Brien, 219 Cal. 775, 29 P.2d 183, 91 A.L.R. 383.

[15] 6. *Was it error to allow compound interest on the unliquidated claims?*

The trial court allowed compound interest in these claims. Appellants contend that neither simple nor compound interest was allowable. There can be no doubt that simple interest could have been allowed. This question also is determined, as to the damages awarded for the wrongful use and occupancy of the real property up to the time of appeal of the original action, by the conclusion reached relative to the application of res judicata to the real property action.

The allowance of interest on that portion of the damages allocable to the wrongful detention of the personal property including the painting is, however, still a question which must be determined. Section 3288 of the Civil Code allows the jury to award interest in an action on tort in "every case of oppression, fraud, or malice". This section has been held to give like power to a judge who is the trier of the facts. Isaacs v. Frank Meline Co., 2 Cal. App.2d 341, 37 P.2d 1045. The record before the court in the personal property action included all records in the original action and, together with much of the testimony in the personal property action, amply supports a conclusion that Mrs. Ahern was guilty of fraud. Simple interest could have been allowed. The court allowed, however, compound rather than simple interest. This was proper. There are many cases cited dealing with the right to award such damages when there is a showing of wrongdoing on the part of a trustee, whether voluntary or involuntary. Falkner v. Hendy, 80 Cal. 636, 22 P. 401; In re Thompson's Estate, 101 Cal. 349, 35 P. 991, 36 P. 98, 508; Long v. Neeland, 118 Cal. App. 203, 4 P.2d 815; Katz v. Enos, 68 Cal. App.2d 266, 156 P.2d 461.

[16] 7. *Was it error to allow exemplary damages?*

The findings in the original action show that Mrs. Ahern pursued a course of conduct which clearly shows a fraudulent intention. Much of her testimony in the consolidated trial of the later actions is of such nature as to justify the judge in inferring a fraudulent intent on her part.

Appellants cite numerous cases on malicious prosecution to attempt to escape the exemplary damages. They further contend that there is no pleading which justifies the award. The pleadings appear to be adequate to bring this case within the scope of section 3294 of the Civil Code. That section reads as follows: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

A mere reading of this section and reading of the record of the original action and of the personal property action here shows this to be precisely the type of situation contemplated by the code provision. The award was proper.

[17] 8. *Was is error to order payment of the cash deposited on appeal in the original action?*

This question is presented by appellants in such a confused manner that it is difficult to follow the argument. The contention is made that the obligation of the sureties is barred by the judgment in the original action and by the statute of limitations. Here there is no question of the liability of any sureties; there was a cash deposit in lieu of undertaking; that cash was deposited for the express purpose of assuring payment of the damages for the use and occupation of the realty from the time of appeal to the time possession thereof was surrendered; the motion to order payment thereof was not barred by any statute of limitations. The order for payment of the full amount made here is not supported by the record, since it does not allocate specifically the amount of damage occurring between the date of appeal and the surrender of possession.

The order appealed from in the original action, No. 15769, is reversed with instructions to conduct a hearing to determine the amount of damage suffered by the use and occupancy of the realty of appellants during the time between the appeal and the surrender of possession of the premises to respondent and to then order the payment of the amount so determined from the cash on deposit in lieu of undertaking.

The judgment appealed from in the matter of the real property action, No. 15770, is reversed, judgment to be entered for appellants.

The judgment appealed from in the matter of the personal property action, No. 15771, is reversed and remanded for trial in accordance with the statements here contained in order to determine what damages were occasioned by the wrongful detention of the personal property including the painting.

Appellants to recover their costs in all three appeals.

PETERS, P. J., and BRAY, J., concur.

LEMING
v.
OILFIELDS TRUCKING CO. et al.*

Civ. 4675.

District Court of Appeal, Fourth District, California.

May 27, 1954.

Rehearing Denied June 22, 1954.

Hearing Granted July 21, 1954.

Action was brought against corporations, which allegedly employed driver of tractor-trailer, and driver to recover for injuries caused by negligent operation of the tractor-trailer. The Superior Court of Kern County, W. L. Bradshaw, J., entered judgment adverse to corporations, and they appealed. The District Court of Appeal, Griffin, J., held that award of $213,480.02 to 47 year old truck driver, who had been earning $410.41 net each month, for loss of part of right leg and fractures of left leg, was excessive.

Judgment reversed.

1. Appeal and Error 🔑931(1)

Substantial conflicts in evidence must be resolved in favor of respondent on appeal, and all legitimate and reasonable inferences must be indulged in to uphold the findings, if possible.

2. Automobiles 🔑244(26)

In action against driver of tractor-trailer and corporations, which were allegedly employers of driver, to recover for injuries caused by negligent operation of tractor-trailer, evidence was sufficient to sustain finding that driver was acting within scope of his employment when accident occurred, and with the express or implied consent of the corporations.

3. Automobiles 🔑244(22)

In action against driver of tractor-trailer and corporations, which were allegedly employers of driver, to recover for injuries caused by negligent operation of tractor-trailer, evidence clearly established a joint venture and that corporations, as joint venturers, exercised control over the driver, so that negligence of driver could be imputed to both corporations.

4. Negligence 🔑89(1)

Negligence of one joint venturer is imputed to the others.

5. Automobiles 🔑246(42)

In action against corporation, which was the alleged employer of driver of tractor-trailer, to recover for injuries sustained because of negligent operation of tractor-trailer, wherein there was evidence that driver took tractor-trailer without permission of corporation, court erred in refusing to give corporation's requested instruction that if jury believed that taking of tractor-trailer by driver was without corporation's permission or consent, then verdict was required to be in favor of corporation.

6. Automobiles 🔑246(42)

In action against corporation, which was allegedly employer of driver of tractor-trailer, to recover for injuries sustained because of negligent operation of tractor-trailer, wherein corporation introduced evidence that driver had taken the tractor-trailer without permission or consent of the corporation, instruction which informed jury that driver was an agent and employee of corporation was erroneous.

7. Damages 🔑132(10)

Award of $213,480.02 to 47 year old truck driver, who had been earning $410.41 net each month, for loss of part of right leg and fractures of left leg, was excessive.

8. Appeal and Error 🔑1177(5)

Where trial court refused to give proffered instruction, which should have been given, and gave erroneous instructions, and verdict was excessive and appeared to have been influenced by passion and prejudice, judgment would be reversed on appeal and new trial ordered.

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* Vacated 282 P.2d 23.

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Baker, Palmer & Wall, Bakersfield, for appellant Oilfields Trucking Co.

Jack W. Bradley, Bakersfield, for appellant Phoenix Const. Co.

Oscar F. Catalano, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action for damages against defendant Oilfields Trucking Company, a corporation (hereinafter referred to as Oilfields), defendant Phoenix Construction Company, a corporation (hereinafter referred to as Phoenix) and James Elbert Mason, driver of the tractor-trailer involved in an accident occurring about 10 p. m. on July 10, 1951.

The evidence shows that plaintiff and another truck driver had parked their respective trucks parallel to the east curbing on Highway 99, near Bakersfield, and across the highway from a small restaurant. These drivers were standing between their two parked trucks, engaged in checking or making some repairs to the front of the rear truck when the rear truck, which was fully lighted, was struck from behind by a tractor-trailer driven by defendant Mason, resulting in the death of one truck driver and the subsequent amputation of a greater portion of one leg and serious injury to the other leg of plaintiff Leming.

It is alleged that Mason was, at the time, an agent and employee of each corporation, which corporations were acting as joint venturers in a construction job, and that the agent was then acting within the scope of his employment.

The answers of the defendant corporations denied generally the allegations of the complaint and admitted that defendant Oilfields was the owner of the tractor-trailer involved, but alleged that Mason was not operating it with its consent or permission at the time, and alleged that he was not then operating it as their agent or employee within the scope of his agency.

A jury trial resulted in a judgment against all defendants for $212,585.69. The corporate defendants filed motions for new trial which were conditionally denied provided plaintiff agreed to accept reduction of said verdict to $117,400.20. Plaintiff refused and a new trial was had before a different jury and judge, which resulted in a verdict against the corporations for $213,480.02. Subsequent motions for new trial by each corporation were denied.

On appeal the questions presented by defendant Phoenix are limited to the claims: (1) That the evidence was insufficient to support the jury's necessary conclusion that defendant Mason, at the time of the accident, was acting within the scope of his employment by defendant Oilfields or within the scope of any agency relationship to either corporate defendant. (2) That the evidence was insufficient to support a judgment against Phoenix, as a joint adventurer of Oilfields, since Phoenix exerted no control over Mason. (3) That there was prejudicial error in instructing the jury on the issue of agency in the course of employment, especially with respect to the question of lack of consent or permission on the part of Oilfields to the operation of the vehicle at the time by Mason. (4) Excessive damages which appear to have been influenced by passion or prejudice.

Defendant Oilfields makes the additional claims: (1) That the jury was improperly instructed as to the law, and that the court erroneously refused certain proffered instructions. (2) That the evidence was insufficient to show agency of Mason at the time in question. (3) That if there was any liability imposed by reason of ownership of the tractor-trailer, the recovery was restricted under section 402 of the Vehicle Code.

The complaint, upon which plaintiff went to trial, stated a cause of action against defendant corporations based on the common-law doctrine of *respondeat superior*, and did not attempt to allege a cause of action based on statutory liability for imputed negligence under Vehicle Code, Sec. 402. The evidence, although in conflict in certain respects, sufficiently shows that Mason was an agent of both defendant corporations, which were operating as joint adventurers in the fulfillment of said contract for the construction of a job known as "Haypress Canyon Job". The complaint alleges that Mason was, at the time, acting within the scope of his employment as to both corporations; that he was negligent and that the injuries sustained were a direct result of that negligence.

[1] It is the time-honored rule that substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings, if possible. Richter v. Walker, 36 Cal.2d 634, 226 P.2d 593; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183.

The defendant corporations are enterprises of the Phoenix brothers of Bakersfield. Harry Phoenix was president of Oilfields and Vice President of Phoenix. Percy Phoenix was president of Phoenix and Vice President of Oilfields. The business of Oilfields was trucking or hauling for hire. The business of Phoenix was construction. The corporations conducted their operations from an area of eight to nine acres mutually occupied by them. They maintained in common their respective offices, shops, yards, garages, warehouses, storerooms, equipment and appliances. Prior to May 21, 1951, the two corporations entered into a written contract with the Division of Highways of the State of California, whereby they agreed to do certain road resurfacing known as the Haypress Canyon Job. It was located a distance estimated about 20 miles east of Bakersfield. This contract was made by defendant corporations as joint venturers and they were so designated therein. This fact was confirmed by the testimony of an officer of each corporation. The corporations had previously engaged, as joint venturers, on similar jobs. Oilfields owned approximately 175 trucking units and employed obout 90 truck drivers. One Butler was its personnel superintendent. He hired Mason, who had previously worked for that company, as a truck driver, on June 14, 1951. He assigned Mason to the Haypress Canyon Job for the duration thereof, as driver of tractor No. 382, combined with a trailer on which was mounted a cement spreader required on the job. The tractor, as well as the trailer, was owned by Oilfields. The cement spreader, mounted on the trailer, was owned by Phoenix. The yards of the corporations were on the west side of Highway 99, south of Bakersfield, and were operated on a 24-hour schedule. Dispatch officers were there maintained. The usual routine or system adopted or followed in the yards in dispatching drivers and equipment was described. Some confusion exists as to whether the usual dispatching orders were to be applied to Mason. Mason had operated a cement spreader on the job from Monday to Friday of each week and it was his duty to be there when the trucks were bringing bulk cement to the job, from 2 o'clock in the morning on, and to assist in unloading them. He slept at the job site in his own car in a convertible bed. Each Friday night he would drive the cement spreader equipment from the job site to the Bakersfield yards of defendants for service and would pick it up again about 4 or 5 o'clock each Monday morning. On July 9th, he returned the spreader to the yards on account of a breakdown of the pug mill. About 5 p. m. on July 10th, the spreader was ordered back on the job by the superintendent of the joint venture, and the dispatcher was unable to locate Mason. He was finally located at about 6 o'clock that evening and told to be at the Haypress Canyon Job the following morning about 5 or 6 a. m., ready to go to work with the spreader.

Mason and one Smith and two girl friends drove around in Mason's car for a while. Mason said he had one drink of Vodka mixed with orangeade. About 9:30 p. m. he drove to the yards of defendant corporations and took from the Oilfields yards the tractor which he had previously used, went to the Phoenix yards and hooked up the trailer and cement-spreading device and drove out on the highway, without notifying the dispatcher of his intended departure. He was going to take it to the job so it would be there the next morning. Smith was to take Mason's private car out and meet him there. As Mason proceeded northerly and easterly on the usual route taken by him to the job site he drove his truck into the rear end of the parked truck, resulting in the injury described.

There is considerable testimony by the dispatcher of the defendant corporations that according to custom Mason was not to take the trucks and trailers without an order, and that it was not his usual custom to take them until an early morning hour, so as to be on the job about 5 a. m.; that on this particular evening Mason did not receive any orders to take the truck at the time it was taken, and did not inform the dispatcher of such fact; that the dispatcher noticed the truck leaving the yard without sufficient lights and the dispatcher immediately notified an agent of the company, who proceeded down the highway to notify Mason of that fact, and found that the accident had happened. Apparently, there was no claim made at that time that Mason had been or was then using the equipment in any unauthorized manner.

Upon this evidence defendants contend that it was conclusively shown that the taking of the equipment, at the time it was taken, was without the consent or permission of defendants.

The evidence and reasonable inferences to be drawn therefrom, although in conflict, might indicate that it was Mason's duty to drive the equipment back to the job site for the early morning work; that on past occasions Mason selected the time; that on some occasions it was as early as 4 o'clock in the morning, and on those occasions he was not required to report to the dispatcher before leaving and that no record was kept during that time of his arrival or departure; that he selected the route he was to travel; that his orders could well have been construed to mean that he was expected to be on the job with the spreader at 5 o'clock in the morning on July 11th, without any designation as to the time when he should leave. There is testimony that Mason was definitely told, by his foreman, to be at the yards at 5 a. m., pick up his equipment, and be on the job at 6 a. m. Mason testified he was told to report to the job at 5 o'clock in the morning, and not to go "out prior to morning"; that he usually picked up the equipment about 4 a. m. and it was not the company's habit to allow drivers to go out at night. Apparently Mason left earlier than usual so he could sleep in his car at the job site. He had arranged to have some one drive his car there for him.

[2] Although there is a decided conflict in the evidence, the record contains sufficient evidence that Mason was acting within the scope of his employment when the accident took place, and with the express or implied consent of his employers. The liability of Mason's employers or employer, for the results of Mason's negligence, arising under the doctrine of *respondeat superior,* apparently rested upon the disputed question whether Mason was or was not an agent of defendant corporations *at the time of the accident,* and whether *he had the permission,* either express or implied, to be using the equipment at that time.

[3,4] Although Mason was paid by Oilfields' payroll check, it was established that the job had one general foreman and it was upon his orders that Mason was recalled to the job that night with orders to return the tractor-trailer and spreader for the purpose of further work then and there contemplated. The evidence clearly established a joint venture and that the defendant corporations, as joint venturers, did exercise control over the agent Mason. Negligence of one joint venturer is imputed to the others. Shook v. Beals, 96 Cal.App.2d 963, 970, 217 P.2d 56, 18 A.L.R.2d 919; Hupfeld v. Wadley, 89 Cal.App.2d 171, 175, 200 P.2d 564.

[5] A serious question arises in regard to the complaint of Oilfields pertaining to the failure or refusal of the court to give a portion of its proffered instruction which recites generally that if the jury believed that the taking of the equipment, at the time, was without its permission or consent, then its verdict must be in favor of that defendant. The court did give a portion of the proffered instruction reciting that the special defense set forth in the answer contained such a claimed defense, but refused to give defendants' instruction

based on that defense. This was clearly error unless the proffered instruction was otherwise sufficiently covered by other instructions. Varner v. Skov, 20 Cal.App. 2d 232, 67 P.2d 123; Schellenberg v. Southern Cal. Music Co., 139 Cal.App. 777, 35 P.2d 156; Plotts v. Albert, 120 Cal.App. 2d 105, 260 P.2d 621.

The court did give general instructions that the acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is at the time of the events out of which the accident occurred, but that if an agent engages in a pursuit suggested solely by his own pleasure or convenience and while so engaged negligently commits a tort, the principal is not answerable although he was using the principal's property. These instructions, although covering the subject matter to some limited extent, did not completely point out to the jury the law as it should be applied to the defense pleaded. Since this was, practically speaking, the only defense defendants had to rely upon, and since contributory negligence was not pleaded, the jury should have been fully instructed in this respect. Rock v. Orlando, 100 Cal.App. 498, 280 P. 377.

The next instruction given was offered by Phoenix and was patterned somewhat after BAJI No. 54–E, p. 66, to the effect that if the jury finds that Mason was an agent of Oilfields and was, at the time, driving a truck owned by it, then the jury may infer therefrom that he was acting as agent for such corporation and within the scope of his authority; that this inference did not necessarily apply to defendant Phoenix since it did not own the truck involved, and since *"the evidence has established that Mason was an employee of Oilfields"*; that the jury was not compelled to draw such inference but may do so if, after considering the evidence, reason and discretion so dictated.

[6] The main complaint to this instruction raised by Oilfields is that the court therein instructed the jury that Mason was in fact the agent of Oilfields; that since the issue of agency, at the time, was disputed, the instruction was erroneous. As will be noted in the given instruction, the court did instruct the jury that Mason was, as a matter of fact, an employee of Oilfields. Although Mason was a daytime employee of Oilfields, the question as to whether he was an employee or agent should have been left to the jury to determine. Although, in this and other instructions, the jury was told that the question whether Mason was an agent of defendants, at the time, was a question of fact for the jury to determine, the giving of this instruction may well have confused the jury and indicated to it that Mason was Oilfields' agent, at the time involved, and that thereby an inference arose that he was driving the truck with the owner's permission and was acting within the scope of his authority because the truck was owned by Oilfields. Accordingly, this was an erroneous instruction. If any inference of agency or employment, by virtue of ownership and permissive use of the vehicle by another, under the theory of imputed negligence is relied upon by plaintiff and is to be applied, then section 402 of the Vehicle Code would restrict the amount of the judgment against the owner to $5,000.

Plaintiff's pleadings made no mention of liability under section 402 of the Vehicle Code and he must rely upon the doctrine of *respondeat superior* to justify the recovery sought. Under that section (paragraph (b) liability for imputed negligence imposed is limited unless it arises "through the relationship of principal and agent or master and servant".

[7] The joint contention of defendants that the verdict, on its face, appears to be excessive and was motivated by passion and prejudice appears to be meritorious and is deserving of a full consideration of the evidence tending to support it.

Plaintiff, at the time, was 47 years of age and his life expectancy was fixed at 23.08 years. He was earning $410.41 net each month, as a truck driver. He sustained an amputation of the right leg at the upper third of the right femur. It was the opinion of the plaintiff's medical expert that plaintiff would never be able to wear a prosthesis or artificial leg or pylon, and that so-called phantom pains described by plaintiff would be permanent. Plaintiff sustained fractures of the left leg. They extended into the knee joint resulting in a shortening of the leg, and restricting motion and flection. The medical expert testified that plaintiff must continually wear a steel brace to support that leg for the remainder of his life. Plaintiff was in the hospital eight and a half months. He now claims to suffer from a "ringing in the ears" due to the inordinate quantity of drugs administered him in the hospital. There is testimony that this condition may be permanent and that plaintiff will need the services of a nurse to assist him for the balance of his life, and he will require medical attention during that period.

The items, as indicated to the jury, constituting the claim for damages were as follows:

"Special Damages		
"Medical fees	$ 4,649.75	
"Hospital	6,041.94	
"Nurses	2,147.00	
"Practical nurse	550.62	
"Miscellaneous such as ambulance, trucks, etc.	372.92	
"Lost wages—19 months at $410.41 per month	7,797.79	
"Total		21,560.02
"Future Medical Expenses		
"$300.99 per year at 23 years	6,900.00	
"Future nursing care—practical nurse at $1.25 per hour—average $175 per month—12 months per year times 23 years	48,300.00	
"Future lost wages $410.41 per month, 12 months per year for 20 years	98,498.40	
"Total		153,698.40
"These two items total		$175,258.42"

Respondent contends that the difference between the proved special damages, both past and future, and the amount of the judgment, i. e., $213,460.02, amounting to $38,201.60, is a reasonable amount for mental suffering, pain and physical discomfort reasonably certain to continue in the future, citing Johnston v. Long, 30 Cal.2d 54, 181 P.2d 645; Roedder v. Lindsley, 28 Cal.2d 820, 172 P.2d 353; and Morgan v. Southern Pacific Co., 95 Cal. 501, 508, 30 P. 601. It is also argued that there is sufficient evidence to support the verdict; that the sound discretion of the jury in fixing the amount of damages which were approved by the trial court should not be disturbed on appeal unless the award is so disproportionate to any limit of compensation as to indicate that it was the result of passion, prejudice or corruption on the part of the triers of fact, citing Drotleff v. Renshaw, 34 Cal.2d 176, 179, 208 P.2d 969, and cases assembled in 10 NACCA Law Journal, pp. 264–280; and 11 NACCA Law Journal pp. 227–248.

Medical testimony of defendants indicates that there is no present appearance of the stump of the leg that would prevent the use of an artificial limb, and as to the left leg, there is an excellent weld, solid union of the fragments, and the alignment is very satisfactory from a functional standpoint; that ultimately the use of a brace will not be necessary; that although there is a partial stiffness of the left knee there is sufficient range so the plaintiff could use the artificial limb and could walk without crutches and would not need a practical nurse to attend him in the future; that phantom pains may last indefinitely but they may become less troublesome.

It does appear that in March, 1952, plaintiff's physician did report that "The patient is now able to walk with his crutches and in the brace. The pelvic portion of the brace has been removed. The patient is ready for a prosthesis for the right leg. However, it might be worthwhile to be sure just where the patient will permanently reside because he will need a great deal of care and adjustment of the prosthesis".

It is defendant's contention that there are no cases of amputated limbs where so excessive a verdict has been upheld; that there are no decisions justifying so tremendous a verdict, even in the sum of $117,400.20, the amount to which the trial court reduced the judgment after the first trial; that the verdict is on its face excessive; and it appears to have been influenced by passion and prejudice, citing such cases as Schraeder v. Robinson, 78 Cal.App.2d 328, 339, 177 P.2d 788; Day v. General Petroleum Corporation, 32 Cal.App.2d 220, 239, 89 P.2d 718; Lindemann

v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 509, 55 P.2d 870; and a Missouri case, Jones v. Pennsylvania Railroad Co., 353 Mo. 163, 182 S.W.2d 157, decided July 3, 1944. In the latter case the first trial resulted in a verdict of $175,000 for plaintiff and the trial court found the verdict was grossly excessive and granted a new trial. The second trial resulted in a verdict of $203,167, and a new trial was again granted on the ground that it was grossly excessive. The plaintiff there was a brakeman 18 years of age and earned $250 per month. The train wheels passed over the brakeman's right leg and amputated it at the lower end of the upper third of the femur. His right thumb was entirely severed and both hip joints were dislocated. There was a comminuted fracture about the neck and head of the right femur and the socket into which the head of the femur would rest was partially absorbed and destroyed. There were multiple fractures about the upper end of the left femur, the socket for the joint was partially destroyed, and the injuries indicated were greater than those of the plaintiff in the instant case. On appeal the court sustained the finding of the trial court that the award was excessive.

In White v. Davis, 103 Cal.App. 531, 284 P. 1086, $30,000 was awarded for the loss of a leg. The court stated, 103 Cal.App. at page 551, 284 P. at page 1095, that the size of the verdict "is large enough to emphasize the fact that the errors herein mentioned were prejudicial to the defendant."

In Huggans v. Southern Pacific Co., 92 Cal.App.2d 599, 207 P.2d 864, a 12-year-old boy, with 54 years life expectancy, was awarded $91,000 for the loss of his left leg below the knee and a major portion of his right foot. At the time of trial more than $17,000 special damages were approved.

In McNulty v. Southern Pacific Co., 96 Cal.App.2d 841, 216 P.2d 534, a $100,000 award was allowed. There a 42-year-old assistant cashier of a bank, with a life expectancy of 26 years, and earning $365 per month was injured. One leg was severed three inches above the knee and the other leg 3 inches below it. He was awarded $100,000. In that case a number of decisions in and out of this jurisdiction allowing large verdicts were reviewed, and none of those reviewed were the size of the verdict rendered in the case at bar.

In Pearson v. Hanna, 145 Me. 379, 70 A.2d 247, 16 A.L.R.2d 1, there is an exhaustive survey of personal injury judgments purporting to cover such cases through the period of 1941 to 1950. Cases involving leg injuries and amputations are there discussed. In those cases there is shown no award approaching the size of the one in the instant case.

In Hallinan v. Prindle, 17 Cal.App.2d 656, 672, 62 P.2d 1075, 1082, it is said that "the best obtainable criterion of the reasonableness of a verdict is its conformity to the average amount awarded by juries in cases in which injuries of like nature and like extent have been sustained." Citing Lockwood v. Twenty-Third Street R. Co., 15 Daly 374, 7 N.Y.S. 663. "While it would be a hopeless task to search for cases exactly like the one at bar, some light also may, we think, be thrown on the question by comparing this verdict with others in amount similar or somewhat more or less, and noticing the character and degree of gravity of the injuries and disabilities for which they were awarded." See, also, Day v. General Petroleum Corp., 32 Cal.App.2d 220, 239, 89 P.2d 718.

With this rule in mind, an examination of the cases collected in 16 A.L.R.2d 249, shows a $165,000 verdict where both legs were amputated about 4 inches below the buttocks, and considerable other injuries were indicated. Delaney v. New York C. R. Co., D.C.N.Y.1946, 68 F.Supp. 70.

In Avance v. Thompson, 1943, 320 Ill. App. 406, 51 N.E.2d 334, the judgment was reversed on other grounds [387 Ill. 77, 55 N.E.2d 57]. The original verdict of $125,000 was reduced to $100,000 for a 22-year-old brakeman. Both legs were cut off by a train, the right leg 2 inches below the knee, and the left leg 8 inches below the knee. A later operation showed amputation of the right leg 3 inches above the knee.

In Beam v. Baltimore & Ohio R. Co., 1945, 77 Ohio App. 419, 68 N.E.2d 159, a $75,000 judgment was sustained in favor of a railroad brakeman earning $280 per month with 25 years life expectancy. Both legs were cut off below the knees.

In Bartlebaugh v. Pennsylvania R. Co., 1948, 150 Ohio St. 387, 82 N.E.2d 853, a judgment for $225,000 was rendered and remittitur of $75,000 ordered. Plaintiff was a 23-year-old railroad brakeman earning $250 per month. Both legs were amputated above the knees, leaving stumps of 4 and 8 inches respectively.

In St. Louis S. W. R. Co. v. Ferguson, 8 Cir., 1950, 182 F.2d 949, a $150,000 judgment was held not to be excessive. A railroad switchman had his left leg cut off 3 inches below the hip joint. His right arm was amputated, leaving only the thumb and forefinger remaining upon the left hand. The left leg stump was so short it could not satisfactorily be fitted with an artificial limb. Plaintiff would not be able to use crutches because of the condition of his hands. He was a permanent wheelchair case and would require a constant attendant the rest of his life.

In Southern Pacific Co. v. Guthrie, 9 Cir., 1949, 180 F.2d 295, a $100,000 verdict was held to be too high but not so high as to indicate passion and prejudice removing the case from the discretion of the trial court, which had denied relief from excessiveness. A railroad engineer past 59 years of age, with a maximum loss of earnings of $6,000 per year after taxes deducted, had his right leg run over and amputated between the knee and hip. He was hospitalized 37 days and underwent two operations on the stump. There was a 27-degree contracture of the right thigh, causing the stump to extend at an angle, preventing him from using an artificial limb. He had phantom pains in the cut limb.

In Affolder v. New York, C. & St. Louis R. Co., 1950, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683, an $80,000 verdict, reduced from $95,000, was sustained. There a railroad employee had one leg lost.

In Kansas City Southern R. Co. v. Taylor, 1945, 209 Ark. 488, 190 S.W.2d 968, a $40,000 judgment was sustained for a 33-year-old railroad fireman with a life expectancy of 38.53 years. He was earning $300 per month. His right leg was crushed and amputated first below and then 6 inches above the knee. He had a 4-inch fracture of the skull, etc., and was totally incapacitated to perform manual labor.

In Jones v. Pennsylvania R. Co., 1944, 353 Mo. 163, 182 S.W.2d 157, $203,167 was held so excessive as to justify the trial court in granting a new trial on the ground of bias and prejudice despite the fact that at a previous trial the verdict was for $175,000. The right leg was amputated at the lower end of the upper third of the femur. The bone of the thigh was grown into and became a part of a scar which was very painful on pressure, with ulcerated lesions over surface, with other injuries.

In Joice v. Missouri-Kansas-Texas R. Co., [1945] 354 Mo. 439, 189 S.W.2d 568, 161 A.L.R. 383, an $80,000 verdict was reduced to $65,000 at the trial, with a further remittitur of $15,000 ordered. Plaintiff was a 47-year-old section foreman with a large family, earning about $2,000 per year. His right leg was amputated, leaving a stump of about 6½ inches. There was some infection in the stump and additional pieces of bone were required to be removed. His ability to use an artificial leg was doubtful. His right arm was broken at the elbow, requiring wiring together, etc.

11 NACCA Law Journal, 229, reports the case of Kieffer v. Blue Seal Chemical Co., 3 Cir., 196 F.2d 614, which was affirmed for $250,000. Plaintiff suffered third-degree facial burns, blindness, and a permanently disfigured face. There was an actual collection of only $133,200 on the judgment.

Counsel for plaintiff concedes that this is the largest judgment obtained in this state for such injuries as here shown, and agrees that there is no reported California case supporting such an award.

Under the rule of comparable verdicts above indicated, it readily appears that the size of the verdict rendered in the instant case compared to verdicts sustained for similar injuries, even considering the claimed decrease in the value of the dollar, is excessive. A full allowance of $410.41 per month for 20 years, totaling $98,498.40, and the claim for the $48,300 for nursing care of plaintiff for 23 years, appears to us to be excessive and unreasonable, when added to the amount allowed for special damages established, and when added to claimed damages which must have been allowed for future pain and suffering.

The question of excessive 'verdicts is generally left to the trial court in the first instance, and its findings do lend weight to the correctness of the jury's award. However, in this case we have a finding by the judge who tried the case in the first instance, based upon practically the same evidence, that the verdict of $212,589.69 was excessive and so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocked the sense of justice and raised a presumption that it was the result of passion and prejudice. Accordingly, he endeavored to reduce the amount of the award to $117,400.20. Our conclusion, when considered in opposition to the conclusion reached by the trial court in the instant trial, therefore, has basic support.

Whether the jurors in the present case knew that a former jury had returned a verdict for $212,589.69, and that the trial court endeavored to reduce it, as shown, is not established by the evidence. However, resentment on the part of the nine jurors in this action to the actions of the trial judge in the first case in attempting to reduce the verdict of the former jury, may be indicated. On the present motion for new trial Oilfields presented an uncontradicted affidavit reciting that during a recess period in said trial and at a time when one of the doctors for plaintiff was testifying, the foreman of the jury talked with plaintiff's doctor all during that recess; that after the trial the foreman was interviewed and told affiant in effect that he and the majority of the jury were of the opinion that plaintiff would not be able to use or walk with a pylon or artificial limb, although this was a matter of speculation since further operations or strengthening of the left limb might permit the use of an artificial limb.

Although the argument of counsel to the jury was not included in the reporter's transcript, it is indicated, as a part of the memorandum submitted to the trial court on the hearing of the motion for a new trial, that the arguments of the attorneys for plaintiff were prejudicial because, by means of innuendo, they suggested: (1) That Oilfields "owned and operated equipment worth $1,700,000." (2) "That the only way to stop automobile accidents was to make it so expensive that people cannot afford to do it"; that "in this regard Mr. Palmquist, (one of the attorneys for plaintiff) stated: 'I think that the day when it becomes so expensive to hurt someone or to kill somebody that they cannot afford to do it, it will stop'." (3) "That the only way to stop Oilfields * * * from having accidents was to teach them a lesson by forcing them into bankruptcy. That Mr. Palmquist intimated no harm would be done, as J. C. Penney has been forced to go through bankruptcy on three different occasions, but that J. C. Penney was still in business." (4) "The suggestion of insurance by innuendo and by stating to the jury that Mr. Harry Phoenix and Mr. Percy Phoenix had insured their own lives for half a million dollars."

[8] In view of the refusal to give the proffered instruction, the giving of the erroneous instructions indicated, and the conclusion that the verdict is excessive and appears to have been influenced by passion and prejudice, we conclude that the judgment should be reversed and a new trial ordered.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

125 Cal.App.2d 714

TINSLEY v. BAUER et al.

Civ. 15854.

District Court of Appeal, First District,
Division 2, California.

June 3, 1954.

In action by former bookkeeper against former employer for amounts due under alleged oral agreements (1) to pay bookkeeper percentage of net sales in addition to salary, (2) to pay $5,000 for services rendered during employer's illness in caring for his treatment, personal and business affairs, and (3) to pay bookkeeper extra compensation of $2,000 for continuing to work during serious illness, wherein employer filed cross-complaint seeking recovery of money allegedly received by plaintiff from petty cash fund. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered judgment for defendant on the original complaint and the cross-complaint, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the evidence supported the determination that such agreements had not existed, and held that the evidence showed that plaintiff had received certain amounts from the petty cash fund without authorization but the evidence was insufficient to support trial court's determination that she had so received the amount claimed by defendant.

Judgment on plaintiff's complaint affirmed; judgment on cross-complaint affirmed in part, and reversed in part, and cause remanded with directions.

1. Master and Servant ⇨80(10)

In action by former bookkeeper against former employer for amounts due under alleged oral agreements (1) to pay bookkeeper percentage of net sales in addition to salary, (2) to pay $5,000 for services rendered during employer's illness in caring for his treatment, personal and business affairs, and (3) to pay bookkeeper extra compensation of $2,000 for continuing to work during serious illness, evidence supported determination that such agreements had not been made.

2. Master and Servant ⇨79

In action by former bookkeeper against former employer for amount allegedly due under oral agreement, wherein former employer filed cross-complaint for money received by former bookkeeper, who had control over petty cash, in excess of that to which she was entitled, evidence supported determination for former employer on the cross-complaint.

3. Appeal and Error ⇨891

Leave to produce in District Court of Appeal allegedly newly discovered witnesses whose testimony would conflict with that of successful litigant, would be denied, in view of fact that such conflicting testimony would not compel reversal. Code Civ.Proc. § 956a.

4. Evidence ⇨75

Failure of defendant to produce evidence explaining circumstances of importance in case, if such evidence is available to him either by his own testimony or otherwise, justifies inference that the evidence, if produced, would operate to his prejudice, and such principle applies with special force if circumstance to be explained points to dishonorable conduct of defendant, but no unfavorable inference may be drawn from such failure to produce evidence until prima facie case has been made by plaintiff.

5. Evidence ⇨76

Trover and Conversion ⇨40(4)

In action by former bookkeeper against former employer for amount allegedly due under oral contracts, wherein employer filed cross-complaint seeking return of money allegedly embezzled by bookkeeper from petty cash fund, evidence was insufficient to make out prima facie case of embezzlement and made inapplicable the principle which otherwise would have permitted an unfavorable inference to be drawn from bookkeeper's failure, in testifying in rebuttal, to take any definite position as to petty cash slips in her handwriting without supporting vouchers, and to deny that she had taken amount from petty cash.

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Joseph A. Brown and Charles O. Morgan, Jr., San Francisco, for appellant.

Philip S. Ehrlich, Albert A. Axelrod, Fred Leuenberger, and R. J. Hecht, San Francisco, for respondent.

NOURSE, Presiding Justice.

This case and the related case, Tinsley v. Bauer, Cal.App., 271 P.2d 116, were consolidated on appeal for argument in accordance with a stipulation of the parties. The subject matter of the two appeals is, however, so distinct that they can better be treated separately.

Mrs. Tinsley, a former bookkeeper in the employ of defendant Bauer (who does business under the firm name of Bauer Cooperage Co.), instituted an action in three counts based on three separate oral agreements: the first on an agreement of June 15, 1950, to pay for her services one-half of one percent of the net sales of Bauer Cooperage Co. over and above the $125 per week regular salary she received, which additional compensation was not paid from January 1 to 19, 1951. This count was amended to change the date of the agreement to July 12, 1950, and the percentage to one percent; second, an agreement of March 10, 1950, to pay her $5,000 for services to be rendered during defendant's illness in caring for his treatment, personal and business affairs, of which agreed amount $2,500 only was alleged to have been paid; third, an agreement of December 23, 1950, to pay her an extra compensation of $2,000 if, notwithstanding her serious illness which required the service of nurses, she would render her services for defendant's business. Defendant's answer denied the conclusion of any of the three alleged agreements and with respect to the last two added as a special defense that at the alleged time of these agreements, if he had entered into them, he was to the knowledge of plaintiff unable to properly manage his affairs and to understand or to enter into said agreements, by reason of weakness of mind, memory and understanding. To the answer was added a cross-complaint for money received in the sum of $15,971.50, amended on the face of the pleading to $21,735.85.

The court, sitting without a jury, found in substance that plaintiff had failed to prove by a preponderance of the evidence the allegations of any of her three causes of action and that therefore the court did not make findings as to defendant's special defense. On the cross-complaint the court found for cross-complainant in the amount claimed and further that cross-defendant as bookkeeper had control over the petty cash of cross-complainant's business, and that it was her duty to account for money so received and disbursed by her; that this was done at the end of each week by vouchers presented by cross-defendant of all amounts of petty cash paid out by her, which were supported by additional invoices, receipts or vouchers for such expenditures, the total amount being reimbursed to her in one check; that in the two years prior to the commencement of the action, cross-defendant embezzled the amount claimed by presenting fictitious vouchers which did not represent any purchases for said business as they purported to do. The judgment was for defendant and cross-complainant and plaintiff and cross-defendant appeals. Her only contention is that the findings are not supported by the evidence.

[1] The evidence shows that beginning early in 1950 defendant Bauer was suffering from a serious depression which required hospitalization in a sanitarium from May 10 to June 24, and from July 19 to November 14, 1950. Even when then discharged after twenty-seven shock treatments he was still not quite well. In his depressed condition defendant, according to expert witnesses, was not able to carry on ordinary business affairs, his decisions would be influenced by his depression and it was possible that he could be taken advantage of. Mrs. Tinsley during this illness gave some of the personal assistance which normally would have been given by Mr. Bauer's wife, with whom there were marital difficulties. She assisted in arranging for medical care, in choosing the sanitarium, renewing his personal notes, depositing his dividend checks, etc.

During the second half of 1950 she received over and above her weekly salary of $125 sizable amounts in checks signed by defendant Bauer or by his relative A.

Craus, who was the superior of Mrs. Tinsley in the business and who, in the absence of Mr. Bauer, was in charge. The checks comprised a payroll check of $2,000 signed by Bauer on July 12, 1950, and explained by plaintiff as half of the amount of $5,000 claimed by her in Count II, after deduction for income tax; several payroll checks of different amounts and dates signed mostly by Mr. Craus and explained by Mrs. Tinsley as relating to one-half of one percent of the net sales of the company until the end of 1950, minus tax deductions; a payroll check of $3,000 signed by Mr. Bauer dated December 31, 1950, for costs of Mrs. Tinsley's illness in the last part of 1950. All these checks were entered on the payroll and declared as taxable income by Mrs. Tinsley. They are not directly involved in this action. On December 30, 1950, Mr. Bauer also signed a commercial check (not a payroll check) of $250 which will be mentioned later with respect to the cross-complaint.

Mrs. Tinsley distinguishes on appeal between the first count of her action as to which she concedes that there exists a substantial conflict in the evidence and the other two counts as to which she contends that her evidence is substantially uncontradicted. There is no good ground for such a distinction. Mrs. Tinsley testified in detail to the making of the three agreements alleged by her, the circumstances under which they were allegedly made and the services which she rendered under them. As to the first and second agreement, both she and her husband testified that the promise to pay her the second one-half of one percent of the sales and the second half of the amount of $5,000 before the end of the year was repeated by Mr. Bauer at a dinner given by them for Mr. Bauer in the end of November, 1950. With respect to the third count there was also some such additional evidence. However, as to all three counts there was evidence which caused a conflict. Mr. Axelrod, the attorney of Mr. Bauer, testified that he was present at the conference on January 19, 1951, in which the employment of Mrs. Tinsley was terminated. She refused to work for her salary of $125 per week only, if one-half of one percent of the sales was not added. When the employment ended for that reason, Mr. Axelrod asked her how much was owing to her and she answered her salary and one-half of one percent of the sales over the last two weeks. To his question whether there was anything else owing to her she answered "no." Mr. Bauer as a witness expressly denied he promised to pay her $5,000 as alleged, or the alleged one percent of the sales. He remembered the dinner party but made no statement there that he owed plaintiff anything. Neither did he offer her $2,000 for work of closing the books over 1950. She offered to do it but he had it taken care of by the accountant. He remembered giving her the check of $3,000; she then wanted also a bonus of $2,000 and when he would not give her the bonus "that is where the trouble came in." The accountant, Mr. Sackett, testified to the work he did on ledgers and statements at that time, which had been otherwise done by the bookkeeper. Appellant attributes much importance to the fact that respondent could not give an explanation of his check of $2,000 of July 12, 1950. However, respondent testified that his memory as to what happened in 1950 was impaired and that he made "forced deals", that she obtained money by telling him how much she needed and calling for sympathy. If this were believed, the point does not have any conclusive importance. The fact that respondent gave appellant certain amounts does not disprove his testimony that he did not promise her more than she actually obtained from him. The conflicting evidence rule, recognized by appellant, and too well known to require citation of authority, is clearly applicable to the denial of all three counts of appellant's action. As appellant wishes this court to reject the evidence of defendant Bauer, evidently believed by the trial court, we may cite our recent opinion in Evje v. City Title Ins. Co., 120 Cal.App.2d 488, 492, 261 P.2d 279, which clearly holds that we cannot so do even if the testimony is much more unbelievable than in the case now before us.

[2] With respect to the embezzlement found as the basis for the judgment on the cross-complaint, the accountant Sackett testified that he examined the petty cash

vouchers for the years 1950 and 1949, those of 1950 about February 1951, those of 1949 just before the trial (April, 1952). The vouchers were enclosed in envelopes, each week's vouchers stapled together. The envelopes were for each month. When the envelopes were opened and the vouchers examined some had supporting data or were signed for receipt, others had neither a signature nor an attachment. Of the latter there were two kinds: some stated, e. g., 50 drums at $100 and the amount of $50, without supporting data or signature; the others said "Drums, see attached," followed by an amount but there was no attachment. A list of the latter kind prepared by the accountant from all vouchers of 1950 showed a total of $14,071.80. A list of the same kind for 1949 totalled $4,864.35. All these slips were in the handwriting of appellant. Two lists of the slips of the first kind in amounts of $25 or $50 each also made by the accountant showed a total of $1,900 for 1950 and of $900 for the year 1949. During the months August, September and October, 1949, in which appellant was on vacation there were no unsupported vouchers of either kind. Neither were there such withdrawal slips in 1950 after November 28, 1950, when appellant became sick. Mrs. Tinsley admitted that the slips of $25 and $50 did not represent purchases of merchandise but withdrawals in her own behalf. She withdrew $25 a week until May 5, 1950, and from then on $50 a week. The withdrawal of $25 a week had been authorized by Mr. Bauer late in 1948 and later increased to $50 a week as a compensation for the fact that her working for his company forced her to have a housekeeper. She deposited these amounts in a special savings account to keep a record of them. They were not entered on the payroll. "That was the way Mr. Bauer handled things." She did not report the amounts as income. On December 31, 1950, Mr. Bauer gave her a commercial check (not a payroll check) of $250 for the five weeks she had not had the $50 per week from the petty cash because of her illness. Like the regular withdrawals this was not entered on the payroll. In her deposition she had said that she did not remember whether Mr. Bauer had authorized her to take $25 a week out of the petty cash during 1949, but she testified that at that time she was confused. Mr. Bauer testified that he did not know of these withdrawals and never gave her any authority to make them. He did not remember what the check of $250 was for; something she demanded under threat similar to the manner in which she obtained the $3,000 for medical expenses. It may seem rather improbable that a bookkeeper who wishes to embezzle would take an equal amount every week and put it in a special account, thus inviting detection, and the check of $250, not a payroll check when the other amounts given were all payroll checks fits well into appellant's theory, but such circumstances are only part of the conflict existing between the evidence of the parties, which is for the trier of facts. The trial judge believed respondent's testimony, and again it is not for this court to reject it. Evje v. City Title Ins. Co., supra.

[3] Appellant has applied for leave to produce in this court three allegedly newly discovered witnesses, among whom Dolores Jones, who would testify in substance that Mr. Bauer told them that he permitted appellant to make certain withdrawals from the petty cash for the purpose of paying said Dolores Jones for services in caring for appellant's child. In Estate of Schluttig, 36 Cal.2d 416, 423, 224 P.2d 695, 699, it was said: "The procedure authorized by § 956a of the Code of Civil Procedure is not a substitute for a motion for a new trial upon the basis of newly discovered evidence." It was also held in that case, relying on Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, that additional evidence cannot be received on appeal for the purpose of reversing the judgment appealed from, if such evidence, if received, would not compel a reversal of the judgment with directions to the trial court. If the evidence offered in this case were received there would still remain the conflict with the testimony of Mr. Bauer, believed by the trial court, and this court could not direct a judgment for appellant on this point. The request must therefore be denied.

With respect to the other kind of petty cash slips without supporting vouchers, cross-defendant did not admit that they represented withdrawals made by her for her own use. She testified that the weekly summaries with petty cash slips and vouchers were presented to either Mr. Bauer or Mr. Craus for signature and verification, that then the papers would not be stapled together and that they would examine them individually before signing the check to reimburse the petty cash. There were not always supporting vouchers attached. Mr. Bauer denied that the vouchers were given to him for examination. He was only given the check to sign. The vouchers were kept by Mrs. Tinsley in her safe, to which no one else had access; she had the key. However, most petty cash checks were signed by Mr. Craus. Mr. Craus was not heard as a witness. On cross-examination Mr. Sackett conceded that the listed slips which had no vouchers attached all had staple holes in them, and some even had staples so that something could have been attached and torn off.

Appellant points out two serious defects in this evidence. No showing was made or attempted that all vouchers and attachments were in the same condition at the time the accountant examined them as when appellant parted with them or that the sizable quantity of drums represented by the slips without vouchers, or any drums, were missing from the stock of the firm. She contends that therefore there is no substantial evidence of embezzlement, especially when the presumption of absence of crime and fraud is considered.

It is also pointed out that appellant was bonded and no claim for the amounts allegedly embezzled was made on the bond, but the weight of this fact as against respondent was solely for the trier of fact and cannot be reviewed by us.

Respondent points out two additional circumstances which the trial court could consider. In 1950 Mrs. Tinsley and her husband deposited abnormally high amounts in bank accounts. Over and above some deposits in other accounts, they made deposits in their commercial account at the Third and Palou Office of the American Trust Company, concededly totaling some $30,000. In that year their combined gross income according to income tax returns was $19,508, of which $14,362 was income of Mrs. Tinsley from respondent. Their income over 1949 was a little over $9,000 of which $4,550 came from respondent. Although part of the deposits were explained as derived from earlier sources (an opening deposit of nearly $5,000 transferred from an earlier bank account; earlier loans to an amount of $4,850; sale of stock $2,886, and amounts transferred from a deposit box in which she had accumulated several thousand dollars) for several sizable deposits no explanation was given. There is, however, no showing that any specific amount of an unsupported petty cash slip appeared as a deposit in any of appellant's accounts.

The second point is that appellant, although she testified in rebuttal, did not take any definite position as to the petty cash slips in her handwriting without supporting vouchers. She did not testify that supporting vouchers had been attached, although she so intimated, or that they represented actual purchases. Earlier on cross-examination her testimony had been to the effect that vouchers were not always attached and that Mr. Bauer sometimes charged moneys to merchandise although it was not for merchandise purchased. She did not at any time expressly testify that she did not take for herself any other amounts from the petty cash than the regular weekly amounts she admitted.

[4] This second point has no separate significance on appeal. It is true that the failure of a defendant to produce evidence explaining circumstances of importance in the case, if such evidence is available to him (either by his own testimony or otherwise) will justify an inference or even cause a presumption to arise, that the evidence, if produced, would operate to his prejudice. Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172; Perry v. A. Paladini, Inc., 89 Cal.App. 275, 281–282, 264 P. 580; Leenders v. California Hawaiian Etc. Corp., 59 Cal.App.2d 752, 758, 139 P.2d 987. This principle applies even with special force if the circumstance to be explained points to dishonorable conduct of defendant. Bone v. Hayes, supra. However, no un-

favorable inference may be drawn from such failure of the defendant to produce evidence in rebuttal until a prima facie case has been made by the plaintiff. Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 830, 206 P.2d 6 and see People v. Ashley, 42 Cal.2d 246, 267 P.2d 271. The essential question is therefore whether a prima facie case of embezzlement was made by the evidence of the absence of the supporting vouchers from certain of appellant's petty cash slips (without proof that they had not been there when appellant parted with the slips and without proof that any of the drums ostensibly bought in the transactions to which these slips related were missing) together with the evidence of suspiciously large deposits in appellant's and her husband's bank accounts during a year as to which some vouchers were missing.

[5] In criminal cases "there is no doubt that evidence tending to show that the defendant had no money before a larceny and considerable money after is admissible, since evidence of a sudden and unexplained possession of means about the time the larceny was committed has the tendency to connect the defendant with the crime where there are other circumstances to support it. This is generally true although the source of the money is not definitely traced or identified by the prosecution." 32 Am.Jur. 1040; see also Annotation 123 A.L.R. 119; People v. Kelly, 132 Cal. 430, 64 P. 563. In Commonwealth v. Mulrey, 170 Mass. 103, 49 N. E. 91, 94, a criminal prosecution for obtaining money by false pretenses, the facts of which have some resemblance to those respondent contends to be present here, the court held that evidence of deposits of money during the period of the alleged crimes of an amount much too large to be accounted for by defendant's salary "properly was admitted, in connection with independent evidence tending to show a successful fraudulent conspiracy", although the evidence of said deposits "by itself, of course, did not prove criminal conduct." In the case before us there is, because of the two flaws in respondent's evidence pointed out before, no independent evidence fully showing any embezzlement of funds from respondent's business. The suspiciously large deposits must not only serve to connect appellant with embezzlements independently shown, as is the normal function of such evidence, but they must also serve to prove that embezzlements have been committed. No inference to that effect can be drawn from them. Such conclusion can be based on conjecture and suspicion only, which are insufficient to overcome the presumptions against fraud and crime. Trousdell v. Equitable Life Assur. Soc., 55 Cal.App.2d 74, 76, 130 P.2d 173, 990. We conclude that respondent with regard to the takings not admitted by appellant did not make out a prima facie case.

Although indebtedness and embezzlement in one total amount of $21,735.85 was found, the evidence makes it clear that this amount is the sum of the amounts of the petty cash slips which refer to vouchers not found by the accountant, totaling, according to his statements, $14,071.80 in 1950 and $4,864.35 in 1949 and the withdrawals admitted by appellant in the total amount of $2,800, with an unexplained deviation of $0.30 in favor of appellant to which the rule "de minimis" applies. We will therefore affirm the judgment on the cross-complaint to the amount of $2,800 and reverse it in so far as it awards respondent more.

The judgment on plaintiff's complaint is affirmed. In so far as the judgment is based on defendant's cross-complaint it is affirmed as to the admitted withdrawals by cross-defendant in the sum of $2,800. As to the other portions of the judgment on the cross-complaint, it is reversed for the sole purpose of determining what further sum, if any, was illegally taken by the appellant and what further sum is now due under the cross-complaint. Appellant's request for findings and application for leave to produce additional evidence are denied. Both parties to bear their own costs.

Judgment affirmed and reversed accordingly.

DOOLING, J., and BRAY, J. Assigned, concur.

125 Cal.App.2d 724

TINSLEY v. BAUER et al.

Civ. 15784.

District Court of Appeal, First District, Division 2, California.

June 3, 1954.

Rehearing Denied July 2, 1954.

In action between husband and former employer of wife to determine title to accounts of husband and wife, which accounts were levied on by employer under writ of execution based on judgment obtained against wife for embezzlement of funds, wherein husband claimed the amounts in the accounts were partly his own property and partly community property. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment for the former employer, and the husband appealed. The District Court of Appeal, Nourse, P. J., held that the evidence supported the trial court's determination that the husband was not the owner and had no right superior to the judgment lien in the accounts in question.

Affirmed.

1. Husband and Wife ⚷259, 268(2)

Wife's earnings, which become community property, are liable for her contracts. Civ.Code, §§ 167, 171a.

2. Execution ⚷194(1)

To prove his title against judgment creditor of his wife, husband must show that property levied on is his separate property or that it is community property not derived from earnings of his wife. Civ.Code, §§ 167, 168, 171a.

3. Husband and Wife ⚷268(2), 270(11)

Amount embezzled by wife from employer and deposited in joint account with husband would be considered as "earnings" within statute providing that earnings of wife are liable for contracts made by her, and would be subjected to employer's levy to satisfy judgment obtained against wife, though husband claimed such amount as community property. Civ.Code, §§ 167, 171a.

See publication Words and Phrases, for other judicial constructions and definitions of "Earnings".

4. Execution ⚷194(3)

In action to determine title to bank account levied on by former employer of person in whose name account stood, under writ of execution based on judgment against such person for embezzlement, wherein husband of such person filed third party claims on ground that it was partly his separate property received prior to marriage and partly community property, evidence supported trial court's determination that the husband was not the owner and had no right superior to judgment lien in the account. Civ.Code, §§ 167, 171a

5. Execution ⚷194(3)

In action to determine title to joint bank account of husband and wife levied on by former employer of wife under writ of execution based on judgment obtained against wife for embezzlement of funds, wherein husband filed third party claim on ground that at least one-half of the amount in the fund was from his personal earnings or income and that the amount in the account was community property, evidence supported trial court's determination that the husband was not the owner and had no right superior to the judgment lien in the account. Civ.Code, §§ 167, 171a.

6. Husband and Wife ⚷14(3)

The presumption that money in joint tenancy account of husband and wife is joint tenancy property is rebuttal.

7. Husband and Wife ⚷14(3)

Husband's allegation, in action to determine title to bank account levied on by former employer of wife under writ of execution based on judgment obtained against wife for embezzlement of funds, that the money in the account was community property rebutted the presumption that the money was joint tenancy property. Civ.Code, §§ 167, 171a.

8. Appeal and Error ⚷173(2)

Exemptions ⚷93

Exemption from execution accorded shares in building and loan association was not available where person claiming such exemption did not invoke it in the trial court and did not deliver to levying officer an affidavit claiming the specific exemption. Code Civ.Proc. §§ 690.21, 690.26.

9. Execution 194(3)

In action between husband and former employer of wife to determine title to savings and loan association share account, which was in the name of the husband or the wife and which was not a joint account, levied on by employer under writ of execution based on judgment obtained against wife for embezzlement of funds, wherein husband claimed amount in account on ground that it was partly his separate property and partly community property, evidence sustained trial court's determination that husband was not the owner and had no rights superior to the judgment lien in the account. Civ.Code, §§ 167, 171a.

10. Husband and Wife ⚿270(11)

Where wife's earnings were subject to levy by former employer under judgment obtained against wife for embezzlement of funds, and savings and loan association account in name of husband and wife as joint tenants had been built up by deposits of $1,500 derived from the husband and more than $3,500 which was subject to levy, but, at time in question, had been depleted to $216, and husband failed to show how much of the balance was directly traceable to deposits derived from him, such balance was subject to levy. Civ. Code, §§ 167, 171a.

11. Execution ⚿194(3)

In action between husband and former employer of wife to determine title to checking account of husband and wife, which account was levied on by employer under writ of execution based on judgment obtained against wife for embezzlement of funds, wherein husband claimed the amount in the account was partly his own property and partly community property, evidence supported trial court's determination that husband was not the owner and had no right superior to the judgment lien in the account. Civ.Code, §§ 167, 171a.

12. Exemptions ⚿127

Judgment creditor of wife would not be permitted to suffer because of fact that assets on which he was entitled to levy and assets which husband could claim as exempt were so commingled that husband could not demonstrate exactly how much was exempt from levy. Civ.Code. §§ 167, 171a.

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Joseph A. Brown, San Francisco, for appellant.

Philip S. Ehrlich, Albert A. Axelrod, Fred Leuenberger, and R. J. Hecht, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action under sec. 689, C. C. P., to determine title to personal property (bank accounts) levied on under writ of execution based on the judgment in the preceding case, Cal.App., 271 P.2d 110. Clint R. Tinsley, the husband of Frances Tinsley, filed with the sheriff two third party claims and Mr. Bauer, the judgment creditor filed a petition to determine title to the property so claimed by the third party. The judgment determined that third party claimant is not the owner and has no right superior to the judgment lien in the following personal property:

(a) Moneys in the commercial account with American Trust Company, Third and Palou Office, San Francisco in the name of Mr. and Mrs. Tinsley and the sum of $8.86.

(b) Moneys in savings account No. 32381 with American Trust Company, Savings Union Office, San Francisco in the name of Mrs. Tinsley and the sum of $1,853.58.

(c) Moneys in savings account No. 32845 with American Trust Company, Savings Union Office, San Francisco in the name of Mr. and Mrs. Tinsley and the sum of $216.41.

(d) Christmas savings account with American Trust Company, Third and Palou Office, San Francisco in the name of Mrs. Tinsley and the sum of $16.

(e) Moneys in Share Account No. 4811 with Citizen's Federal Savings and Loan Association, in the name of Mr. and Mrs. Tinsley and the sum of $3,861.71.

(f) Savings in Share Account No. 4315 with the Bayview Federal Savings and Loan Association in the name of Mr. and Mrs. Tinsley and the sum of $3,784.83.

The husband, third party claimant appeals. He contends that the evidence is insufficient to support the decision because all the property levied on was proved to be separate property of the husband, community property, property held in joint tenancy or property excluded by law from execution.

[1-3] Before taking up the evidence as to the separate accounts it seems necessary to discuss the general principles involved. Sec. 689, C.C.P., expressly provides that at the hearing to determine title, the third party claimant shall have the burden of proof. Appellant primarily takes the position that neither his separate property nor any community property is liable for the post marital debts of his wife, citing the first sentence of sec. 167, C.C., and sec. 171a, C.C., and that therefore it is sufficient that he show that the accounts were intended as community accounts and that what went into them was separate property of his and earnings of the parties during marriage to sustain his burden, in which he claims to be assisted by the presumption that acquisitions during marriage are community property. However this completely ignores the last provision of sec. 167, C.C., added in 1937: "Except as otherwise provided by law, the earnings of the wife are liable for her contracts heretofore or hereafter made before or after marriage." Since that amendment the earnings of the wife which became community property are liable for her contracts. Meyer v. Thomas, 37 Cal. App.2d 720, 725, 100 P.2d 360, 1066. Although it has been held with respect to exemption of earnings of the wife for debts of the husband, sec. 168, C.C., that it is waived where such earnings are so commingled with other community property as to lose their identity, Tedder v. Johnson, 105 Cal.App.2d 734, 738, 234 P.2d 149, and cases there cited, the same will not apply to the liability under sec. 167, C.C.; the wife can waive her exemption but not the liability to her creditors. The fact that under sec. 171a, C.C., the community property in general is not liable for torts of the wife, McClain v. Tufts, 83 Cal.App.2d 140, 187 P.2d 818, does not prevent that the earnings of the wife may be liable under sec. 167, certainly when the tort has been waived and a contract action instituted, as in the case here. To prove his title against a judgment creditor of his wife the claimant husband must therefore show that the property levied on is his separate property or that it is community property not derived from earnings of his wife. Moreover, it would seem that the amounts held in the preceding case to have been embezzled by the wife, should be liable in the same manner as her earnings under section 167, Civil Code. The fruits of her tort or crime may well be considered as earnings for this purpose or at least treated analogously.

Respondent urges further that the husband may be liable for the wife's torts both with his separate and with community property if the wife can be considered his agent or at least he as joint tort-feasor with his wife, relying mainly on Meyer v. Thomas, supra, 37 Cal.App.2d 720, 100 P.2d 360. As there is in our case no evidence of actual participation of the husband in the embezzlements, it is of importance on what exactly the liability can be based. There is in the Meyer case the sentence: "Here, the evidence proves knowledge on the part of the husband of the actions and intent of the wife, and his ratification thereof by acceptance of the benefits of the fraudulent transaction." 37 Cal.App.2d at page 725, 100 P.2d at page 363. However, the liability is not solely based on the acceptance of benefits. There are several expressions in the case showing that the court held that the husband had actually participated. There seems to be no good authority for general liability of the husband who only knowingly benefited from a tort.

In Hulsman v. Ireland, 205 Cal. 345, 270 P. 948, also cited by respondent, action was brought against the husband as partner in a partnership with his wife and a third person for a partnership debt. The trial court found that the husband was not a partner but an employee of the other two who were the only partners. The Supreme Court held the husband nevertheless liable on the ground that he had so clearly ratified the action of the wife from which he intended to profit, that the wife could be considered his agent. In our case there is not shown such cooperation of husband and wife that liability of the husband could be based on the assumption that the wife was his agent in the embezzlement.

There are some cases which indicate that one spouse will not be permitted to hide behind statutory rules of exemption from levy when he is reaping the fruits of the acts of the other spouse on which the action is based, especially if these fruits can be traced into the property levied on. For instance in Kemp v. Enemark, 194 Cal. 748, 230 P. 441, the court affirmed the denial of an injunction from levying on homestead property, where the judgment to be enforced was for a loan obtained by the husband by forging a signature, and the money had gone into the property on which the wife, who had not participated in the fraud, had declared the homestead. The court relies on Shinn v. Macpherson, 58 Cal. 596, in which case the wife had declared a homestead after which the husband paid off a mortgage on the homestead property with money he fraudulently took from a partnership of which he was a member. It was pointed out that although there was no evidence of participation of the wife, she would reap the fruit of the fraud. It should be noted however that the Kemp and Shinn cases were based on equity and requirement of doing equity. The principle of these cases, however, strengthens the conclusion that the husband is entitled to release of only so much of the property levied on he as has clearly proved not to be derived from the earnings or illegal takings of the wife.

In considering in how far the judgment against the husband is supported by the evidence the preceding rules relating to the earnings and illegal takings of the wife are of great importance because of the large amount of the earnings of the wife compared to the income of the husband. His income in those years was around $4,000 a year. In 1950 the wife's taxable income from respondent's business was more than $14,000, in 1949 some $4,500. The fact that not too long prior to the levy, in the years 1949–1950, there were receipts to an amount of $18,500 before taxes from the wife's income and $2,800 from her admitted additional takings which were subject to levy by respondent may well have influenced the trial judge and caused a conflict with most of the evidence of appellant.

We now turn to the separate bank accounts levied on.

[4] (1) Account (b) of $1,853.58 in the name of Mrs. Tinsley alone. As to this account, appellant alleged in his first claim filed that the money in this account was partly his separate property received prior to marriage and the balance community property under his control, substantially all from his personal earnings and none from the earnings of his wife.

Appellant testified that he enlisted in the Navy in December, 1941, and was married October 3, 1943. He sent allotments first to a sister to be deposited in a bank account and later to his wife, or prospective wife for the same purpose. He also sent the latter, even before his marriage, some $200 a month from gambling earnings. However, the wife testified that she put the gambling money in a safe deposit box, not in the account here involved. Letters between the two during the time Mr. Tinsley was in the service were introduced to demonstrate that the character of the money so sent by him to her was community property. That in 1944 Mrs. Tinsley repeatedly wrote *our* savings account, etc., is urged to show that the money was not a gift to her separately. Mr. Tinsley testified that it was Mrs. Tinsley who opened the accounts and that he left all the banking to her. He was never entered on the card. His wife made the withdrawals and deposits; he was not familiar with them. The amounts of $102.50 deposited at regular intervals were his allotments.

Mrs. Tinsley testified that the initial deposit on April 4, 1944, was from earlier allotments sent to her and the sister. She was continually employed while her husband was overseas. Later amounts of $102.50, $100 and $200 were also derived from allotments. But an amount of $1,164.72 deposited April 25, 1945, was her money, earned before she was married.

Other deposits late in 1945 were explained as being the husband's from the Navy or from salary. Sizable amounts deposited in 1946 were unexplained. She was, however, in that year not employed before November 20, 1946. Smaller later amounts were dividends of stock. The first withdrawals were for furniture and such, the later withdrawals for purchase of stock. The purchased stock was in her own name. The account was left in her name alone so that it should not be stopped in case of the husband's death. Her own money, the above $1,164.72, was deposited after $1,500 had been withdrawn for furniture. Although she had been working during the time the allotments came, and she had no other account, none of her earnings went into the account. The $1,164.72 from her earnings before marriage were brought over from an old account in her maiden name because "It was ours."

Although this evidence if believed would indicate that Mr. and Mrs. Tinsley wished to make all moneys in this account community property, and that at least a sizable part of the money in it was not derived from her earnings, the trial judge could reject it, provided he did not do so arbitrarily. In this respect the evident interest of the Tinsleys in this testimony is relevant. Moreover the fact that the account was in the name of Mrs. Tinsley only, that the stock bought from these moneys were in her sole name, that more than $1,000 earnings of the wife went into the account contrary to appellant's allegation, that the allotments sent to her were according to law "for the support of the dependent", U.S.C.A. Tit. 37, § 252, seems sufficient to make the rejection not arbitrary and to cause a conflict which makes the decision of the trial court binding on this court. Compare Watwood v. Steur, 89 Cal.App.2d 620, 624, 201 P.2d 460.

(2) The Christmas savings account (d) of $16 was also in the name of Mrs. Tinsley only. She testified that the deposits were made from a commercial account in which her salary checks were deposited and in which in 1950 nearly $30,000 was deposited. The decision of the trial court with respect to this account seems amply supported.

[5] (3) The savings in share account No. 4315 with the Bayview Federal Savings and Loan Association in the amount of $3,784.83 (f) was in the name of the Tinsleys as joint tenants with right of survivorship. As to this account appellant had alleged the amount was community property in his control, at least one-half of which was from his personal earnings or income. Mrs. Tinsley testified that she opened the account on August 26, 1947. In 1947–48–49 there were many deposits either in cash or in checks in amounts from $100 to $400 which she either could not trace or only to "our checking account." She conceded that most of her salary checks were deposited in that checking account. Several items in 1949 and 1950 were identified as salary checks or expense checks of the husband, one as an insurance refund check of the husband, one as her salary check, two as income tax refunds on their joint return. The only sizable withdrawal was $1000 which went to their checking account. The cash deposited was either cash she saved or from her safe deposit. She also said that in 1947 they transferred money from the checking account at the Third and Palou Office of the American Trust Company to this savings account, although her checking account was only transferred to Third and Palou in 1950 from Savings Union when they took a loan from the Third and Palou Office. All deposits, including cash, and all withdrawals were made by her personally. She worked near this bank; her husband never came near it.

If her testimony were believed the salary deposits of her husband in so far as still considered present in the balance would not be subject to levy. However, as stated before with respect to the first account the trial court could reasonably disbelieve Mrs. Tinsley's evidence. Moreover many of the deposits were derived from sources of which it was not shown that they did not find their origin in Mrs. Tinsley's earnings, illegal takings or separate property. As the husband did not make an exact showing of how much of the balance was not traceable to such sources subject to levy, the trial court was entitled to make its decision with respect to this account wholly adverse to him.

[6, 7] Appellant argues that because the account is a joint tenancy account respondent was entitled to levy on the wife's half interest in the account only, so that appellant was at any rate entitled to one-half of the balance. Appellant's reliance on the joint tenancy character of the account seems completely undermined by his allegation mentioned above that the moneys in said account were and are community property. The presumption that money in a joint tenancy account of husband and wife is joint tenancy property is rebuttable. Paterson v. Comastri, 39 Cal.2d 66, 70, 244 P.2d 902; Cash v. Cash, 110 Cal.App. 2d 534, 538, 243 P.2d 115. No stronger rebuttal as to appellant is possible than his own allegation in his pleading. Silverstein v. Silverstein, 76 Cal.App.2d 872, 877, 174 P.2d 486. It seems therefore unnecessary to decide whether, as urged by respondent, the deposit of separate property, earnings or embezzlements of the judgment debtor in a joint account would be invalid as to the judgment creditor as a fraudulent conveyance.

[8] Appellant further argues that $1,000 of this account was at any rate exempt from execution under sec. 690.21, C.C.P., relating to shares in building and loan associations. However the contention is not available to appellant because he did not invoke the exemption in the trial court and he did not deliver to the levying officer an affidavit claiming the specific exemption by code section as required by sec. 690.26, C.C.P.

[9] (4) The Share Account No. 4911 with the Citizens Federal Savings & Loan Association in the amount of $3,861.71 (e) is in the name of Clint R. Tinsley or Frances Tinsley and not a joint account. It was opened September 8, 1950, with a deposit of $3,562.33 of which, according to Mrs. Tinsley, $2,286.35 was from stock sold, the balance via their checking account from her salary. Another deposit of $268.01 was also a salary check of hers. The stock was in her own name and bought with money from account (b) held subject to levy above under (1). If the decision as to account (b) must be upheld, the same must apply to this account.

[10] (5) The savings account with American Trust Company in the amount of $216.41 (c). It was payable to the Tinsleys as joint tenants or to the survivor. Appellant had alleged that this amount was community property under his control, substantially all from his earnings. Mrs. Tinsley testified that all deposits were made by her. The first deposit on March 15, 1947, in the amount of $900 came from a checking account in which in August, 1946, $1,500 was deposited, obtained by the sale of furniture bought for the same amount from account (b) in 1945. As to the origin of further deposits to the amount of some $950 in 1947, $3,400 in 1948 and some $300 in 1949, Mrs. Tinsley had no recollection. A large number of items varying from $66 to $166, mainly in 1949, totalling some $1,500 were ascribed to the husband's salary checks. There was also at the end of 1949 a bonus check of Mrs. Tinsley from Bauer of $360, and a Christmas club check of $100.50 derived from the checking account. On March 25, 1949, over $1,000 was withdrawn to buy stock in Mrs. Tinsley's name; in 1951 $1,000 was withdrawn to decrease the mortgage on their house and on June 18, 1951, the Bank which held the account as collateral for a note took $2300 for the balance of that note.

If this evidence was believed there passed through this account some $1500 derived from the husband, $1500 derived from account (b), and more than $2000 derived from Mrs. Tinsley or of unknown origin. Even if that evidence was believed it would seem that, as appellant did not and does not explain to how much of the little balance of $216 the above data entitled him, under the circumstances of this case the decision as to this amount must be upheld. Appellant's arguments based on joint account and exemption of $1000 in shares of building and loan associations, mentioned under (3) relate also to this account and must be rejected on the same grounds.

[11] (6) As to the little balance of $8.86 in the checking account (a) appellant of-

fered no evidence so that he did not sustain his burden of proof.

[12] Although earnings of the husband may well have contributed to some extent to the accounts levied on, the result reached by the trial court seems just. The evidence showed that there remained over and above the accounts levied on as community property a house on which $8000 was paid and furniture for which $12,000 was paid, both bought in 1950, and some cash from sale of stocks, together much more than could be saved from the husband's income. Moreover the judgment creditor should not suffer because of the fact that assets on which he is entitled to levy and assets which the husband can claim as exempt are so commingled that the husband cannot demonstrate exactly how much is exempt from levy.

Judgment affirmed.

DOOLING, J., and BRAY, J. Assigned, concur.

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125 Cal.App.2d 578

BASIN OIL CO. OF CALIFORNIA.
v.
BAASH-ROSS TOOL CO.

Civ. 19612, 19613.

District Court of Appeal, Second District,
Division 2, California.
May 28, 1954.

Rehearings Denied June 23, 1954.

Hearing Denied July 21, 1954.

Actions by oil company against tool company for damages resulting from sales of defective suspension plugs. The Superior Court, Los Angeles County, William J. Palmer, J., rendered judgments for plaintiff and defendant appealed. The District Court of Appeal, Fox, J., held that printed matter in defendant's catalogue and upon its invoice, while limiting its liability for breach of warranty, did not exculpate defendant from liability in tort for its negligence in supplying defective material, but that measure of damages applied in second cause of action was improper.

Judgment in first action affirmed; judgment in second action reversed with directions.

1. Sales 🔑441(2)

In action by oil company against tool company for damages for sale of defective suspension plugs, evidence supported findings that tool company had represented that it could and would make a plug as good as those then in use, that oil company relied upon this affirmation in purchasing plugs from tool company, and that sales were made upon an expressed oral warranty.

2. Contracts 🔑114, 189

In cases where public interest or some statutory prohibition are not involved, it is permissible for a party to contract to absolve himself from liability for future negligence, but the law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against person relying on them.

3. Contracts 🔑155

A document is to be construed strictly against its drafter.

4. Indemnity 🔑8

To authorize holding that contract operated to indemnify a party against his own wrong, language of the contract must be clear and explicit, so as to compel that interpretation.

5. Negligence 🔑27

Terms and conditions in seller's catalogue and invoices, purporting to limit seller's liability for defects in goods, would be construed most strongly against seller as being the product of its own draftsmanship and designed to whittle down the normal and ordinary rights of a customer.

6. Sales 🔑427

A seller's obligation to a buyer for breach of a warranty is one of strict and absolute liability.

7. Sales 🔑248

Where a breach of warranty is established, liability is imposed entirely independent of the question of negligence on seller's part.

8. Negligence 🔑27

Language in tool company's catalogue and upon its invoices, purporting to limit its liability for defective goods, limited its liability only in event of a breach of warranty upon which sales were made, and not in event of a breach of duty of care to its customers, and did not exculpate tool company from liability in tort for its negligence in delivering to oil company defective suspension plugs. Civ.Code, § 1732.

9. Negligence 🔑27

Where tool company undertook to design a suspension plug as good as that which oil company was then using, it became tool company's common-law duty to oil company to accomplish the thing agreed upon with reasonable care and skill, and its negligent failure to observe this duty was a tort as well as a breach of contract.

10. Customs and Usages 🔑19(3)

In action by oil company against tool company for damages resulting from tool company's sale of defective suspension plugs, evidence established that there was no prevailing custom that an oil-tool company's liability is limited to the price of the article regardless of its negligence in design and manufacture.

11. Trial 🔑397(4)

Where, in oil company's action for damages for tool company's sale of defective suspension plugs, evidence established that there was no custom relieving an oil-tool company of liability for defects in tools regardless of its negligence, trial court's failure to find on the issue of custom could not be complained of by tool company.

12. Appeal and Error 🔑931(3)

Where an omitted finding must be inferred from a consideration of the findings actually made, a reviewing court will recognize the necessary inference and consider the finding in question as having in effect been made.

13. Appeal and Error 🔑931(1), 1010(1)

A reviewing court will uphold findings based on substantial evidence, resolving conflicts in evidence in favor of the prevailing party, and drawing all reasonable inferences in support of the findings.

14. Damages 🔑62(1)

A person injured by wrongful act of another is bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.

15. Damages 🔑62(1)

What is reasonable care and diligence, such as must be exercised by a person injured to avoid loss or minimize resulting damages, is determined by the facts, knowledge and problems then existent in relation to person in trouble, the injured person, and his point of view at the time.

16. Damages 🔑188(1)

In oil company's action for damages resulting from tool company's sale of defective suspension plugs, evidence was sufficient to support finding that oil company's action in not capping wells upon discovery of defect was not a failure to exercise reasonable care to mitigate damages.

17. Negligence 🔑56(1.12)

The doctrine of responsibility for negligence is based upon postulate that without such negligence the injury would not have occurred.

18. Negligence 🔑136(25)

Question of whether a defendant's negligence was the legal cause of injury, that is, whether plaintiff has sustained burden of establishing that defendant's negligence was the cause in fact from which injury proximately resulted, is ordinarily for the trier of facts.

19. Negligence 🔑134(11)

In oil company's action against tool company for damages resulting from tool company's sale of defective suspension plugs, evidence was sufficient to sustain finding that leak in plaintiff's oil well casing had been either caused directly by dropping of tubing resulting from failure of suspension plug or as consequence of stresses and strains of redrilling operations required by that failure.

20. Damages ⚷95, 103

The measure of damages which may be recovered as the result of tortious conduct of another is that amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not, but compensation received shall be commensurate with the injury, and no more. Civ. Code, § 3333.

21. Damages ⚷95, 103

Ordinarily, the law will not put an injured party in a better position than he would be in had the wrong not been done.

22. Mines and Minerals ⚷73

Oil company which owned lease under which well was being drilled was possessed of a "profit à prendre", which is an interest in the land.

See publication Words and Phrases, for other judicial constructions and definitions of "Profit à Prendre".

23. Damages ⚷103

There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property, and whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.

24. Damages ⚷111

Where oil company's oil well was irreparably damaged by failure of defective suspension plug which had been sold to oil company by tool company, so that cost of restoration would exceed value of remaining production, oil company was entitled to recover an amount equal to the value of the well as it existed prior to the accident, plus any reasonable expense incurred in its efforts to restore the well to production up to time of determination that the efforts were impractical, less than the value of any salvage realized.

25. Damages ⚷111

Where oil company's well was irreparably damaged by failure of the defective suspension plug which had been sold to it by tool company, and oil company plugged back the hole and tapped a higher level, award to oil company against tool company of the cost of exploring and drilling a new well at a different level to produce oil from a hitherto untapped zone under a different lease, in amount exceeding the value of the original well at date of accident, was excessive. Civ.Code, § 3359.

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Eugene S. Ives, Los Angeles, for appellant.

Chandler, Wright, Tyler & Ward, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from two judgments for damages (rendered in separate actions consolidated for trial), resulting from sales of defective suspension plugs to plaintiff. Plaintiff's complaints comprised counts based on breach of express and implied warranties and negligence in the design and manufacture of such plugs. Defendant pleaded as affirmative defenses contributory negligence, plaintiff's failure to mitigate damages, and a limitation of liability clause in its invoices which precluded the recovery of damages.

Plaintiff Basin Oil Co. of California (hereinafter referred to as Basin) is a corporation engaged in the production of oil. Defendant Baash-Ross Tool Company (subsequently denominated Baash-Ross) is a designer and manufacturer of tools used in the petroleum industry. In 1946 Basin commenced drilling 16 oil wells in the city of Inglewood, California, to depths of approximately 10,000 feet. The site of these drilling operations was a high pressure field, with initial gas pressures in excess of 3,000 pounds per square inch. The surface locations of these wells are in proximity to industrial and residential areas of Inglewood.

Prior to and during 1946, Basin had both purchased and rented oil well equipment from Baash-Ross. It had never used any Baash-Ross suspension plugs. Basin had been using a type of double suspension plug in its wellhead equipment known as the Regan plug, which was manufactured by another supplier of oil tools in Southern California. Basin had used these Regan double-suspension plugs in its wells up to a depth of 9,500 feet without ever encountering a plug failure. A double suspension plug, which is made up of an inner and outer plug, is an oil tool used in the wellhead of an oil well to suspend the tubing. It consists of a doughnut shaped outer plug tapered on the outside to fit in the tubing head, and on the inside to seat the inner plug. The latter is a smaller tapered plug which is screwed to the top of the tubing and actually suspends the tubing in the well.

Basin is one of several oil production enterprises in which its president, C. G. Willis, has an interest. Cecil Winslow was the drilling superintendent for Basin. His responsibilities included the procurement of wellhead equipment for Basin. Winslow had become acquainted with Glen Johnson, chief engineer for Baash-Ross, and early in 1946 he had engaged in several conferences with Johnson with regard to a rock bit he (Winslow) had invented and which he hoped Baash-Ross might manufacture. During one of these private conferences on about April 10, 1946, a discussion occurred regarding the wellhead equipment Winslow had been using. Johnson asked Winslow why Baash-Ross couldn't sell wellhead equipment to Basin or to other organizations for which Winslow worked. Winslow stated he liked the Regan tubing head and their double suspension plug and did not know that Baash-Ross manufactured such a plug; he also said he thought that Regan had a patent on the double suspension plug. Winslow testified that Johnson told him that there were no patents on the plug and that Baash-Ross "could make it as good as Regan." Winslow thereupon replied that he saw no reason "why I couldn't have Baash-Ross * * * furnish the tubing heads and well head equipment." Subsequent to this conversation Baash-Ross apparently proceeded to design and manufacture the double suspension plugs which it sold to Basin.

On April 17, 1946, about a week after the meeting last described, Baash-Ross wrote a letter to Basin, addressed to Winslow's attention, in which it quoted a list of prices, in response to a verbal inquiry, for wellhead equipment to be delivered to a well known as Simons No. 1 on the Bandini lease. Among the 11 items listed was "1 special Type K modified Tubing Suspension Plug * * *." Some time after the receipt of this letter, a Baash-Ross double suspension plug was delivered for use on the well referred to in the letter.

In the fall of 1946, Basin began the drilling of its wells in the Inglewood field, and the Baash-Ross double suspension plugs were delivered and used in those wells at the appropriate stage. C. L. Brain, a field man and salesman for Baash-Ross, kept in constant touch with Winslow about the progress of the drilling operation. As soon as the plugs were required to suspend the tubing in the hole, Brain was notified and the equipment was delivered. Winslow testified that he relied on Johnson's statement that Baash-Ross could design and manufacture double suspension plugs "as good as Regan." All of the double plugs used by Basin in the Inglewood field were purchased from Baash-Ross. Three of these plugs failed, causing damage upon which the present actions are founded. Two of these plugs failed during their use by Basin in its wells 5-1 and 1-1 when the inner plug compressed sufficiently to pass through the outer plug, allowing the tubing to drop to the bottom of the 10,000 foot hole. Basin thereupon initiated an action to recover damages, in which it alleged Baash-Ross had breached an express and implied warranty and was guilty of negligence in the design and manufacture of the suspension plugs which Basin had used in wells 5-1 and 1-1. After that case was at issue, another suspension plug sold by Baash-Ross to Basin and used in well 12-1 failed, in that a fracture of the outer plug occurred, which permitted the inner plug with the tubing attached to drop into the hole. Basin filed a second action based upon the same grounds alleged in its prior complaint. Baash-Ross's answer in each case, in addition to certain general denials, pleaded the affirmative defenses of contributory negligence, failure to mitigate damages, and the existence of a written limitation of liability appearing on the Baash-Ross invoices which precluded the recovery of damages. Upon the consolidated trial of the cases, the court found for Basin upon all the issues.

Generally speaking, the wells here involved were approximately 10,000 feet deep. At about 1,000 feet, an 11¾ inch casing is inserted and cemented in place. When the well is drilled to its maximum depth, a 7-inch casing is inserted in the 11¾ inch casing and the bottom is cemented in at about 9,000 feet. Then a 4¾ inch perforated liner is installed at the base of the 7-inch casing through the oil-bearing strata. Sometimes 7-inch casing is used extending to the bottom and is gun perforated to permit the gas and oil to enter. Two and one-half inch external upset tubing, open at the bottom, is suspended through the 7-inch casing by means of the suspension plug. Two and one-half inch tubing is run inside the 4¾ inch casing. In flowing wells of the type here involved, the oil and gas is forced into the liner by the formation pressure causing a high pressure inside the casing, which causes the oil and gas to go around the bottom of the tubing and to flow out through the tubing. The pressure outside the tubing is normally much higher than the internal pressure in the tubing. These pressures, as well as the pressure between the surface casing and the 7-inch casing and between the 7-inch casing and the tubing are registered by a gauge in the wellhead assembly. A tubing packer may be used at the bottom of the tubing inside the 7-inch casing to prevent movement of the tube.

The record on appeal includes 13 volumes of testimony, much of it concerned with technical expositions by experts with respect to the manner in which Basin used the plugs and the character of the procedures it employed during its drilling and remedial operations. This evidence will be alluded to in later discussions. A brief chronological summary is first necessary to establish the sequence of events.

The record shows that Basin commenced drilling well 5–1 on December 17, 1947. By March 9, 1948, the maximum depth of 10,326 feet had been reached, whereupon a perforated liner was installed. The next day, a string of 2½ inch tubing had been run into the hole to a depth of 9,540 feet, from which point 2-inch tubing was emplaced to a depth of 10,245 feet. This tubing string was then suspended from the double suspension plug at the head of the well. On March 11, the well came in as a producer, the flow coming through the suspended tubing. Under flowing conditions, the gas pressures were about 2,600 pounds per square inch in the casing and 2,300 to 2,100 pounds per square inch on the tubing. On March 25, 1948, Basin discovered that something was amiss when the gauges indicated that the gas pressures in the tubing and in the casing outside of the tubing had equalized. This condition was discussed by Basin's officers and employees. George Synold, Basin's assistant drilling superintendent, immediately called the matter to the attention of Winslow and Mr. Hall, Basin's production superintendent. These men considered the possibility of the presence of a hole in the tubing, or that the tubing had parted, or the existence of a leak from the packing between the inner and outer doughnuts. No one suggested the possibility of the inner suspension plug having pulled through the outer; Synold stated he had never heard of such a case. The matter received discussion by other officers of Basin, none of whom suspected that a defective suspension plug might be at fault. Meanwhile, the oil and gas was still flowing from the well. Inasmuch as the well continued to produce, and mindful of the hazards and difficulties that would attend the killing of a well with high gas pressure, in an area surrounded by homes and factories, for the purpose of ascertaining what was wrong, Basin's officers decided to permit the well to flow. The well produced through the remainder of 1948 and for more than half of 1949, until the flow began to diminish as the gas pressures dissipated. Its flow ceased entirely on August 26, 1949.

Well 1–1 was the second well in which the Baash-Ross suspension plug failed. Its surface location was 26 feet from well 5–1; and drilling commenced on March 15, 1948, four days after well 5–1 had been brought in as a producer. After the drilling was completed and the tubing suspended, the well came in as a producer on June 26, 1948. About one week later, it was apparent that the gas pressures had also equalized in this well, but it continued to flow as a producer. From the information then available to it, Basin had no reason to attribute the difficulty to the failure of the suspension plug. Production continued until the flow ceased on March 18, 1950, at which time the gas pressures had become dissipated.

In the meantime, before Basin knew the cause of the difficulty experienced in its other wells, the drilling of well 12–1 was undertaken on October 22, 1948. The drilling reached a maximum depth of 10,362 feet, but was plugged back for actual completion at 10,244 feet. A liner was not installed, but the 7-inch casing was gun perforated on January 25, 1949. By January 27, 1949, 2½ inch tubing to a depth of 10,134 feet had been run into the well and suspended from the Baash-Ross double suspension plug and the well came into flowing production on the same day. Not until July 19, 1950, was any equalization of pressure apparent. On July 26, 1950, its gas pressure had become dissipated and it ceased to produce.

During the interplay of these events, Basin commenced remedial operations to reestablish production in the wells which had been lost. On October 10, 1949, such operations started on well 5–1, which had not produced since August 26, 1949. On October 13, 1949, the outer suspension plug was recovered from the tubing head, at which time it was found that the inner plug, with the tubing attached, was not in place. The inner suspension plug, which had pulled through the outer plug, was found at a depth of 93 feet. In the succeeding weeks, fishing work for the removal of the tubing went on. By November 5, 1949, the tubing was recovered to a depth of 9,919 feet, with 411 feet of 2-inch tubing remaining in the hole. Since the hole could not be regained to the original depth, a window was milled in the side of the liner at 9,675 and a parallel hole drilled through the window alongside the former plugged-up hole to a depth of 10,329 feet. A perforated liner was again run in the well, and by November 29, 1949, 2½-inch and 2-inch tubing was suspended. A Baash-Ross suspension plug was not used. The well resumed production on November 30, 1949.

Similar operations were started on well 1–1 on March 20, 1950, two days after it had ceased to flow. When the outer plug was recovered, it was found the inner plug had pulled through the outer plug, dropping the tubing into the well. The inner plug with tubing attached was found on March 26, 1950. By April 26, 1950, tubing had been recovered to a depth of 9,779 feet, leaving 577 feet of 2-inch tubing in the hole. To avoid additional fishing, a window was again milled in the side of the liner and a hole drilled parallel to the blocked hole to a depth of 10,390 feet. The next day the presence of a hole in the 7-inch casing was detected somewhere between 2,100 feet and 6,200 feet. A sleeve or string of 4¾-inch casing was inserted in the 7-inch casing at a cost of about $25,000. Following this, the remaining processes for regaining the well were completed, and production resumed on June 7, 1950.

Remedial work on 12–1 began on August 1, 1950. The recovery of the outer plug revealed a different type of failure—a fracture, so that only a part of it remained in the tubing head. The inner suspension plug and the tubing had fallen into the hole. On August 13, 1950, the inner plug and part of the tubing was recovered from 117 feet down. In the next three days, 2½-inch tubing had been raised from a depth of 9,668 feet. Basin made no attempt to recover the tubing resting in the bottom of the hole.

Mr. Willis, Basin's president, testified the expense of overcoming the mechanical difficulties would be greater than the value of the production which remained. Instead, Basin decided to abandon that oil zone, and obtain production by perforations at a higher place in the liner which would tap a stratum known as the O'Dea zone. A plug was therefore set at 9,610 feet and 2½-inch tubing was landed at 8,881 feet on September 4, 1950, on which day production was obtained at the new level. The damages awarded for the loss of well 12-1 were $42,911.39, based on the cost to Basin to obtain production from the new oil zone.

At the time Johnson informed Winslow that Baash-Ross could make a double suspension plug "as good as Regan," a Baash-Ross catalogue, issued in 1944, was in circulation. On the first page, beneath a red-letter caption entitled "An Important Message," appeared the following statement: "This is your unqualified guarantee that you will continue to receive in Baash-Ross products only the highest grade of workmanship and materials, regardless of whatever emergency condition prevails." On the inside cover of the last page appears what is called "Terms and Conditions," which covers one half the page. Its language reads in part as follows: "All goods and materials are carefully tested and inspected before leaving point of manufacture, but as it is impossible to always detect imperfections, the only guarantee that is given by us, or for which we are in any way liable, is to replace such goods as prove defective when used for the purpose for which manufactured * * *." Winslow testified he had never familiarized himself with the contents of the "terms and conditions" set forth in the Baash-Ross catalogue.

The record shows that after each sale of the suspension plugs here involved was consummated and delivery accomplished, Baash-Ross sent to Basin a document, labeled an invoice, containing a list of the items sold and the prices charged. This document, which is a sheet with a Baash-Ross letterhead, contains two sets of parallel lines about ½ inch apart which run horizontally across the page immediately below the space reserved for the addressee, in the upper quarter of the invoice. Between these lines, in capital letters of easily readable size to one with normal vision, appears this legend: "Terms: A 2% cash discount will be allowed on this invoice on or before the 20th of the month following date of invoice. Net thereafter." Beneath this is a space reserved for the listing of the invoiced items, which extends almost the length of the page, to a point where it is bordered by two ruled lines which run horizontally along the page about 1½ inches from the bottom. Within the relatively confined space between these lines and the bottom of the page, in small, cramped print, there is to be found the following language: "All quotations and sales are f. o. b. point of shipment unless otherwise expressly stipulated. Carrier's receipt constitutes delivery and our responsibility then ceases. Positively no claims for shortage or damage allowed unless accompanied by original expense bill properly noted by carrier's authorized agent. On account of uncertainty of market, all quotations are subject to change without notice. All statements of date of shipments are estimated and we use our best efforts to ship within the time estimated. All agreements, however, are subject to strikes, accidents and other causes beyond our control. Orders for special goods are not subject to cancellation under any circumstances. *All goods and materials are carefully tested and inspected before leaving point of manufacture, but as it is impossible to always detect imperfections, the only guarantee that is given by us, or for which we are in any way liable, is to replace such goods as prove defective when used for the purpose for which manufactured, f. o. b. at point of delivery to carrier of goods being replaced, or allow credit for such goods at our option. All replaced goods are to be returned to us transportation prepaid. Under no circumstances are we responsible for any damages beyond the price of the goods. No damages or charges of any kind, either for labor, expenses or otherwise, suffered or incurred by the customer in repairing or replacing defective goods, or occasioned by them will be allowed.*

"We certify that to the best of our knowledge and belief, goods covered by this invoice have been produced in conformity with the Fair Labor Standards Act of 1938 [29 U.S.C.A. § 201 et seq.]. Any tax imposed by any law on the sale of articles made or sold by this company, shall be in addition to and a part of the sales price thereof.

"All sales made by us (unless otherwise agreed in writing by an executive officer of this company) are made subject to each and all of the foregoing conditions, and the placing of order by or delivery of such goods or material to the customer, or the use thereof by him, shall be an acceptance by the customer, of all of said conditions." (Italics added.)

Winslow testified that he and Mr. Hall customarily initialed the invoices covering items pertaining to their respective departments. He stated he never read the above matter printed on the bottom of the Baash-Ross invoice, and the only other invoice he had read was from another company in 1932. David Todd, who was controller for the Basin company, was responsible for payment of goods bought. He stated that he was aware that most large firms had some "stipulation" printed on their invoices relating to conditions of liability for goods sold, although he was not certain of the exact language. He testified he had never objected to the wording of any of the invoices.

Baash-Ross introduced testimony by numerous witnesses regarding a general custom prevalent in the oil industry purporting to limit the liability of a manufacturer of oil well drilling equipment either to replacement of the defective equipment or to an allowance of credit in the amount of the purchase price. Some of these witnesses stated that part of the custom was to guarantee good workmanship and good material, and that if there is good workmanship in the product, the custom is to limit manufacturers' liability to the value of the item sold. There was also testimony that the majority of oil tool companies carry products liability insurance which covers the cost of defense of litigation as well as the risk of liability stemming from the sale of defective goods.

Deferring our consideration of those segments of the record which bear on the subjects of Basin's alleged contributory negligence and the elements affecting the measure of damages awarded, it is here appropriate to summarize the factual findings made by the court. It was found that before April 17, 1946, Baash-Ross orally stated that it could manufacture a double suspension plug for Basin, assuring Basin that its plug would be as good as the Regan plug which Basin was then using. Baash-Ross intended this to be a continuingly effective affirmation, and it was in reliance on this affirmation that Basin purchased the three plugs here involved. Prior to the sale of the plugs, Baash-Ross knew the purpose for which Basin required the plugs, and knew that Basin was relying on Baash-Ross's skill and judgment in designing and manufacturing a plug reasonably fit for the intended use. After warranting it could make a plug as good as Regan's, Baash-Ross designed, engineered and manufactured double suspension plugs which it sold to Basin, including the three plugs here involved. These three plugs were each not as good as a Regan plug, and failed when used in Basin's wells 5–1, 1–1, and 12–1 for the purpose of suspending tubing.

The court found that after each of the above wells had become productive by a flow through the tubing by formation pressure, Basin observed, on the dates referred to in our previous narration of events, that the gas pressure on the casing and the gas pressure on the tubing in each of the wells had become equalized, but the wells continued to flow as producing wells. Basin had no information that the suspension plugs had failed. By August 26, 1949, well 5–1 ceased to produce as a flowing well; wells 1–1 and 12–1 ceased to produce as flowing wells by March 18, 1950, and by July 26, 1950, respectively. Subsequent to the termination of the flow on each of the wells, Basin commenced remedial operations on each of the wells for the purpose of placing it back in production. Upon the removal of certain of the wellhead equipment in the normal course of such remedial operations, Basin first discovered that the double suspension plug sold to it by Baash-Ross had failed in each of the aforesaid wells and, as a proximate cause of such failure, the tubing dropped into the hole, coiled and became wedged in the casing. The plug failure on wells 5–1 and 1–1 came about when the inner plug which had supported the tubing pulled through the outer plug, which remained in the tubing head. The failure on well 12–1 consisted in the fracturing of the outer plug, permitting the inner plug, which had supported the tubing, to drop into the hole.

As a proximate result of the above described failures, which made it impossible for oil and gas to flow through the tubing to the tubing head, the formation pressure would no longer cause the respective wells to flow. It thereupon became necessary for Basin, in a reasonable effort to salvage the probable values of each of said wells, to proceed with fishing operations for the purpose of removing the tubing from the wells, and to take other necessary action in accordance with good oil field practice, until wells 5–1, 1–1, and 12–1 were again brought into production as flowing wells.

The court found also that none of the plugs here involved was manufactured with the safety factor required to make each such plug reasonably fit for the purpose for which it was sold; that each such plug was not manufactured with a safety factor adequate to withstand the live-load impacts to which it was subjected, such impacts being within the probabilities of ordinary oil field conditions which Baash-Ross could reasonably have been expected to know and anticipate. Baash-Ross did not use adequate design, testing and safety factors, though this could have and would have insured successful performance by the plugs used by Basin. Baash-Ross was negligent both in designing and manufacturing the plugs used in the three wells, and such negligence proximately caused the failure of the plugs. Basin used due care and was neither negligent in installing each of the plugs nor in the operation of the wells nor in its conduct of the remedial operations required to place the wells back in production.

The court further found that after the sale, delivery and installation of the plugs used in wells 5–1, 1–1 and 12–1, and while those wells were already flowing as producers, Baash-Ross sent Basin three separate invoices listing various items of wellhead equipment, including the suspension plugs here in question. In small print at the bottom of these invoices appeared the statements already quoted. The court found to be untrue the allegations in Baash-Ross's fifth separate defense, among which was the claim that the language appearing on the invoices was a part of the terms and conditions upon which the sales of the plugs were made; that Basin was bound by that language; and that by accepting the plugs and invoices Basin waived all rights it might have had for damages due to the failure of the plugs. The court found that the plugs sold to Basin were newly-designed, having been designed and manufactured by Baash-Ross after its express warranty to Basin that it could make a plug as good as Regan. The plugs were still in an experimental state when sold, and Baash-Ross had made no tests of any facsimile or prototype. The plugs sold to Basin had not been carefully tested or tested in any reasonable manner before the sales, nor did Baash-Ross use reasonable methods to make certain that they were fit for the purpose for which they were intended.

The court awarded Basin the sum of $172,350.86, less the sum of $10,906.84 for which Basin was indebted to Baash-Ross, as damages sustained by reason of the failure of the plugs in wells 5–1 and 1–1. A judgment of $42,911.39 was rendered in Basin's favor with respect to well 12–1.

In its brief Baash-Ross "concedes that there was sufficient testimony as to negligence in the design and manufacture of the plugs to constitute a *prima facie* case in that regard and for purposes of this appeal admits that the findings as to negligence bears (sic) sufficient support in the evidence." It contends, however, (1) that the invoices and catalogue contained an express disclaimer of warranty and an exemption from liability for damages due to defective materials, and (2) the general custom of the oil trade restricted its liability for the failure of any equipment to the replacement of the defective part or an allowance of credit therefor. These arguments are without merit.

[1] It appears from the record that in order to induce Basin to purchase its suspension plugs, Baash-Ross represented that it could and would make a plug for Basin as good as the Regan plug. Basin

relied upon this affirmation in purchasing plugs from Baash-Ross. The sales of plugs were clearly made upon an express oral warranty. Civ.Code, sec. 1732; Stott v. Johnston, 36 Cal.2d 864, 869–870, 229 P.2d 348, 28 A.L.R.2d 580. There is absolutely no language either in Baash-Ross's catalogue or in its invoices which purports to disclaim the existence of any warranties, express or implied, in connection with its sales. The language of these documents, so far as here pertinent, is as follows: "All goods and materials are carefully tested and inspected before leaving point of manufacture, but as it is impossible to always detect imperfections, the only guarantee that is given by us, or for which we are in any way liable, is to replace such goods as prove defective when used for the purpose for which manufactured * * * or allow credit for such goods at our option. * * * Under no circumstances are we responsible for any damages beyond the price of the goods. No damages or charges of any kind, * * * suffered or incurred by the customer in repairing or replacing defective goods or occasioned by them, will be allowed." Far from disavowing any express warranty which Baash-Ross might expressly make, or disclaiming other warranties which the law implies, this language explicitly affirms and warrants that all goods are "carefully tested and inspected" before delivery. However, in the event imperfections in the goods escape detection despite careful testing and inspection, the quoted language announces that Baash-Ross's responsibility shall be restricted to replacement of the defective goods or the amount of the purchase price. In short, having warranted that its goods are carefully tested and inspected, and no specific disclaimer of express or implied warranties appearing, this language is clearly designed to protect Baash-Ross from the measure of damages normally flowing from breach of warranty by limiting its liability to the price of the goods sold. But Baash-Ross's liability in the instant case is predicated not alone on breach of warranty, but on findings of affirmative negligence which proximately caused the damages here sustained. The question posed, therefore, is whether the quoted language exculpates Baash-Ross from the consequences of its own negligence.

Thus, the main problem is one of construction, namely, whether there is any clear indication that Baash-Ross was attempting to shed its ordinary responsibility to a customer by exempting itself from the consequences of its own fault. It becomes unnecessary, therefore, to consider the question of whether Basin was bound by the terms and conditions contained in a catalogue which Mr. Winslow testified he was unfamiliar with, or by language of limitation of liability appearing on invoices sent after the completion of a sale made subject to warranties. We have had recent occasion to indulge in extended consideration of these precise issues in India Paint & Lacquer Co. v. United Steel Products Corp., 123 Cal.App.2d ——, 267 P.2d 408, hearing denied by Supreme Court. For present purposes, we may grant *arguendo,* that the terms and conditions in the catalogue and in the invoices were imported into the transaction under which the plugs were sold. The language therein, however, falls far short of manifesting that it was the intent of the parties that Baash-Ross was to be relieved of the consequences of its own negligence. Butt v. Bertola, 110 Cal.App.2d 128, 138–140, 242 P.2d 32; Doughnut Mach. Corporation v. Bibbey, 1 Cir., 65 F.2d 634, 637.

[2–4] In cases where the public interest or some statutory prohibition are not involved, it is permissible for a party to a contract to absolve himself from liability for future negligence. Stephens v. Southern Pacific Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751; Nichols v. Hitchcock Motor Co., 22 Cal.App.2d 151, 70 P.2d 654. Nevertheless, the law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying upon them. Pacific Indemnity Co. v. California, etc., Ltd., 29 Cal.App.2d 260, 274, 84 P.2d 313; Hollander v. Wilson Estate Co., 214 Cal. 582, 585, 7 P.2d 177; Doughnut Mach. Corporation v. Bibbey, supra; Johnson v. Fargo, 98 App.Div. 436, 90 N.Y.S. 725, 730; affirmed sub. nom. Johnston v. Fargo, 184 N.Y. 379, 77 N.E. 388, 7 L.R.A., N.S., 537; Standard Ins. Co. of N. Y. v. Ashland Oil & Ref. Co., 10 Cir., 186 F.2d 44, 46–48; Cerny Pickas & Co. v. C. R. Jahn Co., 347 Ill.App. 379, 106 N.E.2d 828, 831; Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185, 190; Glant v. Lloyd's Register of Shipping, 141 Wash. 253, 251 P. 274, 277–278, 252 P. 943; 17 C.J.S. Contracts, § 262; 6 Williston on Contracts, p. 5169 and cases cited in note 8; See Pure Torpedo Corp. v. Nation, 327 Ill.App. 28, 63 N.E.2d 600, 606–607. It is also well settled that a document is to be construed strictly against its drafter. Pacific Lumber Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 422, 139 P.2d 892; E. A. Strout Western Realty Agency v. Gregoire, 101 Cal. App.2d 512, 517, 225 P.2d 585. In harmony with this canon of construction, where the language of an instrument purporting to exculpate one of the parties for its future negligence was prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required. Pacific Indemnity Co. v. California, etc., Ltd., 29 Cal.App.2d 260, 274, 84 P.2d 313; Butt v. Bertola, 110 Cal.App.2d 128, 138–140, 242 P.2d 32; Doughnut Mach. Corporation v. Bibbey, supra; Winkler v. Appalachian Amusement Co. supra; Paddle v. Atlantic Basin Iron Works, Sup., 91 N.Y.S.2d 336, 338; 17 C.J.S. Contracts, § 262. As stated in Pacific Indemnity Co. v. California, etc., Ltd., supra [29 Cal.App.2d 260, 84 P.2d 320] "'the provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit. While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company "harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station," is broad and comprehensive, it is, as stated by the court below, provocative of some doubt. The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.'"

[5–8] These principles are pertinent to our inquiry as to whether the language in question is broad enough to exempt Baash-Ross from all manner of negligence upon its part in connection with its manufacture and sale of the suspension plugs. The terms and conditions in the catalogue and the invoices must be construed most strongly against Baash-Ross as being the product of its own draftsmanship and designed to whittle down the normal and ordinary rights of a customer. Burr v. Sherwin Williams Co., 42 Cal.2d ——, 268 P. 2d 1041. Examined in their entire context, it is patent from an analytical reading of the documents in question that they go no further than to limit Baash-Ross's liability for breach of warranty. Their language indicates that is fundamental that reasonable care in relation to the manufacture of the product will be used. But a seller's obligation to a buyer for breach of a warranty is one of strict and absolute liability. Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 520, 86 P.2d 102; Prosser on Torts, pp. 741, 742. Where a breach of warranty is established, liability is imposed entirely independent of the question of negligence on the part of the seller. Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 689, 163 P.2d 470; Patterson v. Orangeburg Fertilizer Co., 117 S.C. 140, 108 S.E. 401, 405; Williston on Sales, secs. 237, 237a. The sense of the conditions on the documents indicates a dominant purpose to escape from the full consequences of such strict liability. The language quoted plainly shows that Baash-Ross, asseverating that it would carefully test and inspect its products, was seeking exculpation not from its own affirmative negligence as a manufacturer and supplier of goods but from liability that might be fastened upon it from sales of goods which might prove defective despite its exercise of reasonable care. In short, its liability was limited in the event of a breach of any warranty upon which the sales were made and not in the event of a breach of its duty of care to its customers. Doughnut Mach. Corporation v. Bibbey, 1 Cir., 65 F.2d 634, 637. See Butt v. Bertola, 110 Cal.App.2d 128, 242 P.2d 32; Pure Torpedo Corp. v. Nation, 327 Ill.App. 28, 63 N.E.2d 600, 606–607. It is true that such language as "Under no circumstances are we responsible for any damage beyond the price of the goods. No damages * * * suffered * * * by the customer in repairing or replacing defective goods, or occasioned by them will be allowed," if isolated from its context and read without regard to the maxims of strict construction here applicable, is of broad scope. "Such broad language, however, is to be read in the light of the subject matter of the contract and the apparent intention of the parties." Eastman Oil Well Survey Corp. v. Lane-Wells Co., 21 Cal.2d 872, 873, 136 P.2d 564, 565; Butt v. Bertola, supra, 110 Cal.App.2d 138, 242 P.2d at page 39. Certainly there is here no mention of negligence nor a clear and explicit indication that Baash-Ross was attempting to relieve itself from the consequences of its own fault. As author of the words employed, Baash-Ross had it in its power to relieve itself from all obligations or liabilities, including that of negligence, by the use of appropriate language. Pac. Indemnity Co. v. California, etc., Ltd., supra. We are in accord with the trial court's view that the language on the invoices does not exculpate Baash-Ross from liability in tort for its negligence. Baash-Ross concedes that the findings as to such negligence are sustained by the evidence.

[9, 10] There is no merit in Baash-Ross's contention that the trial court erred (1) in not rendering judgment in conformity with testimony as to a general custom in the oil-tool trade limiting the liability of a manufacturer to replacement of defective merchandise or allowance of credit on the purchase price, and (2) in not making any finding on the subject. It is axiomatic that accompanying the undertaking on the part of Baash-Ross to design a plug as good as Regan was its common-law duty to Basin to accomplish the thing agreed upon with reasonable care and skill, and its negligent failure to observe this duty was a tort as well as a breach of contract. Roscoe Moss Co. v. Jenkins, 55 Cal.App.2d 369, 376, 130 P.2d 477. The evidence produced on the subject of the custom of the industry clearly indicates it is expected the manufacturer will use every reasonable method to assure that the tools and equipment sold are fit for the intended purpose. The evidence goes no further than to establish that, on the premise that the manufacturer has exercised reasonable care in fabricating the goods purchased, the buyer does not look to the manufacturer to respond in damages for a failure of the equipment. His sole recourse then is reimbursement of the purchase price or replacement of the equipment. But this is far short of showing the prevailing custom to be that an oil-tool company's liability is limited to the price of the article regardless of its negligence in design and manufacture, as is the case here. The reasonable inferences from the evidence are to the contrary. This appears must lucidly from the testimony of one of Baash-Ross's own witnesses, Mr. Chestnut, under cross-examination:

> "Q. As I understand your testimony of the custom, it was that the manufacturer does guarantee good workmanship and good material in his product? A. Yes.
>
> "Q. That is also part of the custom? A. Yes.
>
> "Q. And then if there is good workmanship and good material in his product it is the custom to limit his liability to replacement of the product or the value of the product if something goes wrong, is that right? A. Yes, sir."

In the instant case, good workmanship and good material in the Baash-Ross plugs was not established—on the contrary, the court expressly found negligence both in design and manufacture. It would be an extraordinary business usage, indeed—and one certainly not reflected by any judicious reading of the record—which would universally restrict a manufacturer's liability to the price of the goods regardless of his negligence in constructing the equipment and without regard to the subsequent consequences of such negligence.

[11, 12] Baash-Ross cannot successfully complain of the court's failure to find on the issue of custom when, in the light of the evidence, the facts actually found and the judgment rendered, the finding would have been adverse to it. Logan v. Forster, 114 Cal.App.2d 587, 596, 250 P.2d 730; Walpole v. Prefab Mfg. Co., 103 Cal.App.2d 472, 481, 230 P.2d 36. "Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made (citing cases)." Logan v. Forster, supra [114 Cal.App.2d 587, 250 P.2d 735].

[13] Baash-Ross contends that Basin was guilty of contributory negligence because (1) it failed to install thread protectors in the inner plugs used in wells 5–1 and 1–1, and (2) it did not have the plugs installed under the supervision of a Baash-Ross service man, provided without charge. In so contending, Baash-Ross urges us to conclude that this constituted contributory negligence by emphasizing, out of a mass of conflicting evidence, testimony favorable to itself. It points out that tests conducted by its expert witness indicated that the presence of thread protectors in inner plugs strengthened their capacity, and urges that if thread protectors had been used, the plugs in wells 5–1 and 1–1 would not have failed in the manner described. Although the plug in well 12–1 failed despite the use of a thread protector, Baash-Ross urges that this was due to improper installation of the plug, which would have been obviated if Basin had availed itself of the free services of a Baash-Ross man skilled in these matters. These contentions must prove unavailing when considered with reference to the rule that a reviewing court will uphold findings based on substantial evidence, resolving conflicts in the evidence in favor of the prevailing party, and drawing all reasonable inferences in support of the findings. Sheeter v. Lifur, 113 Cal.App.2d 729, 735, 249 P.2d 336. The court obviously credited Mr. Winslow when he stated that he did not recall anyone from Baash-Ross saying that thread protectors had to be used or that the plugs should not be installed except under the direction of a Baash-Ross service man. Edmond Wagner, Basin's expert witness, testified that thread protectors are ordinarily used only to protect the threads and unless special instructions had been given it could not be assumed they had any other purpose. He testified it was normal procedure in oil fields to remove the thread protector after the part is installed; that the thread protector added little to the strength of the plug until the inner plug had been pulled down by the load into the outer plug, at which time the suspension plug had already failed in performing its normal function. Mr. Synold testified that Baash-Ross led him to believe that the only purposes of the protectors were for the protection of the thread and that he used the Regan plug without thread protectors. He and other witnesses described how they installed the plugs. The memorandum of decision prepared by the trial judge discloses that he analyzed with meticulous and painstaking deliberateness the evidence relating to Baash-Ross's attempt to exonerate the plugs of blame for their failure and to ascribe responsibility therefor on Basin's inept installation and negligent methods of operation. The court's opinion reads in part: "A considerable and sincere effort was made in the trial to clear the plugs themselves of blame for their failure and to place the blame on alleged inexpert or negligent practices of the plaintiff. * * * Aside from purely speculative matters upon which findings of fact could not be made, defendant points to these factors of alleged negligent conduct on plaintiff's part: (1) Thread protectors were not used in two of the plugs. (2) The plugs were not seated properly when first placed in the well-head assembly. * * * The evidence does show that thread protectors were not placed for permanent retention in the inner plugs used in wells 5–1 and 1–1; and we have evidence, even from Mr. Winslow, that thread protectors ordinarily are so used in the inner plug. But we have no evidence—at least none that convinces the trier—that thread protectors ordinarily are used for

any purpose except to protect the threads, that they are used for the purpose of reinforcing and building up the safety factor of the plug or that they generally or usually are regarded as necessary for such a purpose. We have no evidence that any notice was given by defendant to plaintiff to the effect that the thread protector was necessary or advisable to provide an adequate safety factor or that the plug had been designed with reliance on the use of a thread protector to provide an adequate safety factor. The Court is convinced that practical men in the field ordinarily look upon a thread protector as having no essential purpose other than that which the name implies.

"As to the handling and seating of the plugs when installed in the well-head assembly, I firmly believe that Mr. Synold's description of the operation was truthful, and the evidence has not shown a better method, commonly practiced, of doing the job than that which he described." Thus the trial court has resolved the conflicting evidence on these factual matters against Baash-Ross on substantial evidence. Such resolution, which is reflected in the findings, is binding on this court.

Baash-Ross's next point is that the court erred in applying a measure of damages based on the cost of remedial operations undertaken eighteen months after the failure of the plugs instead of assessing damages on the basis of remedial operations promptly instituted. It argues that if the wells had been promptly killed, most of the damage suffered by Basin would have been avoided. In conjunction with this argument, Baash-Ross asserts the court ignored Basin's contributory negligence with respect to its drilling procedures, which contributed to the damage. Once again Baash-Ross is in effect asking this court to reevaluate the conflicting testimony of expert witnesses having practical and theoretical experience in all phases of oil production and oil well drilling and draw inferences contrary to those drawn by the trial court. We may not, however, arrogate to ourselves such fact-finding function. It is true that Baash-Ross' witnesses testified that immediately upon the equalization of the tubing and casing pressures, *they* would have taken steps to investigate the causes and remedy the situation. Baash-Ross argues that the delay resulted in the seepage of sand from the oil formation onto the bottom of the casing, which trapped and prevented removal of part of the tubing. Other witnesses testified as to the type of devices *they* would have used to make tests. Baash-Ross further contends that many of Basin's practices showed negligence in its *modus operandi*—such as running the tubing too close to the bottom of the well, failure to allow sufficient clearance space between tubing and liner to facilitate "wash-over" of the tubing inside the liner, failure to use packing to minimize vibration of the tubing, the improper closing of the master valve, and the like. However, Basin, for its part, introduced testimony to show its practices were in accord with approved standards. Basin's witnesses testified that good oil well practice did not require immediate remedial work. There was evidence that it would have been hazardous to attempt to kill the wells when they were under great pressures. C. G. Willis stated that damages from loss of production might have been greater if the wells had been killed while producing. He stated the practical thing to have done was to allow the flow to continue. Robin Willis, a geologist, testified he recommended that 5-1 be allowed to produce after equalization because the well might have been injured if killed. The sum and substance of the testimony showed that various differences of opinion as to the course of action which Basin should have pursued existed among men versed in the oil well drilling business. The most that can be said for the testimony of Baash-Ross' experts is that they would have used other methods than Basin employed and that they would have taken remedial action despite the fact that the wells were producing oil. This is far from establishing that Basin's reaction to the crisis confronting it was unreasonable or the methods it adopted were imprudent. Under the circumstances thus appearing, it was a question for the trier of fact as to whether Basin was guilty of negligence and a failure to act reasonably to mitigate the consequences flowing from Baash-Ross's negligence.

The court cogently crystallized the problem thus presented in the following language which we adopt as to these points: "As to the manner of shutting off the master valve, and the effects thereof, I believe that defendant's testimony on the subject was highly speculative, and I would find it extremely difficult to make a finding attributing any significant blame to plaintiff for a negligent practice in respect to this operation.

"Mr. Law's testimony concerning the use of guy wires and their effect in preventing vibration carries a good deal of weight with me as a recommendation for ideal practice, but the evidence falls short of convincing me that such installations are an ordinary or common procedure or are commonly in the field considered necessary or even advisable to prevent the failure of suspension plugs. * * *

"A contention sincerely and forcefully advocated by defendant is that after the tubing pressure and the casing pressure equalized, plaintiff was negligent in not handling the situation properly and in not taking steps that would have mitigated greatly the damages resulting from the failure of the plugs.

[14] "It is a firmly established principle of law that 'a person injured by the wrongful act of another is bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.' Valencia v. Shell Oil Co., 23 Cal.2d 840, 844 [147 P.2d 558].

[15] "This duty of the injured person, it will be noted, is not one that can be expressed in absolute terms for general application. The duty is to exercise *reasonable* care and diligence; and what is reasonable in a given situation is determined by the facts, knowledge and problems then existent in relation to the person in trouble, the injured person, and his point of view at the time.

[16] "The men responsible for the decisions of the plaintiff were intelligent, provident, experienced men, with a combined scholastic and field education covering an impressive number of years and bearing impressive significance. It is certain, I think, that, when they were called upon to make the decision in question, they gave not the slightest thought to possible litigation or to a possible claim against defendant, and were concerned solely with the question of what course of action would be most advantageous financially to the plaintiff, on the assumption that plaintiff alone would bear the financial burden of the trouble encountered. They were confronted by an unusual, if not a unique, situation, wholly unexpected as a probability. The evidence shows that in each instance they gave thoughtful, conscientious consideration to the emergency, applied their best judgment to the situation, always with the goal of accomplishing the best salvage, financially, that seemed to them to be practicable. Even a firm opinion held now that a different course from that which was followed would have been financially advantageous, would not in itself, justify a finding that plaintiff's executives, experts and managers failed to exercise reasonable care and diligence. I believe that they did exercise reasonable care and diligence to avoid loss and to minimize the resulting damages, even if their judgment was wrong as we now see the facts."

Baash-Ross's next assignment of error relates to the redrilling operations in connection with well 1-1. After the new liner had been run into this well, it was discovered that there was a hole in the 7-inch casing, causing a leak somewhere between 2,100 and 7,500 feet. Because of this leak, a 4¾-inch sleeve was inserted in the 7-inch casing at a cost of about $25,000. Baash-Ross contends that this item was erroneously included as a part of the damages, asserting it is not in any way referable to the failure of the plugs and the dropping of the tubing. It argues that the leak was due either to the weakness of the type of casing used or was caused by redrilling operations without the use of neoprane rubber protectors around the drilling pipe to prevent it from injuring the casing. Baash-Ross's argument is predicated on the thesis that no causal connection was established between its negligence and the occurrence of the leak in the casing.

[17–19] In considering this argument, the controlling rule of law is clear: "The whole doctrine of responsibility for negligence is based upon the postulate that without such negligence the injury would not have occurred, or, in other words, that the negligence is the proximate cause of the injury." McVay v. Central California Inv. Co., 6 Cal.App. 184, 188–189, 91 P. 745, 747. See Feldesman v. McGovern, 44 Cal.App.2d 566, 569, 112 P.2d 645. The question of whether defendant's negligence was the legal cause of plaintiff's injury, i. e., whether plaintiff has sustained the burden of establishing that defendant's negligence was the cause in fact from which his injury proximately resulted, is ordinarily for the trier of the facts. Shaw v. Owl Drug Co., 4 Cal.App.2d 191, 196, 40 P.2d 588; Been v. Lummus Co., 76 Cal.App.2d 288, 294, 173 P.2d 34; Prosser, Proximate Cause in California, 38 Cal.L.Rev. 369, 375. Baash-Ross points to the indication that leaks developed in the casing of certain other Basin wells. Its expert, Mr. Law, testified that in his opinion the leak was primarily due to the lightness of the casing used and was not necessarily related to the redrilling operations. He stated he could not attribute the leak to the dropping of the tubing. Basin's witnesses, however, gave testimony in opposition. The record shows that the remedial operations required extensive redrilling, which of itself subjected the casing to additional strain. Richard Ballantyne testified that the casing had sufficient collapse and tensile strength to handle what was normally required of it; that protectors are often not used with oil-based drilling fluids because the oil works on the rubber, causing the protectors to come off and create trouble. Mr. Winslow testified that while just a dropping of the tubing would not cause a hole in the casing "dropping the tubing will create a leak." Also, he disputed the advisability of using rubber protectors in the redrilling of well 1–1 under the conditions there prevailing. Considering the evidence and the legitimate inferences in favor of Basin, the court was warranted in finding that the leak was either caused directly by the dropping of the tubing or as a consequence of the stresses and strains of the redrilling operations required to restore the well to production. In sum, there was testimony by expert witnesses which, when considered with all the circumstances established by the evidence, justified the finding that Baash-Ross's negligence was the cause in fact and the proximate cause of this injury. Shaw v. Owl Drug Co., supra; Burford v. Baker, 53 Cal.App.2d 301, 306, 308, 127 P.2d 941; Been v. Lummus Co., supra.

The last point urged by Baash-Ross is that the finding as to the damage caused to well 12–1 is unsupported by the evidence. This contention must be sustained.

The circumstances accompanying the remedial and redrilling operations undertaken upon the cessation of production in 12–1 evince a situation radically different from that obtaining in connection with Wells 5–1 and 1–1. The record shows that 12–1 was the most easterly well, and was drilled as an exploratory hole. No liner was installed, but the casing was set to the bottom so the zones which looked promising could be selectively perforated. C. G. Willis testified there was considerable doubt as to whether 12–1 would produce at all. When it was first drilled, the drillers passed through an oil zone known as the O'Dea stratum without realizing it. It was completed to an effective depth of 10,244 feet, and Mr. Willis testified it was apparent 12–1 was not going to pay for its original drilling cost. After the flow terminated on July 23, 1950, remedial operations were commenced on August 12, 1950. By August 19, 2½-inch tubing to a depth of 9,668 feet had been recovered. No attempt was made to recover the remaining tubing in the bottom of this hole. Mr. Willis stated that the mechanical difficulties of getting all the tubing out of 12–1 would entail an expense greater than the income which could be derived from the amount of production remaining in the well. Mr. Willis therefore determined to abandon the zone from which 12–1 originally produced. A bridging plug was set at 9,610 feet, the effect of which was to seal off the part of the hole with the tubing. The lease on 12–1 was quitclaimed shortly thereafter to the landowner. It was decided to test the O'Dea zone, which was at a higher horizon in the same hole, although Basin had not previously tried producing from this zone. Two and one-half inch tubing was landed at 8,881 feet, the casing was gun perforated, and this well came in as a flowing producer on September 4, 1950. The well, which was drilled from the same surface location as the abandoned 12–1, was now producing from an oil sand different from that tapped in the original 12–1, and was renamed 4–2 under a different lease. The cost to Basin of obtaining production at this lesser depth from a different zone was $42,911.39, which was the amount assessed as damages for the loss of well 12–1.

Mr. Law, the petroleum engineer called by Baash-Ross, testified that he was familiar with the methods of appraisal of low production wells and in general terms of the market value of a well. In response to an inquiry as to the fair market value of well 12–1 just prior to the equalization of pressure, Mr. Law testified that such value was $19,500. This was broken down as follows—$12,000 as the worth of the anticipated oil, $7,000 for the value of the tubing, and $500 as the worth of the surface fittings. Basin did not deny the value placed on this well by Law, nor did any other witness name any other sum. Mr. Willis testified that the operations in each of the wells were reasonably necessary in order to recomplete the wells.

[20, 21] The measure of damages which may be recovered as the result of the tortious conduct of another is that amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not. Civ.Code, sec. 3333. It is a fundamental principle of the law of damages, however, that the compensation received shall be commensurate with the injury, and no more. Hähn v. Wilde, 211 Cal. 52, 55, 293 P. 30; Avery v. Fredericksen and Westbrook, 67 Cal.App.2d 334, 336, 154 P.2d 41; 15 Am.Jur., p. 400. Ordinarily, the law will not put the injured party in a better position than he would be in had the wrong not been done. Avery v. Fredericksen and Westbrook, supra, 67 Cal.App.2d at page 337, 154 P.2d at page 43.

[22] When Basin owned the lease under which 12–1 was being operated it was possessed of a profit *à prendre,* which is an interest in the land. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 649, 52 P.2d 237; Carlson v. Lindauer, 119 Cal. App.2d 292, 304, 259 P.2d 925. Basin's own testimony shows that there was not enough production remaining in the 12–1 oil zone to justify the expense of removing the tubing and resuming production therefrom. In effect, then, this well was completely destroyed as a result of Baash-Ross' negligence and it was abandoned by Basin when it realized further remedial operations were economically unwarranted.

[23] There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted. Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 200–201, 143 P.2d 12; Givens v. Markall, 51 Cal.App.2d 374, 379, 124 P.2d 839; 15 Am. Jur., pp. 514, 515. In Kell v. Jansen, 53 Cal.App.2d 498, at page 503, 127 P.2d 1033, at page 1036, a case involving damage to plaintiff's land due to the negligence of defendants, the court stated: "The rule laid down in Green v. General Pet. Corp., 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475, is that if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value then the value of the property is the proper measure." In Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 558, 96 P. 292, where plaintiff's property was covered by debris from defendant's mining operations, the court said that if the cost of removing the debris would amount to less than the value of the property as it was prior to the injury, the cost would be the

proper measure of damages; but if the cost of removal would exceed such value, then the value of the property would be the proper measure. This rule has been applied where an oil well has been destroyed by a defendant's negligence. In American Glycerin Co. v. Kenridge Oil Co., Tex.Civ.App., 295 S.W. 633, at pages 636–637, an action for damages caused by a premature explosion of a nitroglycerin shell while it was being lowered into an oil well, the court stated: "We suggest that upon another trial of this case evidence should be admitted and the jury called upon to determine in answer to a proper special issue whether or not the well could have been reproduced by drilling another one. If so, the correct measure of damages would be the cost of reproducing and equipping same in the manner that this well was equipped, less the value of any salvage realized by appellees, provided the cost would not exceed the value of the well. Should the cost of reproduction as found by the jury exceed the value of the well, as found by them, or should the jury determine upon competent testimony that the well could not have been reproduced, the damages should be assessed at the reasonable, cash market value of the well as equipped immediately preceding its destruction, less the value of any salvage realized by appellees." In United States Torpedo Co. v. Liner, Tex.Civ.App., 300 S.W. 641 an oil well was virtually destroyed by defendant's negligence, which rendered it worthless as a means of producing oil and gas from the leasehold. The court stated, 300 S.W. at page 647: "The testimony in this case shows that the well had a cash market value before the explosion, and that the salvaged casing had a cash market value. Under the circumstances in this case, the measure of damage for the tortious destruction of the well is the difference in the cash market value of the well immediately before the injury and that amount of the cash market value of the salvage remaining after deducting the expense of salvaging, provided such expense does not exceed the value of the salvage. [Citations.] In a case of this kind the owner would, in addition to the above, be allowed to recover any reasonable expense incurred by him in a prudent attempt to save the well after the injury [citation]."

[24] Basin's own proof showed that the injury to 12–1 was not reparable—that the cost of restoration of its flow would exceed the value of the remaining production. Basin was therefore compelled to abandon the oil formation under the 12–1 leasehold as totally lost. For the destruction of its property under such circumstances, Basin was entitled to recover an amount equal to the value of its well as it existed prior to the cessation of production, plus any reasonable expense incurred in its effort to restore the well to production up to the time of its determination that further efforts at restoration were impractical, less the value of any salvage realized. Green v. General Petroleum Corp., 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475; Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 558, 96 P. 292; American Glycerin Co. v. Kenridge Oil Co., supra; United States Torpedo Co. v. Liner, supra. A measure of damages based on these factors, which would have fully compensated Basin for the loss of the oil zone from which 12–1 produced, as well as for other items of expense reasonably incurred, was within the scope of the issues, as developed during the trial.

[25] The court did not apply this measure of damages. It made no finding as to the value of the well prior to the time production ceased, nor of the reasonable cost of Basin's remedial operations before it decided that the restoration of 12–1 would be futile. The only evidence as to the value of 12–1 immediately prior to the cessation of production is the opinion of Mr. Law that the well was worth $19,500. The court allowed the sum of $42,911.39 as the measure of damages, which was the amount expended to obtain oil production from the O'Dea zone, on the theory that this amount was the cost of regaining the lost well. However, unlike the situation which prevailed with respect to wells 5–1 and 1–1, the remedial operations on 12–1 never resulted in regaining the original oil zone. As has been indicated, 12–1 was never restored to production—it was given

up as lost. The sum of $42,911.39 which was awarded included the cost of exploring and drilling a new well at a different level to produce oil from a hitherto untapped oil zone under a different lease. To award this amount without a determination that such amount did not exceed the value of the original well immediately prior to the cessation of production, plus the legitimate costs of operations to save such well was error. See Green v. General Petroleum Corp., supra; Salstrom v. Orleans Bar Gold Min. Co., supra; American Glycerin Co. v. Kenridge Oil Co., supra; United States Torpedo Co. v. Liner, supra. By way of simple analogy, if an automobile is wrongfully demolished and its owner procures another to replace it, it is at once apparent that to allow an amount equal to the cost of the replacement without ascertaining the value of the thing lost would be to omit a fundamental consideration in the determination of what constitutes fair compensation for the injury. Similarly, unless Basin established that the value of 12–1 prior to the termination of production, plus the reasonable costs of its attempt to restore production in such well, was at least equal to the sum of $42,911.39, there is no justification for the award of such amount. For clearly, if the total of these items should be less than the amount awarded, Basin would be in a better position than it was before the injury and Baash-Ross would be subjected to excessive damages. Civ.Code, sec. 3359. In such a circumstance, Baash-Ross would be underwriting the financing of a new well in a new zone rather than compensating Basin for the value of the well lost through its negligence. Since there was a failure to find on these crucial items, and since it is only upon the basis of a determination of these items that Basin's damages can be properly assessed, the judgment in case No. 580394 must be reversed with directions to try only the issue of damages. Royer v. Carter, 37 Cal.2d 544, 551, 233 P.2d 539.

The case of Alphonzo E. Bell Corp. v. Listle, 74 Cal.App.2d 638, 169 P.2d 462, is not applicable. In that case, a prospect hole had been destroyed and the court allowed as the measure of damages the amount of money necessary to redrill the well to the horizon at which destruction occurred. This was the most equitable means of compensating the owner, since there was no way of knowing whether the hole would ever be a producer and, if so, what profits would be made.

The judgment in case No. 570372 is affirmed. The judgment in case No. 580394 is reversed with directions to retry only the issue of damages in accordance with the views expressed herein. Costs on appeal are apportioned as follows: Seventy-five per cent of such costs to be paid by appellant; twenty-five per cent by respondent.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

125 Cal.App.2d 626

SAYADOFF v. WARDA et al.

No. 15832.

District Court of Appeal, First District, Division 1, California.

June 1, 1954.

Hearing Denied July 28, 1954.

Civil conspiracy action involving question whether one who arranges for abortion is liable to woman who submits thereto to her injury. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., after plaintiff's opening statement to jury, rendered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem., held that plaintiff's consent barred recovery.

Affirmed.

1. Trial ⇨109

Upon motion for nonsuit after opening statement, all favorable inferences reasonably to be drawn therefrom must be accepted by the court as facts proved for purpose of disposing of the motion.

2. Conspiracy ⟹1

Civil action for conspiracy to commit assaults and battery by committing abortions on plaintiff and causing other damage did not fail because action was dismissed as to all but one defendant.

3. Conspiracy ⟹17

One conspirator may be sued as one of several tort-feasors, and failure to join co-conspirators is not fatal to the action.

4. Conspiracy ⟹14

Each participant in wrongful conspiracy is responsible as joint tort-feasor for all damage ensuing from the wrong, irrespective of whether he was a direct actor and regardless of degree of his activity.

5. Abortion ⟹16

Man who arranged for abortion was not liable to adult woman who voluntarily submitted thereto to her injury.

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Belli, Ashe & Pinney, San Francisco, for appellant.

Edmund J. Holl, San Francisco, William Lahanier, San Francisco, for respondents.

McMURRAY, Justice pro tem.

Plaintiff appeals from a judgment of nonsuit rendered after plaintiff's opening statement to a jury.

The action was based on a conspiracy by defendant paramour to commit assaults and battery upon plaintiff by committing abortions on her and rendering her sterile and causing permanent damage to her female organs and causing her extreme mental suffering.

[1] Upon motion for nonsuit after opening statement it is unquestioned that "all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried." Bias v. Reed, 169 Cal. 33, 38, 145 P. 516, 518; Moffitt v. Ford Motor Co., 117 Cal.App. 247, 3 P.2d 605.

The opening statement recites, substantially, the following facts: Appellant, at the time of the abortion, which is the basis for this action, was thirty-five or thirty-six years old, and was a resident of San Francisco. She had been in this country since she was six or eight years old, having come here from Syria. Respondent was a distant cousin, who came from the same Syrian town as did appellant, and was friendly with appellant and her husband while she was married, and became more friendly with her after her divorce in 1948. Mrs. Sayadoff was given custody of the three children of that marriage at the time of the divorce and thereafter supported herself in good health until the time of the abortion which was the basis of action here. Since this abortion she has been able to do little work and her health will remain bad for the rest of her life.

Respondent and appellant began a course of meretricious sexual relations after appellant's divorce, and respondent often told her that he was in love with her and wanted to marry her. These relations resulted in appellant becoming pregnant in about July of 1948. At the "importuning" of respondent appellant went to Portland, Oregon, where she was aborted. At that time appellant knew nothing about the procedure or "anything else." The respondent made the phone call to the clinic where the abortion was performed, gave appellant $350, and she went to Portland from San Francisco, apparently alone, on the train, and had an abortion performed and was "placed on the train" and returned to San Francisco. Upon her return she again resumed the meretricious relationship with respondent and again became pregnant. In December of 1948 appellant again, apparently alone, went to Portland on the train, after respondent had phoned the clinic, and again was aborted, "placed on the train" and returned to San Francisco. This time respondent gave her $500 for the abortion.

In August of 1949, having again become pregnant, appellant again followed the same procedure. "* * * when Mrs. Sayadoff went up there, she knew nothing of this place, nothing of the doctor, nothing of the procedure or nothing of the establishment, but that it was all known by Mr. Warda and the arrangements were completely and entirely made by Mr. Warda and at his behest."

After this last trip appellant was ill and it became necessary to remove her female organs.

In the language of counsel it is said: "* * * of course, it is not contended here that Mr. Warda himself performed the abortion; it is contended, and very much contended, that it was through the offices of Mr. Warda, the importuning of Mr. Warda, the selection by Mr. Warda of the abortionist, the payment for her to go to this abortionist, that the abortion was done."

At the conclusion of this statement and upon the motion for nonsuit the trial judge said in part: "* * * if all the facts stated in the opening statement were presented to a jury, I don't think the case would be entitled to go to the jury. I don't think a jury could make a finding entitling the plaintiff to recover against the defendant."

[2-4] Some mention is made in the briefs filed herein that because the action was dismissed as to the abortionist and other named defendants, the action for conspiracy must fail. This is not the law. One conspirator may be sued as one of several tort-feasors and the failure to join the coconspirators is not fatal to the action, for as is said in Biggs v. Tourtas, 92 Cal. App.2d 316, at page 322, 206 P.2d 871, at page 876: "'In an action for damages resulting from acts of conspirators, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.'" If an abortion is an actionable tort the opening statement is sufficient to show a conspiracy.

Appellant contends that here there was no consent on her part to the claimed tort, that she was "importuned" by respondent and that she passively submitted. Under the facts outlined in the opening statement it is difficult to see how she can seriously support this contention. Even resolving, as we must, every favorable inference which might reasonably be drawn from the opening statement in appellant's favor, still there would appear to be consent on her part to participation in the act. The relationship of the parties, their intimacies, their common foreign extraction, are not enough to show that appellant did not consent to the acts here in question. She was 35 or 36 years old, with sufficient intelligence to be self-supporting, had been married and had children, and had lived in this country for twenty-seven to twenty-eight years. The fact that she was "importuned" by respondent shows nothing more than that he urged her to submit to this last abortion. She rode on the train alone and submitted to the operation several hundred miles removed from the importuning of respondent. The only reasonable inference from this is that there was a consent to the act. The case of People v. Dong Pok Yip, 164 Cal. 143, 127 P. 1031, is not in point. There it appeared that a nine year old boy of inferior mentality submitted passively to an assault. The court pointed out that "consent" and "assent" have a different meaning, and that no consent could be based upon passivity of the mentality before it.

The main question here presented is whether, under such facts, one who arranges for an abortion is liable in tort to the woman who submits thereto.

The question appears to be one of first impression in this state, although there have been similar cases relating to recovery for injuries sustained by abortions in other jurisdictions. These cases divide sharply in their results: one line allowing recovery, the other line denying recovery. They are collected in a note in 21 A.L.R.2d 369.

Those cases allowing recovery are in general accord with the reasoning contained in Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264, 33 A.L.R. 53, to the effect that although it is the general rule that where a plaintiff has consented to the act by which he is injured he cannot recover, it is otherwise where the public peace or the life of a citizen is involved, since that is a matter in which the state has an interest. Also it is there stated that there can be no power to consent to an act forbidden by law, and such a consent is illegal and void. The case was one wherein the administrator of a woman who died as the result of an abortion sought to and did recover from the abortionist, and the court states that no one may consent to the taking of his own life; and further, that no one can defend an action for injury to another's person on the ground of such other's consent to the injury, as the life and persons of individuals are guarded in the interest of the state.

In support of the view allowing recovery it has been argued that the state's interest is material, since, by consenting to injuries, its citizens may become public charges with attendant expense to the state. Some consideration has also been taken of the possible deterrent effect upon wrongdoers of imposing upon them the liabilities of civil actions as well as criminal actions.

Those cases which deny recovery are typified by Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217, 21 A.L.R.2d 364, wherein the court denied recovery against the abortionist for injuries and death of a woman growing out of an abortion. The court relied on the general rule that a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act. In the opinion, 190 Va. 162, 165, 56 S.E.2d 217, 218, 21 A.L.R.2d 364, 366, the court quotes as authority the statement of Lord Mansfield in Holman v. Johnson, 98 Eng.Rep. 1120: " 'No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.' "

In Goldnamer v. O'Brien, 98 Ky. 569, 33 S.W. 831, 36 L.R.A. 715, it was held that a woman who consented to treatment for the purposes of procuring an abortion could not recover from the persons who aided her in securing a doctor to produce the abortion, on the ground that a party who participates in an illegal act cannot profit by such act.

[5] Where, as here, a paramour arranges an apppointment with an abortionist, and the woman to be aborted travels several hundred miles, unescorted, for the third time in a little more than a year, and the abortion results in injuries to that woman, it would appear that she should not recover, at least against the paramour.

The maxim "volenti non fit injuria" would seem applicable. The appellant was experienced in these operations. She undertook to submit herself to the abortion after having been a participant in two prior abortions at the same place. The respondent, whose actions and conduct are assuredly indefensible, took no active part in the performance of the abortion other than "importuning" appellant to submit thereto and paying therefor after making telephonic arrangements for appellant's admission. She, alone, submitted.

Admittedly, the courts should discourage the violation of the penal statutes of this state, but it is highly doubtful that this end should be sought through the medium of civil litigation. It is also highly doubtful that any deterrent would be afforded by allowing damages in such a case as this. Such holding might well encourage a line of conduct such as we have before us,—the submission to abortions with no complaint if they are successful, but with the assurance of financial reward if the woman participant is injured.

The Restatement of Torts, § 60, adopts the rule of the Miller case denying recovery, but seems to limit its scope by Illustration 4 to an "abortion * * * skilfully performed." It would seem unwise to attempt to set up standards of skill in such cases, and nothing herein said should be so construed.

Where one submits to an illegal act voluntarily and suffers injury thereby, the interest of the state in the individual's health would seem somewhat remote, and also it is highly speculative to assume that in such instances the injured person will become a public charge.

Under the facts here before us the judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

125 Cal.App.2d 739

PEOPLE v. RAINEY.

Cr. 2987.

District Court of Appeal, First District, Division 1, California.

June 4, 1954.

Hearing Denied June 30, 1954.

Defendant was convicted of first degree robbery. The Superior Court, County of Alameda, James R. Agee, J., entered judgment, and defendant appealed in propria persona. The District Court of Appeal, Peters, P. J., held that, where, under the admitted facts, defendant had committed crime of first degree robbery while being armed with a pistol which defendant purportedly did not display during the robbery, trial court's refusal to grant defendant probation did not constitute an abuse of its discretion.

Judgment and order denying motion for new trial affirmed.

1. Robbery ⚷11

Where defendant admitted that he, together with two companions, participated in armed robbery of liquor store and that he was then armed with a pistol which he claimed he did not display during robbery, the crime was clearly that of first degree robbery.

2. Criminal Law ⚷982

If weapon which defendant had in pocket during robbery was a "deadly" weapon, trial court did not have power to grant defendant probation, and, if it be assumed that under such circumstances the weapon was not "deadly" but only "dangerous," matter of granting of probation was within trial court's discretion. Pen.Code, §§ 211a, 1203.

3. Criminal Law ⚷982

Probation is not a matter of right but an act of grace within trial court's discretion.

4. Criminal Law ⚷982

Where, under the admitted facts, defendant had committed crime of first degree robbery while being armed with a pistol, which defendant purportedly did not display during the robbery, trial court's refusal to grant defendant probation did not constitute an abuse of its discretion. Pen. Code, §§ 211a, 1203.

Bernard Rainey, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant, Bernard Rainey, appeals *in propria persona* from his judgment of conviction of first degree robbery, and from the order denying his motion for a new trial. He also complains that the denial of probation was an abuse of discretion.

In the Municipal Court appellant pleaded guilty to the charge of robbery, and the cause was transferred to the Superior Court to fix the degree of the crime. In that court, appellant's counsel, an assistant public defender, stipulated that the admitted robbery was one in the first degree, and the court so fixed it. Thereafter, the defendant appeared for sentencing. Defendant's counsel had on file an application for probation, arguing that his client had no prior felony involvement, that, although he had three prior misdemeanor charges against him, all of them had resulted in fines and no imprisonment, and that defendant had a good employment record. The probation officer recommended against probation. The trial court denied probation, and sentenced appellant to the state prison.

[1] Appellant admits that he, together with two companions, participated in the armed robbery of a liquor store. He admits that he was then armed with a pistol, but claims that he did not display the gun during the robbery. Appellant also admits that he has had a high school education. He claims that his counsel, by advising him to plead guilty in the Municipal Court and by stipulating in the Superior Court that the admitted crime was one of the first degree, deprived him of effective legal assistance. There is no merit to this contention. The record of the preliminary hearing is not before us. Appellant admits in his brief that he participated in the robbery. Thus, the advice to plead guilty was in accordance with the facts. The stipulation that the admitted crime was of the first degree is also in accordance with the admitted facts. Under Penal Code section 211a "All robbery which is perpetrated * * * by a person being armed with a dangerous or deadly weapon is robbery in the first degree." A person armed with a gun is guilty of robbery in the first degree although the gun is unloaded, People v. Raleigh, 128 Cal.App. 105, 16 P.2d 752, and even though the weapon was not exposed. People v. Hall, 105 Cal.App. 359, 287 P. 533. Thus, the admitted facts support the stipulation and the judgment. Under the admitted facts the crime was clearly robbery of the first degree.

[2–4] Appellant next objects to the fact that he was denied probation, claiming, without a record to support the claim, that one of the participants in the robbery with prior felony convictions, was granted probation. Under the law and the facts the trial court had, at least, the discretion to deny probation, if it was not in fact compelled to do so. If the weapon in the pocket was a "deadly" weapon, under the provisions of section 1203 of the Penal Code, the court had no power to grant probation. If it be assumed that under such circumstances the weapon was not "deadly" but only "dangerous," then the same section places probation within the discretion of the trial court. People v. Johnson, 106 Cal.App.2d 815, 236 P.2d 190. Probation is, of course, not a matter of right, but an act of grace within the discretion of the trial court. People v. Dandy, 106 Cal.App.2d 19, 234 P.2d 61; People v. Connolly, 103 Cal.App.2d 245, 229 P.2d 112. In the instant case, the court had before it the application for probation, and the report of the probation officer, made after investigation, recommending a denial of probation. Under such circumstances, and under the facts admitted by appellant, we cannot hold, as a matter of law, that the trial court abused its discretion.

The judgment appealed from and the order denying the motion for a new trial are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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125 Cal.App.2d 838

PEOPLE v. WILLIAMS et al.

Cr. 5136.

District Court of Appeal, Second District,
Division 1, California.
June 14, 1954.

Prosecution of accused charged by information with crime of possession of heroin. From adverse judgment of Superior Court of Los Angeles County, Charles W. Fricke, J., the accused appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

Poisons 🔑9

Evidence was sufficient to sustain conviction for possession of heroin. Health and Safety Code, § 11500.

Cletus J. Hanifin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant Mae Miller was charged by information "with the crime of possession of heroin in violation of Section 11500 of the Health and Safety Code". A jury returned a verdict of guilty. Defendant Frank Williams pleaded guilty. A motion for a new trial was denied and defendant Miller appeals from the judgment.

Appellant contends, in substance, that the evidence is insufficient to support the verdict, in other words, as recited in appellant's brief, "Based upon the evidence presented by the prosecution in this case, we respectfully submit that the prosecution has not sustained the burden of proof and that the verdict of the Jury must be set aside on the ground that it is prejudicial and against the weight of the evidence and that there was no substantial evidence to warrant such a finding." It is also contended that, "The Court was guilty of misconduct in that the Court definitely attempted to convey to the Jury, an impression that the Court believed the defendant guilty".

The record reveals that "for ten or fifteen minutes immediately prior to the arrest, the officers had observed Mrs. Miller and Mr. Williams through the window in the bedroom of the apartment.

"Officer Rock testified that when he observed Mrs. Miller she was seated facing a dressing table with her back to him. He could see her head, her shoulder and her side. Defendant Williams was to her right facing her. The officers observed defendant Williams holding pieces of small white paper.

"After placing Mrs. Miller and Mr. Williams under arrest, Officer Rock turned and observed a small pile of brownish powder on the dressing table together with some implements. There was a small spoon, a dinner knife, a hairpin and some white paper squares. The powder that was on the dressing table was lying loose. There were also 28 white paper bindles on the dressing table which contained a brownish powder.

"Shortly thereafter, the officers discovered, and Mr. Williams pointed out, a brown paper bag. The bag was between the window and the table upon which the powder was found. At the time Williams pointed to the bag, he said, 'There is the bag, that is all the stuff there is in the room, you have got it all now, * * *.' On examining the bag, the officers found inside 157 paper bindles made of white paper containing a brownish powder. At that time also Mr. Williams stated, 'All of this stuff belongs to me, none of it belongs to her'—indicating the defendant, Miller,—'she was just putting them in the bag and counting them for me.'"

In part, appellant Miller testified and "denied that she had handled the papers or powder. She said that she had arrived at the apartment sometime around 10:00 o'clock that evening and she saw that Williams was papering up this powder. She admitted that he told her that he was papering up heroin. Mrs. Miller then said the reason she did not leave was because he had taken the keys to her car. She admitted thereafter sitting at the table where defendant Williams was papering the heroin. She also admitted that he asked her to count the papers and put them in the bag but that she refused."

The testimony reveals also that, "Sergeant Howe told her that he had seen them both 'papering up' through the window, and she answered that she had not been papering up but that she was merely counting the papers and putting them in the bag. She stated that she had once previously helped Frank to paper up but that she put too much in the papers and he wouldn't let her do it any more." It was established that the brown powder was heroin.

Without going into further detail it is sufficient to note the record does not sustain appellant's contentions. That the evidence was sufficient, as a matter of law, to support the verdict there is no question. Nor is there a sufficient showing of judicial prejudice or misconduct.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

125 Cal.App.2d 823

CONKLIN v. GOODSON et al.

Civ. 20033.

District Court of Appeal, Second District,
Division 2, California.
June 11, 1954.

Action for damages to real property allegedly resulting from defendants' interference with surface drainage. The Superior Court, Los Angeles County, Arthur Crum, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence supported findings that defendants had not been negligent in respect to grading and resurfacing the road above plaintiff's property and that damage to plaintiff's property had always been imminent and, on occasion in question, resulted from storms of unusual violence.

Judgment affirmed.

1. Municipal Corporations ⚷648

Where trail had been in constant use as a street for 20 years by owners of adjacent property, as only way of ingress and egress, public acquired title thereto by open, notorious and adverse user for over five years, and purchaser of the trail bought title subject to the abutting owners of easement for street purposes. Revenue and Taxation Code, § 3520.

2. Municipal Corporations ⚷757(2)

Purchaser who bought trail upon which there was an easement for street purposes in favor of abutting owners had no obligation to keep surface of the trail in proper repair, that burden being upon the owners of the easement. Revenue and Taxation Code, § 3520.

3. Highways ⚷120(4)

In action for damages to real property allegedly resulting from floods occasioned by defendants' resurfacing and regrading a road above plaintiff's property, evidence sustained findings that defendants had not been negligent in resurfacing the road, and that the flooding of plaintiff's property, which had always been imminent, resulted, on occasion in question, from storms of unusual violence.

Hugh Ward Lutz, Los Angeles, for appellant.

Howard W. Hunter, Los Angeles, for respondent Van Wert.

James V. Brewer, Los Angeles, for respondent Goodson.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment denying her relief in an action for damages to real property.

Her home is on lots 10, 11, and 12 of tract 798 in the Hollywood Hills. Directly to the east of and adjacent to appellant's land are lots 45 and 46 which are contiguous with each other. To the east of lots 45 and 46 is lot P, about 30 feet in width and 534.38 feet long. As it approaches lot 46, lot P makes a turn southward, bounds lots 45 and 46 on their easterly sides and at about 190 feet from a point opposite the southerly boundary line of lot 11, it connects with lot O which is also about 30 feet wide and lies generally in a westerly direction. Lots 45 and 46 are uphill from lots 10, 11 and 12 and are immediately below a ridge at or about where lot P adjoins lot 46.

Appellant alleged that lots 45 and 46 are not normally subject to the flow of water coursing down any slope or gully other than the natural rainfall on the slope of said ridge immediately above them; that prior to October 1947, lots O, P, Q and M were maintained as a narrow dirt trail through the hills; that defendants, owners of adjacent lands, then widened, graded and surfaced with asphaltum black top, lots O, P, Q and M in a negligent and wrongful manner and have continuously excavated the soil from said lots and deposited the same on the downhill slopes thereof, thereby widening the drainage-collecting area of said lots and blocking the normal course of water flowing down the slopes and gullies northerly and above the said lots 45 and 46 and have so negligently constructed and maintained the road on said lots that the natural rainfall coming down the slopes and gullies above lots 45 and 46 were and are collected upon the surface of said lots M, Q and O and caused to course down the length thereof towards the point of the ridge directly above the property of plaintiff where lot P adjoins lots 45 and 46.

In paragraph V she alleges that "about January 17, 1952, during the course of a normal rainfall, rain waters were negligently and wrongfully collected as aforesaid on said Lot 'P' and debouched over the side or bank, where Lot 'P' adjoins Lots 45 and 46, down and across said last-mentioned lots and upon the property of plaintiff flooding her property and her home and garage with water, mud, silt and debris to plaintiff's damage as follows: Undermining and destroying two retaining walls upon the slopes to the rear of plaintiff's home, the landscaping of said hillside, flooding against the dwelling with mud and debris, breaking two screens and a window, filling a sleeping room with mud and debris, destroying the hardwood floor, the plaster and paint on the walls thereof, two heating radiators and the furniture and furnishings in said room and filling the entrance way to the garage and the dwelling with mud and debris."

In paragraph VI she makes similar allegations with reference to the floodwaters that came down upon her home about March 15, 1952, and that they flooded her home and garage with water, mud, silt and debris which accumulated against her home and garage and damaged her home and garage and movables within them, and such waters were collected on lot P, by reason of defendants' negligence.

She alleges that by reason of defendants' construction and maintenance of lots O, P, Q and M of tract 798, further damage will occur to plaintiff's property as normal rains are received above her property and wrongfully debouched upon her home. She makes appropriate allegations and demands compensation for the damage to her home in the sum of $2,450 and for exemplary damages.

In response to the issues created by respondents' denials of the amended complaint, the court made findings whereby respondents were exonerated from all charges of negligent or wrongful acts with relation to appellant's property or to the accumulation of storm waters that flooded her home and damaged her property. It was found that appellant was present at the surfacing and grading of the road on lots P and O and acquiesced in its maintenance after surfacing for a period of several years through a series of rainstorms of intensity equal to those described in her complaint, without complaining, and that her injuries suffered were solely and proximately contributed to by appellant's own negligence in failing to take precautions to protect her property.

[1, 2] The evidence is ample support for the findings. The proof is that lot P was purchased at tax sale by respondent Van Wert in March, 1949. It had been known as Yucca Trail and used as a street, but Mr. Van Wert had not participated in its grading improvement. He had not even seen it prior to 1952. The proof adopted is that the Trail had been in constant use as a street for twenty years by the owners of adjacent properties as the only way of ingress and egress. Therefore, at the time of the sale of lot P to Van Wert, the public had acquired title thereto by open, notorious and adverse user for over five years. Wallace v. Whitmore, 47 Cal.App.2d 369, 372, 117 P.2d 926. Purchase of the Trail brought the title of the land to Van Wert subject to the easement for street purposes of abutting owners. Tax. and Rev.Code, § 3520. This placed upon the new owner no obligation to keep the surface of the Trail in proper repair. That burden was incumbent upon the owners of the easement. Crease v. Jarrell, 65 Cal.App. 554, 559, 224 P. 762.

[3] The evidence fails to establish that either respondent negligently paved the Trail or did any act to cause the floodwaters to flow upon appellant's home and movable property. The evidence was that appellant's homesite is an excavated area cut into the side of the hill below the adjacent areas. Exhibits received show the drainage curve was filled with debris on January 18, filling the Trail there almost level with the edge of the berm. In such situation, what power could have stayed the onward rush of waters upon her or

have suspended the downward course of the flood? To divert the flow of such storm waters would have parallelled King Canute's struggle with the sea on the dates in question. The official Los Angeles "climatological data" shows that January 17, 1952 witnessed the completion of a three days' precipitation of more than six inches. In an area of steep and rocky hills and gullies, that amount of water is a monstrous force. The destructive power of sudden storm waters is incalculable. If the paved portion of Yucca Trail was only eleven feet wide, deeply rutted after rains and tilted from six to twelve inches, as testified by Mr. Goodson, it was inevitable that such storm waters should fill the normal drainage curve with debris and the following waters laden with silt leap the berm and invade the lower hillside home. After an ordinary rain, the waters never went over the edge of the Trail. The community had employed experienced road contractors to pave the Trail with a three-inch layer of rock and oil, slightly increasing the pitch to keep drainage next to the hill. The road was not changed at the point where the water spilled over onto appellant's home.

Nor had there been any change in the area drained by Yucca Trail. According to Professor Mackintosh who testified that the Trail "forms now a channel for water which had collected from and along those hills so that it performs both the functions of a channel for water and a one-car roadway" the excess water that flowed over to appellant was caused (1) by its content of surface material which was deposited on the low spots on the inside of the curve of the Trail above appellant's home and (2) by a caved-in bank that dammed the flow. Moreover, he testified also that the drainage on the Trail was improved by its pavement; that it had not washed over in recent years; that the rear of appellant's premises had from twelve to thirty-six inches of loose dirt over the decomposed granite which would be washed into her house during rains because of conditions at her place; the harder surface of the asphalt would prevent the washing down of the road, take the water away more quickly and carry off a larger amount of water without running over the outer edge.

From such testimony and that of other witnesses and from the court's inspection of the premises and surrounding area, it was demonstrated to the satisfaction of the trial court, Summers v. Parker, 119 Cal.App.2d 214, 218, 259 P.2d 59, that in no respect were respondents negligent; that their efforts tended to increase the protection to appellant; that the flooding of appellant's home was always imminent; that the storms on January 17 and March 15, 1952, were of unusual violence and the damage to appellant was unavoidable.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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125 Cal.App.2d 763

GLOBE INDEMNITY CO.
v.
INDUSTRIAL ACC. COMMISSION et al.
Civ. 8393.

District Court of Appeal, Third District,
California.
June 4, 1954.

Rehearing Denied June 29, 1954.

Petition by insurance carrier to review award of Industrial Accident Commission granting compensation for disability due to silicosis. The District Court of Appeal, Peek, J., held that evidence that claimant was exposed to dust during employment in mines of last two successive employers and that he was disabled due to silicosis made out a prima facie case against such employers and their insurance carriers and that whether such employers and their insurers met burden of proving that claimant's exposure while in their employ could not have contributed to his disability was essentially a question of fact for Commission.

Award affirmed.

award was based on findings that the employee's disability from silicosis was contributed to and caused by his employment by the Empire Star Mines Company, Ltd. and the Idaho-Maryland Mines Corporation during the periods of May 1, 1929, to March 30, 1938; and January 22, 1945, to July 25, 1949.

Since the basic facts and issues, as well as the contentions made and the authorities cited in support thereof, are essentially the same, our determination of this petition will necessarily be determinative of the other three.

The record establishes that for a period of five years beginning May 1, 1929, through April 30, 1934, the Empire Star Mines Company, Ltd., was permissibly self-insured. For the first year of this period (May 1, 1929, through April 30, 1930) the Globe Indemnity Company insured this employer's workmen's compensation liability, for indemnity benefits only, in excess of $1,000. During the remaining four years of this self-insuring period (May 1, 1930, through April 30, 1934) the United States Fidelity and Guaranty Company insured this employer's workmen's compensation liability, for indemnity benefits only, in excess of $5,000.

From May 1, 1934, through July 25, 1949, the Pacific Employers Insurance Company was the workmen's compensation insurance carrier for the Empire Star Mines Company, Ltd.

The record also establishes that the Idaho-Maryland Mines Corporation was permissibly self-insured during the period of June 11, 1938, through August 15, 1942, and January 2, 1945, through January 20, 1945.

The employment record of Trembath shows his work as a miner began in England at the age of 14; from approximately 1909 until his disability in 1949 he worked at different mines in various western states. At the outset of the hearing he elected to proceed against the Empire and the Idaho-Maryland mines. His employment record with these two companies shows work for Empire as a pumpman from May 1, 1929, through January 4, 1937; as a shift boss from January 5, 1938, through March 30, 1938; and as a pumpman from January 22, 1945, through July 25, 1949. From July 11, 1938, through July 15, 1942, and from January 2, 1945, through January 20, 1945, he worked as a mine and timberman for Idaho-Maryland. The record further shows that at all times subsequent to May 1, 1929, Empire operated the Pennsylvania Mine and the Empire Mine, and that from June 11, 1938, through August 15, 1942, and from January 2, 1945, through January 20, 1945, Idaho-Maryland operated the Brunswick Mine. During the years from 1938 until 1945 Trembath was employed in San Francisco Bay area defense work; he was employed by the Moore Shipbuilding Corporation as a fire guard, and by Hall-Scott Motor Company as an operator of a machine sanding crank shafts.

Trembath's testimony concerning conditions which existed while he was working in the Pennsylvania Mine was that from the time he started until he left he worked as a pumpman, which required him to look after all of the pumps which were in use at that time; that this work took him throughout and upon all levels in the mine; that when he first went on the pumps there conditions were "pretty bad;" that there was considerable smoke and gas, and "dust probably," because the blasting was close to the shaft; that these conditions continued as long as there were two shifts working, but after the mine went on one shift the conditions improved. In regard to his employment as a shift boss in 1937 and 1938, he testified that it was his job to go through the mine twice each shift; that in some places the air conditions were "pretty bad." His testimony concerning his work in the Brunswick Mine of the Idaho-Maryland Mining Corporation was that he did no mining there—only timbering, and after an injury received on that job, he was given lighter work greasing cars, which work however continued underground. He further stated that when greasing cars it was necessary to go all over the mine; that sometimes his work would take him very close to mining operations, particularly when he was timbering. He also testified that the air in that mine seemed fairly good except for one place, but because of the ventilation system the dust and smoke would clear out faster. Following his return to work in the Empire Mine in 1945, he went back on the pumps. This work took him on various levels of the mine where pumps were operating, and he testified that the air was pretty good in the shafts where he was working.

Conflicting testimony was given by one Charles H. Plumbtree, a safety engineer employed by the Empire Star Company since 1938. He testified that by 1926 or 1927 all drilling by that company was conducted by the wet method; that by November, 1929, the North Star Mine was connected to the Empire Mine to increase the ventilation, and in the space of a few years blowers were installed to take care of the expansion program. He also testified that it took a few years to get the ventilation into full operation; that during the early periods of dry drilling and dry mucking, the mines were dusty—this condition could be observed on the walls and on the timbers—but that after the ventilating system was installed, together with wet drilling and wet mucking, there was no dust. In comparing the dust conditions before and after the improvements he stated that originally dust could be seen, but that since the change there was no dust. He also testified that from 1935 on dust counts were taken periodically, and that he had accompanied a Mr. Finn in making dust counts throughout the mines during the different years that they were taken, and that such counts were representative of the mines at those times. A miner employed by Empire was called and testified that by 1929 the mine was using wet drills exclusively; that the miners were instructed to wet down the muck, and that the ventilation was good. Another employee of Empire testified that he had worked in the Pennsylvania Mine since 1935, and had likewise accompanied Finn while he was taking dust counts. He further testified that during Trembath's employment as a pumpman from 1935 to 1938 he performed duties from 1,500 to 2,000 feet from the nearest workings; that while Trembath was employed as a shift boss he did no drilling nor mucking, but it was necessary for him to go throughout the mine. This witness also testified that during these periods wet drilling was used exclusively and the mine was considered a wet mine. A chemical engineer and dust counter, John Finn, testified that he had been doing such work since 1919, using the same procedure as is followed by federal and state agencies, and more recently by the United States Navy for testing particles in the upper atmosphere. He further testified that in 1935 there were 120 miles of open tunnels, 60 per cent of which were covered by his report; that at the time air samples were taken, wet drilling was being conducted, and the samplings were made with the objective of getting samplings at the places where men were working and to get them as close to the face of the driller as possible. Finn's reports indicated that dust counts were taken in October, 1938; June, 1941; January, 1946; October, 1947; October, 1949; May, 1951; and April through June, 1935. All such counts showed the amount of dust to be less than the standard set by the Industrial Accident Commission.

The evidence concerning Trembath's medical history shows that he stopped operating drilling machines in 1925 and obtained work as a pumpman because of shortness of breath, and while it is true that he again experienced shortness of breath and coughing in 1942, it was not until July, 1949, that he was unable to continue working. He had been losing weight, experienced shortness of breath and general weakness. The doctor with whom he consulted hospitalized him for approximately a week and thereafter returned him to the hospital for a period of six weeks. He had no chest pains and no chest X-rays were taken. However metabolism, blood and cardiograph tests were made, and his case was diagnosed as chronic myocarditis. He continued under that physician's care until August, 1951. X-rays which were taken showed an infection of the right lung, so he was again hospitalized and a right lower lobectomy was performed. One doctor testified he could have had an abscess of the lung which could be wholly unrelated to his silicotic pathology. It was not until this period of hospitalization that he was informed he had silicosis. Reports of various doctors in the spring of 1952 discussed his case as stage two silicosis and tuberculosis. His disability was stated to be permanent so far as any heavy physical work was concerned. Various percentages of disability as it related to his years of employment were given; that is, one doctor estimated 75 per cent could be ascribed to silicosis and 25 per cent to his age; a second doctor expressed the opinion that 80 to 90 per cent of his disability was attributable to his early years of employment.

As previously stated, all of the contentions made by petitioners, that is, insufficiency of the evidence to support the award; impropriety of the award as to the excess carriers; failure to apportion the award; and the applicability of the statute of limitations, are substantially the same as are the authorities cited in support thereof.

[1] It would seem that since the case of Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 172 P.2d 884, there could be no question of the right of a disabled employee to proceed against "any one or more of successive employers or successive insurance carriers", 29 Cal.2d at page 82, 172 P.2d at page 886, and if the "disease and disability were contributed to by the employment * * * [he could] have an award against any or all of them for the whole disability * * *".

The precise situation is again presented in this case. The employee, Trembath, elected to proceed against his last two successive employers, Empire Star and Idaho-Maryland companies and their insurance carriers. Each petitioner, however, contends that the record contains no evidence to support the commission's finding that the employee suffered injury arising out of the course of his employment while that particular petitioner was the employer or insurance carrier. Here it should be noted that, although such contention is made by all petitioners, and each in turn re-states the evidence as it sees it, only one petitioner, and then in only one instance, makes any specific reference to the record.

[2] At the outset it must be noted that an "* * * employer takes the employee as he finds him at the time of employment and when subsequent injury lightens up or aggravates a previously existing condition rendering it disabling, liability for the full disability without proration is imposed on the employer." 29 Cal.2d at pages 83 and 84, 172 P.2d at page 887. It therefore is of no consequence whether Trembath's terminal employments were the sole proximate cause for his disability or whether such employments merely aggravated a pre-existing condition.

[3] It is true that there can be no question but that Trembath's greatest exposure took place in the early years of his work as a miner when dry drilling was the only method used. But it is not true that the record contains no evidence of exposure from 1929 to 1949 as petitioners contend. As we previously stated in our summary of evidence, Trembath testified that there were portions of each of the mines in which he worked where the conditions were "pretty bad." Thus under the mandatory rule set forth in section 3202 of the Labor Code relative to the liberal construction of the Workmen's Compensation Act, it necessarily follows that since the testimony shows that Trembath was exposed to dust during the years in question, and since the medical testimony established that he was disabled from silicosis, he has proven a prima facie case. See Industrial Indemnity Exchange v. Industrial Accident Comm., 87 Cal.App.2d 465, 197 P.2d 75. Whether or not the petitioners met the burden of proof thereby cast upon them to prove that his exposure while in their employ could not have contributed to his disability was essentially a question of fact to be resolved by the trier of fact. 87 Cal.App.2d 465, 197 P.2d 75.

[4] Only two factual situations are, or could be, relied upon by petitioners to refute Trembath's case—the changeover from dry to wet drilling, and the dust counts. The first would be no more conclusive that there was no dust thereafter than would the seven dust counts which were taken over a period of 20 years be conclusive that during all of that period

his employment was free from silica dust. The Commission was not compelled to accept either petitioners' summary of the evidence or the inference they have drawn therefrom.

As regards the next question raised by petitioners, that of apportionment, the Supreme Court in the Colonial Insurance case held that when a disabled employee has produced sufficient facts to show himself to be disabled from a progressive occupational diease—

> "To require [him] * * * to fix upon each of the carriers or employers the precise portion of the disability attributable to its contribution to the cause of the malady is not in consonance with the required liberal interpretation and application of the workmen's compensation laws. The successive carriers or employers should properly have the burden of adjusting the share that each should bear and that should be done by them in an independent proceeding between themselves. They are in a better position to produce evidence on the subject and establish the proper apportionment. All of them may have contributed to the disability and the employee should be permitted to proceed against and have an award against any or all of them for the whole disability if the evidence discloses that he was exposed to silica dust during his period of employment with each of the employers named." 29 Cal.2d at page 82, 172 P.2d at page 886.

[5] Hence Trembath, having established that during his two terminal employments he was so exposed and disabled, was not required to establish the precise portion of his disability attributable to each. That is the problem of the respondents, to be decided by them in an independent proceeding.

[6] The final contention made that Trembath is barred by the statute of limitations is also answered by the same case. There the court, quoting from an earlier case held that—

> "In dealing with the question of when the statute of limitation commences to run in progressive occupational disease cases this court has said: 'An injury, then, may arise out of, and in the course of, the employment, when there is a causal connection between the employment and the injury; but for purposes of compensation the injury dates from the time when the diseased condition culminates in an incapacity for work. It is at that time that the employer's liability becomes fixed; for until then the workman had received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before.' Marsh v. Industrial Acc. Comm., 217 Cal. 338, 345, 18 P.2d 933, 86 A.L.R. 563." 29 Cal.2d at page 83, 172 P.2d at page 886.

We find no merit in the contention that Trembath knew or should have known that the acute condition which caused him to leave work in 1949 was caused by or due to the same silicotic condition that had been bothering him ever since 1925.

[7] Whether or not such a progressive disease has progressed to a point which constitutes compensable disability, and whether or not the employee had knowledge or should have known of his condition, are primarily questions of fact to be determined by the Commission.

> [8] "*The question regarding a claimant's possession of knowledge of the cause of his ailment*, or as to whether the disease has progressed to an extent which constitutes compensable disability, is primarily one of fact to be determined by the commission. This court will not interfere with the commission's finding in that regard provided it is supported by substantial evidence or by reasonable inferences drawn from the testimony adduced. Morrison v. Industrial Acc. Comm., supra, 29 Cal.App.2d 528, 533, 85 P.2d 186." (Emphasis added.) Alford v. Industrial Accident Comm., 28 Cal.2d 198, 204, 169 P.2d 641, 644.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

125 Cal.App.2d 874 1

IDAHO MARYLAND MINES CORP., Petitioner, v. INDUSTRIAL ACC. COMMISSION of the State of California, and John James Trombath, Respondents.

Civ. 8394.

District Court of Appeal, Third District, California.

June 4, 1954.

Rehearing Denied June 29, 1954.

Appeal from Industrial Accident Commission, Nevada County.

Leonard, Hanna & Brophy, San Francisco, for petitioner.

T. Groezinger, San Francisco, for respondents.

PEEK, Justice.

This petition for review is a companion case to, and presents the same issues as those disposed of in Globe Indemnity Co. v. Industrial Accident Comm., Cal.App., 271 P.2d 149, and is controlled by the decision in that case.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

125 Cal.App.2d 875 2

PACIFIC EMPLOYERS INS. CO., and Empire Star Mines Company, Petitioners, v. INDUSTRIAL ACC. COMMISSION of the State of California, and John James Trembath, Respondents.

Civ. 8395.

District Court of Appeal, Third District, California.

June 4, 1954.

Rehearing Denied June 29, 1954.

Appeal from Industrial Accident Commission, Nevada County.

Mullen & Filippi, San Francisco, for petitioners.

T. Groezinger, San Francisco, for respondents.

PEEK, Justice.

This petition for review is a companion case to, and presents the same issues as those disposed of in Globe Indemnity Co. v. Industrial Accident Comm., Cal.App., 271 P.2d 149, and is controlled by the decision in that case.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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UNITED STATES FIDELITY & GUARANTY CO., Petitioner, v. INDUSTRIAL ACC. COMMISSION of the State of California, and John James Trembath, Respondents.

Civ. 8396.

District Court of Appeal, Third District, California.

June 4, 1954.

Rehearing Denied June 29, 1954.

Appeal from Industrial Accident Commission, Nevada County.

Leonard, Hanna & Brophy, San Francisco, for petitioner.

T. Groezinger, San Francisco, for respondents.

PEEK, Justice.

This petition for review is a companion case to, and presents the same issues as those disposed of in Globe Indemnity Co. v. Industrial Accident Comm., Cal.App., 271 P.2d 149, and is controlled by the decision in that case.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

125 Cal.App.2d 749

WILSON
v.
SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 16233.

District Court of Appeal, First District,
Division 2, California.
June 4, 1954.

Proceeding upon accused's application for writ of mandate requiring Superior Court judge to discharge indictment on ground that he had not been brought to trial within 60 days. The District Court of Appeal, Nourse, P. J., held that where, prior to indictment for subornation of perjury, accused had established residence in Hollywood, purportedly had notified Department of Motor Vehicles in Sacramento of such fact, and had been continuously in business at such address under partnership in which his partner conducted his share of business at an address in Oakland, and such addresses were publicized, and after indictment accused announced his candidacy for governorship of California with resulting wide publicity, good cause was not shown for delay of about 16 months after indictment before any effort was made to apprehend accused, and, therefore, indictment would be ordered discharged.

Peremptory writ issued.

1. Criminal Law ⚿=575

Trial within 60 days after indictment is mandatory unless some good excuse is given for the delay. Pen.Code, § 1382.

2. Criminal Law ⚿=576(2)

Where, prior to indictment for subornation of perjury, accused had established residence in Hollywood, purportedly had notified department of Motor Vehicles in Sacramento of such fact, and had been continuously in business at such address under partnership in which his partner conducted his share of business at an address in Oakland, and such addresses were publicized, and after indictment accused announced his candidacy for governorship of California with resulting wide publicity, good cause was not shown for delay of about 16 months after indictment before any effort was made to apprehend accused, and, therefore, indictment would be ordered discharged. Pen.Code, § 1382.

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Richard H. Cantillon, Beverly Hills, for petitioner.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., William K. Coblentz, Dep. Atty. Gen., Thomas C. Lynch, Dist. Atty., of the City and County of San Francisco, Cecil Poole, Asst. Dist. Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

On November 26, 1952, an indictment was filed against the petitioner herein charging the commission of a felony—subornation of perjury—on the third day of January, 1951. No effort was made to apprehend him until February 22, 1954, when he appeared in Washington, D. C., in opposition to the confirmation of the Governor of the State as Chief Justice of the United States. He was thereupon charged in the municipal court of Washington, D. C., with the crime of being a fugitive from justice of this state. Released on bail by the Washington court he was returned to San Francisco where, on March 29, 1954, he appeared in the superior court and moved for his discharge from the former indictment on the ground that he had not been brought to trial within the time fixed in section 1382 of the Penal Code. This motion was denied, hence this application for a writ of mandate.

The case made by the petitioner is that, prior to the indictment, he had established a residence in the City of Hollywood in Los Angeles County and had on August 29, 1952, so notified the department of Motor Vehicles in Sacramento giving the number of his driver's license; that he has been continuously in business at that address under a partnership wherein his partner conducted his share of the business at an address in Oakland. That these addresses were publicized and that no effort was made to conceal them. He also showed that in the fall of 1953 he announced his candidacy for the governorship of California and that wide publicity had been given of that fact. The only conflict is that the Motor Vehicle Department had no record of a request for change of address.

[1, 2] The respondents do not make the slightest showing of an effort to apprehend the petitioner over the period of more than one year after the indictment. A trial within sixty days is mandatory unless some good excuse is given for the delay. The cases cited in the other opinions this day filed point out that the delay may be excused for good and reasonable cause. No good cause is shown here.

Let a peremptory writ issue as prayed.

DOOLING and KAUFMAN, JJ., concur.

126 Cal.App.2d 13

PROVIDENT IRR. DIST. et al.

v.

CECIL et al.

Civ. 8379.

District Court of Appeal,
Third District.
June 15, 1954.

Action by upper property owners within irrigation district and irrigation district for injunction against lower property owner within the district to restrain interference with natural drains which had been improved by irrigation district. From adverse judgment of Superior Court, Glenn County, Belieu, J., the lower property owner appealed. The District Court of Appeal, Van Dyke, P. J., held that the upper property owners did not have the prescriptive right to discharge excess irrigation waters into the drains of such discharge would injure the lower property owner.

Judgment affirmed.

1. Waters and Water Courses 🔑119(1, 3)

Upper property owners have the right to have natural drains maintained in a natural state to carry off waters naturally flowing through them and also to discharge into them such reasonable quantities of excess waters as can be discharged and borne away without injury to lower property owners' land.

2. Waters and Water Courses 🔑152(8)

In action by upper property owners within irrigation district and irrigation district against lower property owner for filling two natural drains thereby impeding natural flow of water and drainage of excess irrigation water, evidence was insufficient to support finding that upper property owners had a prescriptive right to discharge excess irrigation waters which would be injurious to lower property owner.

3. Waters and Water Courses 🔑150

Where irrigation district had adapted natural drains to provide land within its boundaries with irrigation water and to maintain sufficient drainage channels to protect the land from injury from irrigation water, the drains had been appropriated to public use and upstream property owners whose irrigation waters were being discharged into drainage facilities could not, through the use of those facilities, obtain a prescriptive right to discharge irrigation waters into the drain without limitation.

4. Eminent Domain 🔑98
Waters and Water Courses 🔑150

Where irrigation district entered upon lands of defendant and improved natural drains for carrying away natural and irrigation waters from lands of upper property owners, the lower property owners had no right to interfere with the improved drains, but did have the right to be compensated for any property taken for improving the natural drains.

5. Waters and Water Courses 🔑152(3)

Where lower property owner filled in natural drains which had been improved by irrigation district to drain off water from upper land and to carry off excess irrigation waters, upper property owners whose land had been flooded by defendant's act of impeding drainage of water could enjoin lower property owners' interference with the natural drains.

6. Waters and Water Courses ⚿150

Lower property owner has no right to enter upon and in any wise change the character of the location of natural drains which had been improved and adapted by irrigation district and were being operated by the district to carry off natural drainage and excess irrigation water.

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Duard F. Geis, Willows, Virgil O'Sullivan, Colusa, for appellants.

P. J. Minasian, Oroville, for respondent.

VAN DYKE, Presiding Justice.

In this action two owners of land within an irrigation district joined with the district in an action brought to obtain mandatory and prohibitory injunctions against defendants, who also owned land within the district.

Responsive to the pleadings, the trial court found the following: Provident Irrigation District is and at all times mentioned in the complaint was an irrigation district organized by virtue of law. The north boundary of defendants' land was the south boundary of Carriere's land and his north line in turn was the south line of Lambert's. The lands of the three owners sloped from north to south and had been drained by two wide and shallow natural channels coursing through the Lambert and Carriere properties and on to and across the lands of defendants. These drains in a state of nature accommodated the flow of rain and surface waters brought to or falling upon the lands within their drainage areas. These drains converged at a point in the northerly portion of the defendants' lands and led thence southerly until their waters emptied into Willow Creek, a well-defined and natural channel. For more than five years before this action was begun the three plaintiffs, with their predecessors in interest, had continually, openly, notoriously, adversely and under claim of right, used, improved and maintained the said drains and through them had drained the summer run-off of excess irrigation water and waste water from the Lambert and Carriere lands and from lands lying north of them. In order to carry out the duties imposed upon it by law to provide drainage for land within its boundaries the district had cleaned and dredged the channels of the drains and in particular in the years 1939, 1942 and 1945 had caused them to be dug to a level of 82.6 feet S. V. I. Co. datum at their junction with Willow Creek and from that level, at that point, had caused the drains to be dug out and maintained to constant hydraulic grade northerly across the lands of defendants and of Carriere and Lambert. The channels of these natural drains had been so improved by the district, and had been, for more than five years, used by the district for the aforesaid purposes. In December of 1948 the defendants constructed a levee or dike along the northerly boundary of their lands and across the drains and thereafter had so leveled and planed their land as to fill in the drains. The levee which the defendants so erected made no provision for escape of waters flowing in the drains. But after this action was begun, the defendants made an insufficient opening in the levee and constructed a toe ditch along it to combine both drains. The defendants merged the two channels at a point where the most westerly thereof entered their lands and from that point, after action begun, defendants had constructed a new channel for the combined drains leading in a more direct route across their lands and into Willow Creek. However, the toe drain, the opening through the levee for the combined drains, and the channel made to carry the water to Willow Creek were insufficient both as to cross section and depth to accommodate the usual flow of waters and were not on a hydraulic grade. The result was that the waters were impeded and prevented from flowing across defendants' lands as they had theretofore done. This hindrance in flow prevented the accustomed movement of both summer irrigation water and normal high winter water having its source from rainfall on the lands within the area so that the waters were backed up and impounded. On the lands of Carriere the result was substantial damage to his lands, and to crops planted thereon. The waters so impeded were not flood waters, although often flood waters inundated and covered all of the lands in question. These floods, however, were temporary. The lands soon emerged and the waters returned to the natural channels from which the overflow came. A cash judgment was awarded Carriere. Judgment was given the plaintiffs in substance as follows: The court ordered defendants "to forthwith provide, dig, and deepen the channels for drains 27 and 27a [being the two drains heretofore discussed] across the hereinafter described land of defendants, to a condition, width, grade and depth, and remove that portion of the levee or dyke constructed by defendants * * across the northerly boundary of the said hereinafter described land of defendants to the extent necessary so that said drains and openings in said levee will provide drainage equal to and of a capacity equal to that of drains 27 and 27a as they existed immediately prior to the acts of defendants in filling in and damming off said drains; * * *" The defendants were further ordered generally to provide sufficient facilities to receive and transport across their lands "the surface waters naturally and normally flowing through and from the property of plaintiffs [here describing the lands of Carriere and Lambert]; such facilities to be of sufficient capacity and depth to receive and transport such surface and excess irrigation and crop drainage waters from the property of plaintiffs that may flow to or from the same, so that said waters may flow uninterrupted and unimpeded to and across said hereinafter described land of defendants as the same were accustomed to flow through the said drains 27 and 27a to and upon and through said hereinafter described land of defendants prior to the acts of the defendants in filling in and blocking off said drains." Defendants were further prohibitorily enjoined from thereafter filling in or damming up the drains or facilities to be provided under the mandatory order and from in any way interfering with the flow of water in the drains north of defendants' lands so as to injure or interfere with the use of the lands of Carriere and Lambert and from in any way interfering with or preventing the district from maintaining or cleaning the drains or facilities after the same had been so restored by the defendants pursuant to the mandatory order. From this judgment defendants have appealed.

[1] It appears that the court has adjudged all three plaintiffs to have established prescriptive rights, not only to flow across the land of defendants waters naturally draining through them from the lands of Carriere and Lambert, but also to use the drains for the purpose of discharging into them and having borne away by them excess irrigation waters without limit as to amount of the latter. Carriere and Lambert, since these were natural drains, had the right to have them maintained in their natural state to carry off waters naturally flowing through them and also to discharge into them such reasonable quantities of excess waters as could be discharged and borne away without injury to defendants' lands. Fell v. M. & T. Incorporated, 73 Cal.App.2d 692, 166 P.2d 642. But the limitations as to discharging irrigation waters into natural drains noted in the cited case and in other cases decided before and after that case is an important limitation. Anything in excess of reasonable and non-injurious discharge of irrigation water upon the lands of a lower owner is wrongful. To prove a prescriptive right to discharged irrigation waters into the drains without limitation required evidence that this hostile act had been so long continued as to give rise to a prescriptive right to do so. The trial court found such to have been the case.

[2] Appellants contend that there was no evidence sufficient to support a finding of such a prescriptive right in Carriere and Lambert. This contention must be sustained. There was no evidence whatever of any adverse and hostile use exceeding a rightful use of these drains by those two plaintiffs. A use of the drains to discharge and carry away waters accumulated in rice culture was shown, but it was not shown that this use exceeded a reasonable and

non-injurious use. Such use as was shown could not have been enjoined by defendants and such use could not give rise to prescriptive right since it could not be hostile or adverse.

[3] There is another reason why the finding of prescriptive right in Carriere and Lambert is not supported by the evidence. It was shown and found that for many years the district, in the exercise of its duties not only to provide the land within its boundaries with irrigation water but also to maintain sufficient drainage channels to protect the district lands from injury therefrom, had adapted these natural drains to such purposes and in so doing had rectified their channels and maintained them in condition to function as drainage canals. Indeed, the testimony was that when the district was organized these natural drains were already being used by a predecessor district for the same purposes and that when the properties of the predecessor district were conveyed to plaintiff district the deeds purported to convey easements over and along these drains for drainage purposes. Disregarding entirely the findings that the use made by the district of these drains had been adverse and had so adversely continued for more than five years it is apparent from the findings that these drains had long been appropriated to public use by the district. The findings bring into application the rule declared in Peabody v. City of Vallejo, 2 Cal. 2d 351, 377–378, 40 P.2d 486 and in Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185, that where a person or legal entity such as respondent district, which is in charge of a public use and has the power of condemnation has gone upon private property, constructed works in furtherance of its public use with at least the acquiescence of the owner and has put such structures to public use, the owners cannot disturb the possession so taken and are relegated to an action to recover compensation for the taking. It appears from the findings here that such a situation had long existed and therefore that any right of appellants to object to the use being made by the district of the drains was gone. It follows as a corollary that upstream owners in the district whose irrigation waters were being disposed of through what had become the district's drainage facilities could not, through the use of those facilities, obtain any adverse rights and this for the same reason we have referred to before that the use was not one which, under the circumstances, the appellants could object to or restrain. To prove a prescriptive right, therefore, Carriere and Lambert would have had to show that in respect of drainage of irrigation waters they had made use of these drains over and above merely emptying into them irrigation waters which the district was empowered to receive into the drains and to convey across appellants' lands. In so far, therefore, as any prescriptive right in Carriere and Lambert be concerned the findings are not supported by the evidence and to that extent will not support the judgment.

[4, 5] In so far as the judgment restrains appellants from interfering with the district's drainage works, that is, with the use of these improved natural drains for carrying away natural or irrigation waters from the lands of upper owners, the judgment must be affirmed. The district having entered upon, occupied and improved the drains and devoted them to the performance of its duties to provide drainage for the lands within its borders, the defendants have no right to interfere therewith and if the taking so resulting has not been compensated for they are relegated to any right they may have to enforce payment therefor; but they must otherwise submit to the established public use. Peabody v. City of Vallejo, supra. Appellants' interference with these public drains could be enjoined by respondents Lambert and Carriere since they suffered private injury.

[6] Appellants contend that the artificial structures installed by them did not damage plaintiffs. There are two answers: One is that appellants, regardless of damage, had no right to enter upon and in any wise change the character of the location of the public drains being operated by the district. It was not for them by unilateral action to merge the drains along their northern line nor to discharge the waters so collected through a different channel from that

being used by the district. The other answer is that there was evidence of actual damage. It was testified that by appellants' structures water was backed up over the lands of Lambert and Carriere.

The district upon this point, however, maintains that the court in its judgment, which the district has not appealed from, has gone no further than to say to the appellants that, accepting the toe drain and the new channel, they must do whatever is necessary to make them perform the work formerly done by the established drains. Respondents say:

"The judgment does not require relocation of the drains in the locations they formerly occupied. The court refused to grant that relief. There is not one word in the judgment to support appellants' contention that the drains must be restored in their original locations. All references are to depth and capacity.

"The judgment requires the performance of two acts:

"The first is to provide openings in the levee constructed across the north boundary of appellants' property of a size sufficient to let the water through. Particularly is this true with respect to Drain 27a. Appellants blocked it off completely at their north line and dug a small toe ditch at right angles. The result is that water flowing down this drain hits a solid levee and is forced to make a right angle turn and proceed through a narrow toe ditch to join Drain 27. Necessarily, the right angle turn and levee behind the turn and the too narrow toe ditch impedes the flow of winter water. The testimony proved this and the court, in addition, at the request of both parties viewed the premises. Thus the first requirement of the judgment is an opening in the levee opposite Drain 27a to let the high water coming down that drain through, instead of impounding it on the property of respondent Carriere. There is no requirement of a ditch through the levee at this point, merely an opening through the levee down to surface ground level. Likewise at the intersection of Drain 27 and the levee. There is an opening at this point but it is inadequate. The judgment requires this opening to be made adequate so as not to restrict the drainage below what Drains 27 and 27a provided before appellants' acts reduced their capacity.

"The second requirement of the judgment is that the drains be dug and deepened to provide drainage *equal* to that existing in Drains 27 and 27a prior to the said acts of appellants. Nothing in the judgment requires the old drains to be replaced. It merely requires comparable drainage."

Certainly the mandatory injunction issued does not expressly order appellants to reestablish the old drains. It orders appellants to "deepen the channels for drains 27 and 27a across the hereinafter described land of defendants * * * to the extent necessary so that said drains * * * will provide drainage equal to and of a capacity equal to that of drains 27 and 27a as they existed immediately prior to the acts of defendants in filling in and damming off said drains." We agree with respondents that this langues does not direct appellants to reestablish the old drains. The court has directed generally that appellants provide drainage equal to that in every way which they destroyed. It has not specifically told them just how they are to do this. We cannot, therefore, agree with the respondents that, so far as the court order is concerned, appellants must open their levee at the point where their toe drain picks up the water flowing in drain 27a and carries it over along appellants' north line to drain 27 and thence through their levee. It may be that such an opening in the levee will be necessary. The court has not yet said so. There was evidence that this toe drain, by reason of its right angle turning of the water in drain 27a operated so as to impound the water on respondent Carriere's land. Appellants conclude that this can only be rectified by opening the levee at that point. That may be, but it is a detail which has not been settled by the court's mandatory order and which the court will be authorized to rule upon when the case is returned to it.

As so construed, we find nothing objectionable in the mandatory order and hold that it is supported by the findings which are in turn supported by the evidence which is sufficient to justify the mandatory order made. No particular objection is made to the prohibitory order which simply restrains the appellants generally from impeding or interfering with the drainage theretofore enjoyed by respondents.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

125 Cal.App.2d 751

Ex parte VACCA.

Cr. 3026.

District Court of Appeal, First District, Division 2, California.

June 4, 1954.

Proceeding for writ of habeas corpus for release of defendant in criminal case charged with crime of grand theft and three prior convictions of felony. The District Court of Appeal, Nourse, P. J., held that no cause was shown why defendant had not been brought to trial within 60-day limit required by law.

Writ issued.

1. Criminal Law ⇨576(11)

Under statute requiring court to order criminal prosecution dismissed if defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after finding of indictment or filing of information, burden is upon prosecution to show existence of good cause why defendant is not brought to trial within 60-day limit. Pen.Code, § 1382; Const. art. 1, § 13.

2. Criminal Law ⇨573

Under statute requiring criminal cases to be given precedence over civil matters and providing that if court is unable to hear all criminal cases pending before it within 30 days after respective defendants have entered their pleas it must immediately notify chairman of judicial council, showing that large number of civil cases are pending does not excuse failure in county having large number of judges to assign sufficient number of them to handle criminal matters. Pen.Code, § 1050.

3. Habeas Corpus ⇨25(1)

In habeas corpus proceeding for release of defendant in criminal case, where no showing was made that chairman of judicial council had been notified that sufficient number of judges were not available to try criminal cases, and no showing was made as to why more departments of court were not assigned to hear criminal matters, no cause was shown why defendant had not been brought to trial within 60-day limit required by law. Superior Court Rule 25; Pen.Code, §§ 1050, 1382; Const. art 1, § 13.

Henry J. Kleefisch, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William K. Coblentz, Deputy Atty. Gen., San Francisco, Thomas C. Lynch, Dist. Atty. of City and County of San Francisco, Cecil Poole, Asst. Dist. Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

The petitioner seeks his release on a writ of habeas corpus for the delay in bringing his case to trial within the sixty day period specified in section 1382 of the Penal Code.

The facts are without dispute. An information was filed on January 14, 1954, charging the defendant with the crime of grand theft and three prior convictions of a felony. On January 22, 1954, petitioner was arraigned and pleaded not guilty. On February 11, 1954, the case was continued successively to March 3rd, March 26th and April 12th. All these continuances were granted over the objection of the defendant who asserted that he wanted an immediate trial. The ground for each continuance was that the court was then engaged in the trial of another defendant, one who in each case had been informed against prior to the information filed against this plaintiff. The record inescapably shows that no one of the orders continuing the case for trial was arbitrary or capricious but that each was made solely on the ground that the court was then engaged in the trial of other defendants whose cases preceded in date of information filed that of this petitioner.

On almost identical facts the District Court of Appeal in Dearth v. Superior Court, 40 Cal.App.2d 56, 104 P.2d 376, 377, granted a writ of mandate to dismiss a criminal action because it was not brought to trial within 60 days as prescribed by article I, section 13, Constitution of California and no good cause to the contrary was shown. The court there held:

[1, 2] "The Constitution of California, article I, section 13, provides that in criminal prosecutions 'the party accused shall have the right to a speedy and public trial'. In section 1382 of the Penal Code it is provided: 'The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: 1. * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information.' In 1927 the legislature added section 1050 to the Penal Code by which it is provided that criminal cases shall be given precedence over civil matters and that if the court is unable to hear all criminal cases pending before it within 30 days after the respective defendants have entered their pleas it must immediately notify the chairman of the judicial council. Upon the constitutional provision and in accordance with the requirement of section 1382 of the Penal Code it was the duty of the court to dismiss the action against petitioner unless good cause was shown why the action was not sooner brought to trial. The burden was upon the prosecution to show the existence of good cause why petitioner was not brought to trial within the 60-day limit. People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873; In re Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A., N.S., 882, Ann.Cas.1912D, 1267. * * * To comply with the provision contained in section 1050 of the Penal Code that criminal matters should be given precedence over civil matters and to enable defendants in criminal actions to have the speedy trials which are guaranteed by the Constitution, a greater number of judges should have been assigned to departments handling criminal matters. There are fifty judges in the superior court of Los Angeles county, and the showing that a large number of civil cases were pending does not excuse the failure to assign a sufficient number of judges to handle criminal matters. Nor was there any showing made that the chairman of the judicial council was notified that a sufficient number of judges was not available to try criminal cases. In rule 25, adopted by the judicial council for the guidance of the superior court, it is provided that the departments handling criminal cases 'shall be sufficient in number to hear all criminal cases within the time required by law.'"

[3] Here, as in Dearth v. Superior Court, supra, the motion to dismiss was made after the 60th day. Here, also, no showing was made that the chairman of the judicial council had been notified that a sufficient number of judges were not available to try criminal cases. Here, also, no showing has been made as to why more departments of the court were not assigned to hear criminal matters.

We conclude that no good cause, or any cause, has been shown why petitioner was not brought to trial within the 60 day constitutional limit.

Let a writ issue as prayed discharging petitioner from custody.

DOOLING and KAUFMAN, JJ., concur.

125 Cal.App.2d 803

OWENS v. TRAVERSO et al.

Civ. 15889.

District Court of Appeal, First District, Division 1, California.

June 9, 1954.

Suit by daughter of decedent against defendants, another daughter and her husband, for wrongful repudiation of an alleged oral trust. The Superior Court in and for the city and county of San Francisco, Albert C. Wollenberg, J., entered judgment sustaining demurrer to sixth amended complaint of plaintiff, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that although prior complaints are normally superseded by subsequent ones, and should be disregarded, a pleader cannot cure a defect in a verified complaint by simply, without legal explanation, omitting the destructive allegations from the subsequently filed pleadings, but in such a case the original defect infects the subsequent pleading and renders it vulnerable to a demurrer.

Judgment affirmed.

1. Pleading ⟹252(2), 254

Although prior complaints are normally superseded by subsequent ones, and should be disregarded, a pleader cannot cure a defect in a verified complaint by simply, without legal explanation, omitting the destructive allegations from the subsequently filed pleadings, but in such a case the original defect infects the subsequent pleading and renders it vulnerable to a demurrer.

2. Pleading ⟹254

Sixth amended complaint by heir of a decedent against decedent's daughter and her husband was sufficient, standing alone and without reference to defect in original complaint by presence therein of destructive allegation omitted from sixth amended complaint, to state a cause of action, good against general demurrer, for the breach and enforcement of an oral trust.

3. Wills ⟹427

Complaint by heir of decedent against decedent's daughter and her husband, founded upon alleged fraud and undue influence of daughter and her husband in procuring the execution by decedent of a codicil to his will, was defective on its face when it was alleged that codicil was filed at time of decedent's death when plaintiffs first learned about it but that its execution was not challenged at that time in the probate court, since the probate determination barred any further attack on the due execution of the codicil.

4. Pleading ⟹254

Where original complaint by daughter of decedent against defendants, another daughter and her husband, referred to procurement by defendants of codicil to will of decedent by fraud and undue influence, but was defective in that it showed that execution of codicil was not challenged in probate court, subsequent amended complaint, seeking recovery on theory that funds were given subject to restrictions was also defective and subject to general demurrer, since the causes of action were contradictory.

5. Pleading ⟹53(1)

Although a plaintiff may plead inconsistent counts or causes of action in his complaint even where it is verified, if there are no contradictory or antagonistic facts, the rule does not sanction statement in verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction.

6. Pleading ⟹254

Where first four complaints by daughter of decedent against defendants, another daughter and her husband, were based on fraud and undue influence alleged to have been exerted by defendants in securing execution of codicil to will, and such complaints were demurrable because attack should have been made in probate court, sixth amended complaint, based upon repudiation of alleged oral trust, was not saved from vulnerability demurrer by explanation of omission of allegations of existence of fraudulent codicil, that allegations were merely inserted in anticipation of a defense, and that they were not necessary to state a cause of action.

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Mancuso, Herron & Winn, San Francisco, for appellant.

Ferrari & Ferrari, and Theodore Cicoletti, San Francisco, for respondents.

PETERS, Presiding Justice.

[1] Plaintiff appeals from a judgment based upon an order sustaining a demurrer without leave to amend to her sixth amended complaint. The sixth amended complaint, considered alone, undoubtedly states a cause of action, good, at least, against a general demurrer. But the original complaint, the amended complaint, and the second and third amended complaints, all verified, alleged facts that were destructive of any cause of action. The fourth and fifth amended complaints omitted these facts, without explanation. The sixth amended complaint likewise omitted these facts, and alleged an insufficient explanation of why they were omitted. Thus, we are presented with the following problem: When prior verified complaints contain allegations that are destructive of any cause of action, can the defect be cured by omitting such allegations in complaints subsequently filed, without a proper explanation as to why the prior allegations were omitted? The answer must be that, although prior complaints are normally superseded by subsequent ones, and should be disregarded, a pleader cannot cure a defect in a verified complaint by simply, without legal explanation, omitting such allegations from subsequently filed pleadings. In such a case the original defect infects the subsequent pleading so as to render it vulnerable to a demurrer.

From all of the pleadings these underlying facts can be ascertained: Manuel Santos died on November 12, 1949, leaving as his heirs his son, Jose Santos, two daughters, Manuela Traverso and Carmela Owens, and two grandchildren who are children of a predeceased daughter. Carmela Owens is the plaintiff and Manuela Traverso and her husband are the defendants. The complaints generally allege that after Manuel Santos had suffered two strokes in 1947, he went to live with the Traversos; that he lived with them from December 5, 1947, until his death on November 12, 1949; that sometime during this period he sold certain real property for $24,500, which property he had bequeathed by a then existing will to all of the heirs equally; that after the sale he gave the Traversos the $24,500 received from the sale of this property, and also made a codicil to his will in which he recited that he had given the money to the Traversos in consideration of their promise to care for him the rest of his life; that the codicil also provided that if this transaction, for any reason, was found to be invalid then, as a special legacy, the $24,500 was bequeathed to the Traversos absolutely. It is the right to this fund that is here involved.

The last or sixth amended complaint alleges that when this money was delivered to the Traversos, Manuel instructed them, and they agreed, to hold it subject to an oral trust to pay it to designated beneficiaries, including plaintiff, upon Manuel's death. Repudiation of this claimed oral trust is properly alleged, and this complaint seeks to enforce that trust, and to secure punitive damages. This pleading contains this allegation: "That this plaintiff had in prior complaints in this action alleged the existence of a fraudulent codicil to a will which was done in anticipation of certain defenses; that said allegations are not set forth in this complaint as they were not originally necessary to state a cause of action when pleaded and are not necessary now and are not a part of this complaint."

[2] A common count and a cause of action for conversion of personal property, based on the same transaction, are alleged. Without analyzing these allegations in detail, it can be stated that this complaint, standing alone, although subject in several respects to a special demurrer, states a proper cause of action good against a general demurrer for the breach and enforcement of an oral trust.

The original complaint was based on a basically different theory. It alleges, in several forms, a cause of action based on fraud and undue influence exerted by defendants on Manuel to induce him to execute the codicil to his will whereby Manuel "left the sum of Twenty Four Thousand Five Hundred Dollars ($24,500.00) to said defendants to the exclusion of his other children." It is alleged that plaintiff discovered this codicil upon its filing for probate in November, 1949. There is no allegation that plaintiff or any other person contested the admission of this codicil to probate.

There are other allegations to the effect that an intimate and confidential relationship existed between defendants and Manuel which permitted defendants to dominate and control his actions; that this control was exerted by defendants to poison the mind of Manuel against his other children; that this was done as part of a scheme or plan to secure the major portion of Manuel's estate; that in pursuance of this plan defendants induced Manuel to execute the codicil in question; that such codicil was secured by fraudulent representations made to, and undue influence practiced on, Manuel.

[3] In this complaint the allegations in reference to the codicil were an integral part of the cause of action attempted to be pleaded. The theory of this original complaint is that the decedent was induced to execute the codicil and so transfer the $24,500 to defendants by the fraud and the undue influence of defendants. The objections to this disposition related to the manner of securing the execution of the codicil. Obviously, such a pleading was subject to demurrer because it is alleged that the codicil was filed at the time of decedent's death when plaintiff first learned about it but its execution was not challenged at that time in the probate court. That was the proper court and time to attack the due execution of the codicil. Clearly, the probate determination bars any further attack on the due execution of the codicil.

[4, 5] Thus, the allegations in reference to the codicil were indispensable to the cause of action pleaded in the original complaint. Even if this complaint hinted at the trust theory as an additional ground of recovery, this would not aid plaintiff. Once having pleaded the outright transfer of the funds to defendants by virtue of the recitations contained in the codicil, plaintiff could not ignore these facts and attempt to state an alternative cause of action based on the theory that the funds were given to defendants subject to restrictions. If such an alternative cause of action is hinted at in the original complaint, it is infected and controlled by the more specific facts contained in the first cause of action. The proper rule was stated in the recent case of Faulkner v. California Toll Bridge Authority, 40 Cal.2d 317, 328, 253 P.2d 659, 666: "Furthermore, although a plaintiff may plead inconsistent counts or causes of action in his complaint (citing a case) even where, as here, it be verified, if there are no contradictory or antagonistic facts * * * Beatty v. Pacific States S. & L. Co. (1935), 4 Cal.App.2d 692, 697, 41 P.2d 378, we are in accord with the view stated by the court in the Beatty case that the rule was not 'intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath.' Here, the more specific facts affirmatively alleged in the third cause of action * * must be accepted as precluding our construing the more general and negative allegations of the fifth cause of action * * *."

The original complaint, therefore, was subject to a general demurrer. So was the amended complaint, which merely repeats, substantially, the allegations of the original complaint.

The second amended complaint does not allege how the codicil came to be executed, except that it is averred that plaintiff did not discover the codicil and the fraudulent intent of defendants to deprive her of her share of the estate until after the death of her father when the codicil was filed with the will of the testator. Allegations also appear to the effect that the $24,500 was paid to defendants on their promise to distribute it at decedent's death to the heirs, including plaintiff, and that, at such death, defendants claimed it was a gift.

The third amended complaint elaborates on these allegations, and incorporates the codicil as an exhibit. The codicil recites that the testator was "not acting under duress, menace, fraud, misrepresentation or the undue influence of any person," that he has sold certain property mentioned in his will and therefore revokes that paragraph, and then states: "*Second*: I hereby declare that I have paid to my daughter Manuelita Traverso, also known as Manuela Traverso, and to her husband, Henry J. Traverso, the sum of Twenty-four Thousand Five Hundred and No/100 Dollars ($24,500.00)" received from the sale of the property above mentioned "in consideration of their taking care of me and providing a home for me with them for the rest of my life.

"*Third*: In the event the said transaction * * * should, for any reason whatever, be declared invalid, or in the event that the said sum * * * or any part thereof, should eventually be considered a part of my estate, I hereby give, devise and bequeath as a special legacy the said sum of Twenty-four Thousand, Five Hundred and No/100 Dollars ($24,500.00), or whatever portion thereof might constitute part of my estate, to my said daughter * * * and to her husband * * * as joint tenants * * *."

All four of these complaints are basically predicated upon the claimed fraud in inducing the decedent to execute the codicil, and, because no attack was made on the codicil in the probate court, were subject to demurrer in this action.

The fourth and fifth amended complaints are based solely on the theory that defendants received the $24,500 upon their promise to distribute the fund on decedent's death to all the heirs—in other words, on the repudiation of an oral trust. The execution of the codicil is not mentioned. Thus, the fourth, fifth and sixth amended complaints stated a good cause of action based on the theory of the breach of an oral trust. But the first four pleadings were demurrable because the attack was on the due execution of the codicil, an attack that should have been made in the probate court. If that codicil stands, the questioned fund belongs to the Traversos absolutely.

On this state of the pleadings, plaintiff urges that we should consider only the allegations of the sixth amended complaint, and disregard the first four complaints, on the ground that subsequent pleadings supersede earlier ones, and the earlier ones cannot and should not be considered in determining whether the last complaint states a cause of action. It is undoubtedly a general rule of law that an amended pleading takes the place of the original, and that thereafter the superseded complaint performs no function as a pleading. Darsie v. Darsie, 49 Cal.App.2d 491, 493, 122 P.2d 64; Puchta v. Rothman, 99 Cal.App.2d 285, 291, 221 P.2d 744; Viera v. Viera, 107 Cal.App.2d 179, 180, 236 P.2d 630; O'Brien v. O'Brien, 50 Cal.App.2d 658, 661, 123 P.2d 877. But to this general rule there is an equally well settled exception. This exception is to the effect that if in the prior verified complaint there are allegations destructive of the cause of action, the defect cannot be remedied by simply omitting, in subsequently filed pleadings, without proper explanation, such allegations. Lee v. Hensley, 103 Cal.App.2d 697, 709, 230 P.2d 159, 166, states this exception as follows: "The rule is that a defect in a verified complaint, by reason of an allegation which renders it vulnerable, cannot be cured simply by omitting the allegation without explanation in a later pleading. (Citing cases.) Facts once alleged cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation. Accordingly, the court was fully justified in examining and considering the original complaint. (Citing a case.)

"In Slavin v. City of Glendale, 97 Cal. App.2d 407, 411, 217 P.2d 984, 987, the court adopted the language: '* * * "appellant should not be allowed to breathe life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective."'" See, also, Uchida Investment Co. v. Inagaki, 108 Cal. App.2d 647, 654, 239 P.2d 644. This rule is here applicable.

[6] This exception to the general rule is subject to the limitation that if a proper explanation is offered in the amended pleading for the omission therein of the facts alleged in the prior pleading, the amended pleading is not vulnerable because of the facts alleged in the prior pleading. Plaintiff contends that this case falls within this limitation, relying on the explanation contained in the sixth amended complaint and quoted in the first part of this opinion. This so-called explanation is to the effect that the allegations in reference to the codicil contained in the earlier complaints were inserted "in anticipation of certain defenses" and "were not originally necessary to state a cause of action." This alleged explanation is contrary to the facts. As already pointed out, the first four complaints were based on fraud and undue influence alleged to have been exerted by defendants in securing the execution of a codicil to the will. Thus, the references to the codicil were not inserted merely in anticipation of a defense, and were necessary to state a cause of action. Thus, the so-called explanation is no explanation at all.

The two additional causes of action set forth in the sixth amended complaint—the common count and the count for conversion of the personal property—are admittedly based on the same transaction set forth in the first count. Under well settled principles the second and third counts were therefore subject to the same objections as the count in which the transaction was alleged in detail. Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248; Crane v. Livingston, 98 Cal.App.2d 699, 702, 220 P.2d 744.

For the foregoing reasons the demurrer to the sixth amended complaint was properly sustained without leave to amend.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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125 Cal.App.2d 866

In re CANTWELL'S GUARDIANSHIP.

CANTWELL v. CANTWELL.

No. 16058.

District Court of Appeal, First District,
Division 1, California.

June 15, 1954.

Rehearing Denied July 15, 1954.

Hearing Denied Aug. 10, 1954.

Proceedings on petition of father to be appointed guardian of his minor sons. The Superior Court for the County of Monterey, Anthony Brazil, J., entered order appointing mother of the children guardian, and the father appealed. The District Court of Appeal, Fred B. Wood, J., held that where petition seeking appointment of petitioner as guardian for minor children presents question whether it is necessary or convenient that guardian be appointed, and all persons in interest, including both parents, are before the court, court has jurisdiction to appoint either parent as guardian whether the petition requests or opposes the appointment of that parent.

Order affirmed.

1. Guardian and Ward 🔑10

On petition for appointment of a guardian for minor child, the state as foster parent has an interest in the subject-matter, consisting of the welfare of the children, with result that court, through which state acts, is not restricted in selection of guardian to the petitioning relative or to person, if any, recommended by the petitioning relative. Civ.Code, §§ 199, 214; Probate Code, § 1440.

2. Guardian and Ward 🔑10

On petition by father for appointment of himself as guardian for his minor sons, court was not precluded from appointing mother of sons as guardian, regardless of whether mother's petition contained the essential jurisdictional averments, since petition properly served upon all interested parties presents question whether it is necessary or convenient that a guardian be appointed, and court is not restricted to grant of guardianship to the petitioner. Probate Code, §§ 1406, 1407(1), 1408, 1440.

3. Guardian and Ward 🔑10

Where petition seeking appointment of petitioner as guardian for minor children presents question whether it is necessary or convenient that guardian be appointed, and all persons in interest, including both parents, are before the court, court has jurisdiction to appoint either parent as guardian whether the petition requests or opposes the appointment of that parent. Probate Code, §§ 1406, 1407(1), 1408, 1440.

Webster Street, Monterey, for appellant.

Lacey & Thornberry, Salinas, for respondent.

FRED B. WOOD, Justice.

Frank E. Cantwell, petitioned the superior court that he be appointed guardian of his sons Frank Edmund, aged 5, and Peter Allen Cantwell, aged 3, alleging that the wife and mother, Clotilda Allen Cantwell, is not a fit and proper person to have custody.

Notice was duly served upon Clotilda and the children, also upon the county probation officer as custodian of the children. Clotilda attended the hearing in person and by counsel. During the course of the hearing she filed an answer alleging that she is, and the petitioner is not, a fit and proper person to have the care, custody and control of the children. She prayed that the petition for his appointment as guardian be denied and that exclusive custody of the persons of the children be awarded to her under the provisions of sections 199 and 214 of the Civil Code for such time and under such regulations as might seem proper to the court and that the court fix the circumstances under which petitioner may see and visit with the children.

The court denied Frank's petition for appointment; found that it is necessary and convenient that a guardian of the persons of these minors be appointed and that Clotilda is a fit and proper person; and ordered Clotilda appointed guardian of the persons of the minors.

Petitioner has appealed. He claims the trial court lacked jurisdiction to make the appointment because (1) his petition presented the issue whether he should be appointed, not whether Clotilda should be appointed, (2) her request to be given custody under the Civil Code sections can not be treated as a petition for appointment as a guardian because it lacks the jurisdictional averments prescribed by section 1440 of the Probate Code and (3) if her request could be treated as such a petition, jurisdiction to hear it would be lacking because of failure to give notice thereof to the children and to the probation officer as custodian of the children.

We need consider only the first point. It is not well taken. It represents too narrow a view of the issues presented when a proper petition for appointment of a guardian is filed and served upon all interested persons.

[1] This is not a case of private litigants who may delimit the scope of the issues by narrowly stating what they plead and pray for. Here, the state as foster parent has an interest in the subject matter, the welfare of the children. It acts through the superior court in attending to their welfare. "When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age." Probate Code, § 1440. The primary ques-

tion is whether it is "necessary or convenient" that a guardian be appointed. Concerning the person who should be appointed, section 1440 is silent. It does not restrict the court, in its selection, to the petitioning relative or to the person, if any, recommended by the petitioning relative.

When the court, in such a case, decides it is "necessary or convenient" that a guardian be appointed, the duty of selecting a fit and proper person springs into being. Certain rules for the guidance of the court in the performance of this duty are furnished by the Probate Code.

The principal rule is that in appointing a general guardian "the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare". § 1406. The court must consider also the preferential rights of various persons who may be eligible for appointment. "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows: (1) To a parent * * *." § 1407. "As between parents claiming the guardianship adversely to each other, neither is entitled to priority; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." § 1408.

[2] All of these factors were before the court in the instant case and all persons in interest had due notice. The fact that Frank asked for his own appointment, not Clotilda's, and that she sought custody order under sections 199 and 214 of the Civil Code instead of letters of guardianship, did not deprive the court of its jurisdiction and duty to select and appoint a proper person as guardian, once it decided that a guardian was needed by the children. The court found the mother fit and proper and appointed her. No question as to her fitness is raised upon this appeal, merely the jurisdiction of the court to appoint her. We entertain no doubt concerning the court's power to appoint her. We can conceive of no need for the serving and filing of a new petition expressly praying for Clotilda's appointment as guardian. It would not add any pertinent issue to those presented by Frank's petition, of which all in interest had due notice.

Although no California decision precisely in point has come to our attention, the tests for ascertaining jurisdiction are well established.

In Ex parte Miller, 1895, 109 Cal. 643, 42 P. 428, a person not a relative filed a sufficient petition and was appointed guardian of a child of eleven years. Notice was given to both parents of the child and they appeared at the hearing. "As the filing of the petition for the appointment of a guardian gave to the superior court jurisdiction of the subject-matter, and the appearance of the parents at the hearing of the petition, as well as the service upon them of the citation, gave to the court jurisdiction over their persons, it was incumbent upon them to present to that court any matter, if such existed, which would have justified the court in denying the petition. They cannot afterwards, upon proceedings in *habeas corpus*, assert a right to the custody of the infant as against the guardian, which they might have presented in that proceeding, but which they neglected to present." 109 Cal. at page 647, 42 P. at page 428.

In Halett v. Patrick, 1875, 49 Cal. 590, it appeared that Abraham T. Enos had been appointed guardian of James P. Wright, an insane person, upon a sufficient petition and after due notice and hearing. Enos failed to qualify by filing the prescribed bond. Thereupon Halett petitioned for appointment and was appointed guardian, without further notice to the ward. The court held that upon "the filing of the petition by Enos, and the service on Wright of the notice required by the statute, the Court acquired jurisdiction to adjudicate the question of insanity and to appoint a guardian. On determining that Wright was insane, the Court had authority to select a guardian and its discretion in the selection of a proper person was in no degree restricted by the fact that in his petition Enos prayed that he himself be appointed. Under that petition, the Court had authority to exercise its discretion as to the person to be appointed. It appointed Enos, coupled with a condition that he execute a proper bond, as required by the statute. The law annexes this condition to the appointment, and the Court had no power to dispense with it. After a sufficient time had been allowed for that purpose, Enos failed to execute the bond, and his appointment remained ineffectual and incomplete. He never became the guardian of Wright, and the proceeding remained in *fieri* until a guardian was appointed and qualified. The Court did not lose its jurisdiction to appoint a guardian, because the person first selected failed to qualify. Wright had his day in Court, was notified of the proceeding, and was bound to take notice that Enos failed to qualify, and that the Court would appoint another in his stead. Having had one notice of the first step in the proceeding, Wright was bound to take notice of every subsequent step until a guardian was appointed and qualified, or the application otherwise definitely disposed of. The order appointing the plaintiff recites the fact that he was appointed because Enos failed to give the requisite bond. His appointment was not a step in a new and original proceeding commenced by him but in the former proceeding commenced by Enos. The plaintiff, it is true, filed a petition praying that he be appointed guardian; but this was superfluous, as the Court had authority to appoint him without any petition for that purpose; and the order shows on its face that he was appointed in the original proceeding, for the reason that Enos had failed to give the requisite bond." 49 Cal. at pages 594–595.

The Supreme Court of Arizona, under statutes substantially the same as sections 1440, 1406 and 1408 of our Probate Code, has held that the court has jurisdiction, upon hearing the petitions of the mother and the paternal grandmother of a minor (each for appointment of herself as guardian), to appoint the father as guardian. In re Iler, 1914, 16 Ariz. 323, 145 P. 143. The question was whether "a prayer requesting the appointment of a certain person [was] necessary to authorize the court to select and appoint". 145 P. at page 144. Analyzing the statute, the court said: "The vital question for determination is the best interests of the child—the child's welfare. In selecting and appointing a guardian, one which, when appointed, will, in the judgment of the court, best promote the child's welfare, the court is not limited in such selection of a guardian to the suggestions found in the pleadings. The person appointed must, of course, in some manner make known to the court that he or she will accept the trust, but that fact may be made known after the appointment with equal force as if made known before the order is entered. When the court has selected and appointed a general guardian for a minor child having no guardian appointed by will or by deed, and the guardian so selected and appointed appears to be one of the parents of the child, and such appointment was made upon the hearing of a petition of a relative of the child filed for that purpose, the irresistible presumption arises therefrom that the court determined from the evidence that the best interests of the child would, in its judgment, be promoted by the appointment of the particular person named." At page 144 of 145 P. See also In re Mignerey's Guardianship, 1941, 111 Wash.2d 42, 118 P.2d 440, 443–444, and In re Guardianship of Vogelpohl, 1952, 243 Iowa 701, 53 N.W.2d 151, 160, appointment of guardian of an incompetent person.

[3] When, as in the instant case, the petition presents the question whether it is "necessary or convenient" that a guardian be appointed and all persons in interest, including both parents, are before the court, the court has *jurisdiction* to appoint either parent whether the petition requests or opposes the appointment of that parent.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

125 Cal.App.2d 781

HUGHES v. HUGHES et al.

Civ. 4700.

District Court of Appeal. Fourth District. California.

June 7, 1954.

Hearing Denied Aug. 4, 1954.

Action brought for support of unborn child by its mother as guardian ad litem, and involving a question of legitimacy of the child. The Superior Court, Kern County, R. B. Lambert, J., made a determination adverse to defendant, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence on issue as to sterility of plaintiff's husband was sufficient to support temporary order against defendant for payment of attorney's fee and support of child pending trial.

Affirmed.

1. Bastards ⚿3

A child born of a married woman is, in the first instance, presumed to be legitimate; but such presumption may be wholly removed by proper and sufficient evidence showing that husband was (1) incompetent, (2) entirely absent, so as to have no intercourse or communication of any kind with the mother, (3) entirely absent at period during which child must, in course of nature, have been begotten, or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Code Civ.Proc. § 1962, subd. 5.

2. Bastards ⚿3

Where sterility is capable of definite determination, conclusive presumption of legitimacy arising from marital relationship is not properly applicable. Code Civ.Proc. § 1962, subd. 5.

3. Bastards ⚿92

Order for payment of attorney's fee and support of child pending trial of action brought for support of unborn child by its mother as guardian ad litem, and involving question of legitimacy of child, was appealable, but it did not determine issue as to legitimacy or affect final judgment.

4. Bastards ⚿65

In action brought for support of unborn child by its mother as guardian ad litem, and involving a question of legitimacy of the child, evidence on issue as to sterility of plaintiff's husband was sufficient to support temporary order against defendant for payment of attorney's fee and support of child pending trial.

Vizzard, Baker & Sullivan, Bakersfield, for appellant.

James B. Fredericks, Beverly Hills, for respondent.

Mack, Bianco & King, Bakersfield, amicus curiae on behalf of appellant.

Dorris, Fleharty, Phillips & Underhill, Bakersfield, amicus curiae on behalf of respondent.

MUSSELL, Justice.

This is an action brought for the support of an unborn child by its mother as guardian ad litem and involves a question of the legitimacy of the child.

Annabelle Harbaugh (the mother) and Frank Harbaugh were married in 1932 and there are two children living, the issue of said marriage. They are aged eighteen and twenty years. The Harbaughs lived together continuously from the time of the marriage until the latter part of September or some time in October, 1952. Mrs. Harbaugh testified that the separation was during the latter part of September of that year and her husband stated that they lived together in Lancaster for about two weeks during the first part of October, before the separation. Both Mr. and Mrs. Harbaugh admitted that there had been sexual intercourse between them during 1952 and up to the time of their separation. Mrs. Harbaugh testified that she did not remember whether she had separated from her husband when she first met the defendant Wesley Hughes; that she first had sexual intercourse with defendant Hughes on October 6 or 7, 1952, at a motel in Bakersfield; that she called Hughes on the telephone on October 19th and told him that she thought she was pregnant. Defendant Hughes testified that she called him on the telephone a week after the 8th of October and told him that she thought she was pregnant and that he should come down to see her. She first visited a doctor in February, 1953, and the child, who was named Cheryll Lynn Harbaugh, was born on June 29, 1953. Mrs. Harbaugh and Hughes lived together in Oildale for several weeks commencing about the middle of October, 1952, and defendant Hughes admitted several acts of intercourse with Mrs. Harbaugh occurring after October 7, 1952. The Harbaughs became reconciled in February or March, 1953, and at the time of the hearing herein were living together. The child was living with them, was accepted by Harbaugh, and was being raised by him as his daughter.

Frank Harbaugh testified that in 1934 or 1935 an operation was performed upon him "making him sterile". However, the doctor who performed the operation was not called as a witness and there was no medical testimony as to the exact nature of the operation.

Dr. Ogden, called as a witness on behalf of plaintiff, testified that he had examined Frank Harbaugh on July 6, 1953, and saw two scars near the scrotum where a vasectomy is performed; that the purpose of a vasectomy was either for sterilization or a type of surgery of the bladder and the kidneys; that he tested a specimen of semen from Harbaugh and found no sperm therein. It was his opinion that Frank Harbaugh was sterile as of the time of the hearing and upon being asked a hypothetical question based upon a vasectomy performed sixteen years before stated that in his opinion Frank Harbaugh had been sterile for sixteen years.

Dr. Harry Bishop who was called on behalf of the defendant testified that it was possible that a vasectomy to induce sterilization could be unsuccessful; that he had personally observed such a case and had read of others; that sterility might occur without an operation to induce it; that if sterility had been ascertained as late as July 6, 1953, it would not necessarily have to be attributed to some operation performed sixteen or seventeen years earlier, and that it was a matter of surmise.

At the hearing held on an order to show cause the trial court ordered the defendant to pay the sum of $40 per month for the support of the plaintiff minor pending trial and allowed plaintiff attorney's fees. Defendant's appeal is from this order and judgment and his contention is that there is a conclusive presumption that Frank Harbaugh is the father of Cheryll Lynn Harbaugh under Code of Civil Procedure section 1962, subd. 5, and that even if the conclusive presumption can be rebutted by proof of the husband's sterility rather than proof of impotency, the record does not support a finding of sterility of Frank Harbaugh at the time the child was conceived.

Section 1962, subdivision 5, of the Code of Civil Procedure, insofar as is material here, provides as follows:

> "*Specification of conclusive presumptions.* The following presumptions, and no others, are deemed conclusive: * *
>
> "5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate".

[1] The stated presumption is conclusive, and with certain exceptions evidence cannot be received to the contrary. Hill v. Johnson, 102 Cal.App.2d 94, 95–96, 226 P.2d 655. As was said in Williams v. Moon, 98 Cal.App.2d 214, 217, 219 P.2d 902, 904, quoting from Hargrave v. Hargrave, 9 Beav. 552:

> "'A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as

> afford clear and satisfactory proof that there was no sexual intercourse.' And the same rule is supported by the authorities in this country."

And on page 218–219 of 98 Cal.App.2d, at page 905 of 219 P.2d, quoting from Estate of Walker, 180 Cal. 478, 181 P. 792:

> "'There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted. The only exception to this, if it really be an exception, is where it is clear that, although the husband had intercourse with the wife, yet by the laws of nature it is impossible for him to have been the father, as, for instance, where husband and wife are white and the child a mulatto.' * * *
>
> "'* * * the true rule in America, as well as England, is, we believe, that if it is possible by the laws of nature for the husband to be the father (that is, if there was coition and no impotency), no inquiry will be permitted into the probabilities of the case one way or the other, but the presumption of legitimacy is conclusive; and, on the other hand, it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race or color such that it could not have been conceived by the husband.
>
> "'The fact that it was not possible by the laws of nature for the husband to be the father, where that fact is in issue, is to be inquired into in the same manner as any other fact which is the subject of judicial inquiry, and any competent evidence relevant to the question is admissible as in other cases; it being the rule, however, in California, as in many jurisdictions, that neither the husband nor the wife is competent to testify to lack of intercourse.'"

In People v. Hamilton, 88 Cal.App.2d 398, 400, 198 P.2d 907, it was held that the courts of this state have established the rule that where the laws of nature make it possible that the husband is the father, the presumption is conclusive, but that where the laws of nature do not, only the disputable presumption applies, and evidence by the proper parties is admissible. Citing Estate of Walker, 180 Cal. 478, 181 P. 792; Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308; Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313; Anderson v. Anderson, 214 Cal. 414, 5 P.2d 881.

In the instant case we are concerned only with two of the exceptions to the rule stated in section 1962, subdivision 5, of the Code of Civil Procedure, namely: (1) Where the husband is incompetent; and (2) Where it is not possible by the laws of nature for the husband to be the father.

The word "incompetent" has many definitions, 20 Words and Phrases, p. 532, et seq., and in the pocket part of said volume it is defined as:

> "'Incompetency' is a relative term without technical meaning which may be employed as meaning disqualification, inability, incapacity, lack of ability, legal qualification, or fitness to discharge the required duty. It means want of physical, intellectual or moral ability, insufficiency, inadequacy, want of legal qualifications or fitness. It means general lack of capacity or fitness, or lack of the special qualities required for a particular purpose. Appeal of School Dist. of City of Bethelehem, 151 Pa.Super. 522, 30 A.2d 726, 728, 729."

Its meaning as used in the exception stated in Williams v. Moon, supra, 217, is not therein set forth. However, as defined in Webster's International Dictionary it means wanting in adequate strength, power, capacity, means, qualifications or the like; incapable. Under this definition it is clear that a husband who is sterile and therefore incapable of being a father of a child is "incompetent".

"Sterile" is defined in Maloy's Medical Dictionary for Lawyers as "barren, not fertile; free from micro-organisms". "Sterility", according to Black's Law Dictionary, means "barrenness; incapacity to produce a child". "Sterilization" is defined as "making sterile or incapable of reproduction" in Ballentine's Law Dictionary.

In Estate of McNamara, 181 Cal. 82, 96, 183 P. 552, 557, the court said:

> "There is one class of cases where it is recognized, in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance white, and it appears that the wife has had intercourse with a man of another race, as for instance, a negro, and the child is of mixed blood. Watkins v. Carlton, 10 Leigh (Va.), 560; Bullock v. Knox, 96 Ala. 198, 11 So. 339; Wright v. Hicks, 12 Ga. [155], 161, 56 Am.Dec. 451; Cross v. Cross, 3 Paige (N.Y.), 139, 23 Am.Dec. 778. The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable."

[2] Sterility is a condition which, if established, renders it impossible to procreate and it is clear that a husband who is sterile during the period of conception cannot become a father. The same reasoning applies in such a case as is found in the McNamara decision. Where sterility is capable of definite determination, the conclusive presumption of legitimacy which is a substitute for such determination is not properly applicable. As was said in Bullock v. Knox, 96 Ala. 198, 11 So. 339, 340:

> "The modern authorities sustain the propositions that the presumption of legitimacy from the birth of a child during marriage may be rebutted by evidence which clearly and conclusively shows that the procreation by the husband was impossible; and that it is competent to show that, according to the course of nature, the husband could not be the father".

[3] The order from which the appeal was taken in the instant case is for payment of attorney's fee and support of the child pending trial. Such an order is appealable. It is determined upon a record of its own and results in an appealable judgment independent of the final judgment in the action. Carbone v. Superior Court, 18 Cal.2d 768, 772, 117 P.2d 872, 136 A.L.R. 1260. It is there said that although such an order implies a finding of the existence of the relationship (parentage), the proceeding need not be so complete nor the evidence so extensive as upon the trial of the issues of the case and the order does not, therefore, determine those issues nor affect the final judgment.

[4] The testimony in the instant case upon the question of the sterility of Frank Harbaugh was sufficient in our opinion to support the temporary order made.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

126 Cal.App.2d 61

ESTRIBOU v. ALMA INV. CO. et al.

L & B PRODUCING & DRILLING CO. et al.
v.
ALMA INV. CO. et al.
Civ. 4697, 4698.

District Court of Appeal. Fourth District. California.
June 16, 1954.

Actions were brought to quiet title to gas and oil interests in realty, and defendants relied on deed from tax collector of county to the state and the deed from the state to the defendants. The Superior Court of Kern County, William L. Bradshaw, J., entered judgments adverse to defendants, and defendants appealed. The District Court of Appeal, Griffin, J., held that evidence sustained Superior Court's conclusion that description of gas and oil interests in assessments and tax deeds as mining rights, was defective and that no title passed by virtue of sale and tax deeds.

Judgments affirmed.

1. Taxation ⚷805(1)

Limitation sections of the Revenue and Taxation Code applying to invalidity of tax proceedings do not affect right of owner of realty to show that proceedings, even if valid, did not apply to or effect the realty or interest in realty which he owned. Revenue and Taxation Code, §§ 175, 3521, 3522, 3727.

2. Taxation ⚷810(3)

In actions to quiet title to gas and oil interests in realty, wherein defendants relied on deed from tax collector of county to the state and a deed from the state to the defendants, evidence sustained trial court's conclusion that description of gas and oil interests in assessments and tax deeds as "mining rights" was defective and that no title passed by virtue of the sale and tax deeds.

See publication Words and Phrases, for other judicial constructions and definitions of "Mining Rights".

West, Vizzard, Howden & Baker, Vizzard, Baker & Sullivan, Bakersfield, for appellants.

Norbert Baumgarten, T. R. Claflin, Bakersfield, for respondents.

GRIFFIN, Justice.

These consolidated actions to quiet title involve the same legal questions in relation to certain claimed gas and oil interests in real property in Kern County.

In the Estribou case the plaintiff alleged that he was the owner of an undivided one-half interest in all oil, gas, and other hydrocarbon substances within or underlying the described land. In the case of L and B Producing and Drilling Company (hereinafter referred to as L & B) the plaintiffs alleged that they were the owners of an undivided 4⅛ per cent interest therein. In both cases the defendants denied the title of plaintiffs and filed a cross-complaint alleging their title.

The facts show that one McInerny owned the fee and all mineral rights to the property prior to 1928; that on January 24, 1928, he conveyed of record a 6¼ per cent of all oil and gas rights to Hillman-Long, Inc., a corporation; that all of the interests of plaintiff L & B arise from this conveyance; that on March 24, 1926, McInerny, still being the owner of the fee and remaining oil and gas interests, conveyed 4 per cent more of his interest to one Womack; that this interest descended to certain parties who are cross-defendants in the original action by L & B, but who defaulted; that on May 12, 1942, McInerny, then owner of the fee and 89¾ per cent of the oil and gas interests, conveyed them to plaintiff Estribou; that on May 25, *1942,* Estribou sold all of his interest to one Allen, except a reservation of "one-half of the oil, gas, or other hydrocarbon substances contained in or under this land"; that Allen sold all of his interest to one Ola Cronk; that in March, *1944,* the ownership being as above stated, there was made the assessment on which defendants' tax deeds were predicated; that at this time the assessor assessed to McInerny the following: "50 per cent *min-*

ing rights E ½ Lot 1, Section 22, Township 29S, Range 27E, M. D. B. & M." (italics ours); that at the same time the assessor assessed to Ola Cronk the balance of the land and all interests therein (which tax was fully paid); and that subsequently the taxes on the foregoing assessment to McInerny of the "50 per cent *mining rights*" were not paid and a sale followed. (Italics ours.) This is the sole basis of the claim by defendants to negative plaintiffs' rights to certain oil and gas interests in said land.

Defendants' claim of title in each action is based upon two deeds, the first being a deed from the tax collector of Kern County to the State of California dated June 29, 1950, and recorded July 25, 1950. The second deed is from the State to defendants, executed October 31, 1950, and recorded November 29, 1950. The Estribou action was commenced on August 16, 1951, and the other action on November 6, 1951.

In the Estribou case, defendants pleaded, as an affirmative defense, the one-year statute of limitations, under the provisions of Sections 175 and 3521 of the Revenue and Taxation Code. In the L & B case they set up an affirmative defense of the statute of limitations under the provisions of sections 3727, 3521, and 3522 of the Revenue and Taxation Code.

The evidence shows that plaintiffs entered into an oil and gas lease with the Waters Company, as lessee, on October 30, 1950, and that defendants thereafter, on January 10, 1951, entered into a similar lease with the same lessee on the same property. It was stipulated that there was production of oil, gas, and other hydrocarbon substances commencing on May 5, 1951, until November, 1952. The various plaintiffs, by the judgment, had their titles quieted to the portions of oil, gas, and other hydrocarbon substances contained in or under the land mentioned.

At the trial the tax deeds were received in evidence over objections. Other exhibits establishing the facts related were also received in evidence. Some testimony was taken indicating that it was the method of the assessor in that county in assessing oil and gas interests to assess them as "mining rights". Several stipulations between counsel followed which included a stipulation that neither McInerny nor anyone else filed a statement of ownership of any separate mineral interest independent of the fee title, under oath, as provided by sections 441 and 442 of the Revenue and Taxation Code.

The tax deeds upon which defendants rely are predicated upon the nonpayment of a delinquent tax, based upon a separate assessment made in 1944, denominated "mining rights" in certain described real property. No further description is indicated in the assessment nor in the tax deed, except that the tax deeds recite that the last assessee was T. J. McInerny. These "mining rights" were not assessed to the record owner of the gas and oil interests, as described in the deeds conveying or reserving that interest to plaintiffs. It was described in these deeds as a specified percentage of the "oil, gas and other hydrocarbon substances contained in or underlying said land".

A similar question to that here presented was before this court in Alma Investment Co. v. Krausse, 117 Cal.App.2d 740, 256 P.2d 1017 (hearing denied by the Supreme Court) and we there held, under a somewhat similar statement of facts in reference to the description of the property being assessed as "mining rights", that it did not necessarily include ordinary oil rights, and that such a description in the assessment and tax deed appeared to be uncertain, indefinite and misleading if it was intended to segregate from the fee and separately assess for the first time only a percentage of oil, gas, and other hydrocarbon substances contained in or underlying said land.

[1] For the reasons therein thoroughly discussed and pointed out, it was held that the description, under the circumstances indicated, did not appear to sufficiently describe the property assessed, and which was sold. It was there also held that under the circumstances, the statutes of limitation, as pleaded herein, were not applicable. These limitation statutes apply to the question of the invalidity of the tax proceedings and do not affect the right of an owner to show that the proceedings, even if valid,

did not apply to nor affect the land or interest in land which he owned.

The title stood on the assessment date in question as follows: (a) Ola Cronk owned the fee and 39¾ per cent of the oil and gas; (b) Plaintiff Estribou owned 50 per cent of the oil and gas; (c) 6¼ per cent was owned by various assignees of Hillman-Long, Inc., which descended to plaintiff L & B; (d) 4 per cent was owned by C. E. Appling and A. Vanoni. In spite of the record ownership for the years in question, the county assessor reached back and assessed a 50 per cent of the "mining rights" to McInerny. Apparently McInerny never owned a separate 50 per cent of "mining rights" or of oil and gas rights in this property and owned no interest of any kind at the time of the assessment. Since there are two halves to every unit, and since the assessor assessed a "50 per cent mining rights" in the property to McInerny, it is difficult to determine which 50 per cent he did so assess, and which 50 per cent was sold under the tax deed.

[2] The conclusion reached by the trial court that the description was defective and that no title passed by virtue of the sale and tax deeds is supported by the evidence and authority cited. See also, McCracken v. Hummel, 43 Cal.App.2d 302, 110 P.2d 700; Miller v. Williams, 135 Cal. 183, 67 P. 788. Stewart v. Atkinson, 96 Cal.App. 50, 273 P. 606; Spring Valley Water Company v. Alameda, 24 Cal.App. 278, 141 P. 38; and Mallman v. Kneeben, 11 Cal.App.2d 484, 54 P.2d 46.

In view of this conclusion and this court's holding in the Krausse case, as well as the court's holding in Moran v. Thomas, 19 S.D. 469, 104 N.W. 212, and the general principles of law stated in 133 A.L.R. p. 570 et seq., no further discussion is necessary as to the applicability of the statutes of limitation, as pleaded by defendants, or as to the claim that under Elbert, Ltd. v. Gross, 41 Cal.2d 322, 260 P.2d 35, they did apply because of defendant's contention that it was established that plaintiffs, as owners, were not in possession of the property during the period in question, or because, under Skidmore v. County of Amador, 7 Cal.2d 37, 59 P.2d 818, plaintiffs failed to file a taxpayer's statement of just what interest they did own.

Judgments affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

126 Cal.App.2d 65

SMITH v. SMITH.

Civ. 4837.

District Court of Appeal. Fourth District. California.

June 16, 1954.

Rehearing Denied July 12, 1954.

Hearing Denied Aug. 10, 1954.

Proceedings on motion of father to modify interlocutory divorce decree with respect to the right of visitation given to him with respect to infant daughter placed in custody of mother. The Superior Court of San Diego County, John A. Hewicker, J., modified the decree, and the mother appealed. The District Court of Appeal, Griffin, J., held that where mother was given custody of minor daughter by interlocutory divorce decree, subject to right of father to visit child at reasonable times, subsequent order respecting father's right of visitation, which inter alia, ordered that father should have the right of visitation and custody for a period of three weeks during the summer months, was not only a modification and clarification of visitation rights, but absolutely changed custody for the three week period, and thus was improper in the absence of showing of changed conditions between the time of the interlocutory decree and the modification order.

Order reversed.

Divorce ⇐303(3)

Where mother was given custody of minor daughter by interlocutory divorce decree, subject to right of father to visit child at reasonable times, subsequent order respecting father's right of visitation, which, inter alia, ordered that father should have the right of visitation and custody for a period of three weeks during the summer months, was not only a modification and clarification of visitation rights, but absolutely changed custody for the three-week period, and thus was improper in the absence of showing of changed conditions since the time of the interlocutory decree. Civ.Code, § 138.

◆

Stanford & McDonough, San Diego, for appellant.

Thomas P. Golden, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff obtained an interlocutory decree of divorce from defendant on March 21, 1951, and it provided that plaintiff be awarded the care, custody and control of their minor daughter, Charlene Marie Smith, then aged about 5 years, "subject to the right of defendant to visit the said child at reasonable times". This form of order was agreed upon in a property settlement agreement signed by the parties. The agreement also contained a provision that the child could be taken to Arkansas for a visit with the father's parents, provided the maternal grandmother of the child take her and that the child would be under her exclusive care.

On March 24, 1952, a final decree was entered adopting the provisions of the interlocutory decree in this respect. Defendant, according to his affidavit filed in connection with his motion to modify the decree respecting the right of visitation, recites that on occasions the plaintiff refused to permit defendant to take the child from her home unless she or her mother was present with defendant; that he, being in the Marine Corps service near Santa Ana, desired to take the child with him on week-ends to that city and that plaintiff refused him this right; that he is given a furlough for one month each year and desires to spend this month each year with his child and visit his parents in Arkansas. He requested the court to declare, in particular, his rights of visitation, and asked for an order allowing him to take the child to Arkansas alone, for the period and for the purposes indicated.

Several affidavits of physicians and others used in opposing this motion were submitted. They indicated that the child's health would be greatly jeopardized by such an order; that the child was subject to food allergies and had an asthmatic condition; that any change in diet or environment would be detrimental to her health; that plaintiff never refused reasonable visitation by defendant with said child, and in fact allowed him, on two occasions, to take the child to Santa Ana, but that upon her return the child complained of exhaustion and other illness, and of the necessity of being left to the care of unknown acquaintances or friends of defendant.

Upon the hearing of the motion the court made an order and decree that the "orders respecting the right of visitation * * * be modified" as follows: defendant to have the right of visitation the first and third week-end of each month from Saturday p. m. at 3 o'clock to Sunday evening at 7 o'clock, and have the right to take the child with him to Santa Ana during such period. It then ordered that he shall have the right of visitation *"and custody"* for a period of three weeks during the summer months and during such time as he shall obtain leave, and have the right to remove the child from the State of California.

Thereafter, plaintiff moved to set aside this order of modification and asked that defendant's right of visitation be confined to the City of San Diego. Affidavits in support of the order were filed, reiterating the physical condition of the child and the probable undesirable results to her that might flow from a compliance with the order as made. A most convincing medical showing was made why the child should not be removed from plaintiff's home. This showing might well have justified an order refusing defendant's request to take the child out of the city and away from the mother's home care and surroundings and from her medical advisers.

In reply defendant averred that he was a capable and loving father; and that he would accept the advice of plaintiff and the doctors as to the best diet and care that should be given the child.

The court then made an order denying this motion, continued the previous order in effect, and then made an order that defendant be forbidden to file any matters in any jurisdiction outside of the State of California regarding the custody of said minor child. Plaintiff appealed from these two last-mentioned orders and contends that the orders were a material modification of the previous *"custody"* order; that they in effect give defendant actual *custody* of the child for a period of three weeks each summer and grant defendant more extensive visitation rights than those agreed upon by the parties in their property settlement agreement and granted by the court's interlocutory decree. It is contended that although section 138 of the Civil Code grants authority to modify orders regarding the custody of children, that this grant of authority is limited in this, that before custody may be changed from one parent to another, when both are fit and proper persons, a change of conditions must develop between the time of the interlocutory decree and the subsequent order changing such custody which, from the point of view of the welfare of the child, makes such a modification of the former order advisable, citing such cases as Olson v. Olson, 95 Cal.App. 594, 272 P. 1113; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719; Dixon v. Dixon, 76 N.J.Eq. 364, 74 A. 995; and Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96.

It is then argued that defendant's affidavit shows no change of conditions and that accordingly the order of custody should not have been modified. It is also claimed that the trial court abused its discretion, under the facts shown, in so modifying this order as well as the right of visitation order, citing Sorrels v. Sorrels, 105 Cal.App.2d 465, 234 P.2d 103, and Juri v. Juri, 69 Cal.App.2d 773, 160 P.2d 73, where the court held it to be an abuse of discretion to modify a previous order of custody and deprive the mother of the custody of the child for four months.

We are in accord with plaintiff's contention, under the authorities cited. Had the court, upon more convincing evidence, merely modified or changed the right of visitation of defendant by the order a different question might here arise. The order not only modified and clarified the visitation rights but absolutely changed the custody of the child from the mother to the father for a three-weeks period each year for the purpose of taking the child out of the State of California, and no adequate showing was made why the custody of the child should be changed for this purpose. It was not shown how or in what manner the child would be benefited by such a change. Gantner v. Gantner, 38 Cal.2d 691, 242 P.2d 329. In fact, the showing is that the mother was a fit person to have custody in the first instance and so remained, even during the three-weeks period involved. There was no change in her status. In fact, the ability of the father and his parents in Arkansas to properly care for the child under the circumstances shown was highly problematical.

In respect to the change in *custody* a serious question also arises which is deserving of consideration. The seriousness of the distinction between changing *custody* and changing *visitation rights* is apparent. The possibility of the defendant father (after securing legal custody of the child although for a limited period) taking the child to another state, and the possibility of his commencing legal action therein for her permanent custody, might well arise. This is indicated by the additional order made forbidding defendant from filing any matter in other jurisdictions regarding the right of custody. Just how this order could be enforced by plaintiff in this action is not pointed out, particularly where defendant's future residence in the service is so indeterminable, and where defendant may never return to California again.

In Lerner v. Superior Court, 38 Cal.2d 676, 242 P.2d 321, the court discusses, at some length, the unhappy consequences which result from one parent being able to shop from one state to another until one is found which will hold that conditions have changed, and award him custody of a child.

Stagliano v. Stagliano, 125 Cal.App.2d 343, 270 P.2d 91, 93, is factually similar to the instant case. There, plaintiff obtained an interlocutory judgment of divorce, stating that a property settlement agreement of the parties was approved. In that judgment the custody of the minor daughter, 5½ years of age, was awarded to plaintiff, subject to defendant's right of reasonable visitation. The final judgment of divorce included those provisions as to custody and support. Later, defendant applied for an order directing plaintiff to show cause why the provisions relating to custody and support should not be modified to allow defendant to have custody of the child during school vacation periods. The court made an order that plaintiff have custody subject to defendant's reasonable visitation, and provided that "defendant shall have physical custody of said child for a period of four consecutive weeks" in the summer and may transport the child out of the state. The mother of the child appealed from the order, contending that the court abused its discretion in modifying the order regarding custody, on the theory that there was no evidence which would warrant such modification. The court thoroughly discussed the showing there made and summarized it as follows:

> "Defendant did not present any evidence which purported to describe the house or place where he lives. The only evidence regarding his dwelling place was testimony implying that he lived in Boston. There was no evidence regarding the living conditions which prevail in his home. * * * There was no evidence as to what supervision or care Hope would have when he was performing his duties with the orchestra. * * * It thus appears that it was not shown what the home environment would be if Hope were to go to defendant's home."

The court then cited several cases holding that the paramount consideration in determining the question of custody of a minor child is the welfare and best interests of the child, and to justify the modification of an order for custody of a minor child there must be a change of circumstances arising after the original decree, which change makes a modification of the former custodial order advisable from the consideration of the welfare of the child. The court then concluded that the burden was upon the defendant to prove that circumstances or conditions had changed so as to justify his requested modification of the order for custody, and to prove that such modification would be for the best interests of the child, or at least to prove that such a modification would not be detrimental to her welfare. It was then stated that several factors regarding the home surroundings and conditions of defendant were not before the trial judge, and he was entitled to know the home environment of defendant; that it might well be that defendant could present evidence that would be sufficient to justify such a modification of the order regarding custody, but under the record there presented, practically no evidence which would make such modification advisable from the viewpoint of the welfare of the child was presented. It then concluded that "A trial judge has a broad discretion in determining the question of custody of a minor child," but that such discretion is to be exercised only within the limits of fixed legal principles, citing cases and quoting from Gossman v. Gossman, 52 Cal.App.2d 184, 194, 126 P.2d 178, to the effect that " 'To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision' ". It then concluded that the evidence related was not sufficient to support an implied finding that such modification would be for the best interests of the child or that such modification would not be detrimental to her welfare, and held that it was an abuse of discretion to modify the custody provision of the judgment.

We conclude that the order thus signed taking away the *custody* of the child from the mother and giving it to the father for the term and for the purpose indicated is not sufficiently supported by satisfactory evidence.

Order reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

125 Cal.App.2d 742

MORICONI v. FLEMMING et al.

Civ. 15697.

District Court of Appeal, First District, Division 2, California.

June 4, 1954.

Action on two notes given by defendant to plaintiff wherein defendants in intervention to whom the money had been reloaned admitted their liability for any balance due the plaintiff. From adverse judgment of Superior Court, City and County of San Fransisco, Preston Devine, J., the defendant and defendants in intervention appealed. The District Court of Appeal, Dooling, J., held that separate awards could be made against both the defendant and defendants in intervention even though plaintiff was entitled to have only one complete satisfaction of the total amount due him.

Judgment affirmed as modified.

1. Evidence 🔑423(6)

Principal and Agent 🔑120(2)

Extrinsic evidence may be introduced to establish the liability of a principal who is not a party to the contract, but extrinsic evidence is not admissible to avoid liability of maker of a promissory note who signs in his individual capacity even though he was agent of another at the time.

2. Evidence 🔑402

The maker of an unconditional note cannot vary its terms by parol evidence.

3. Bills and Notes 🔑96

Detriment suffered by plaintiff, who loaned money to defendant, who in turn loaned the money to others, was sufficient consideration for defendant's note even though defendant received no personal benefit from the loan.

4. Mortgages 🔑218.1

In action on two notes given by defendant to plaintiff wherein defendants in intervention, to whom the money had been reloaned, admitted their liability to plaintiff for balance due plaintiff and asked for an accounting to ascertain this balance, it was not necessary that mortgage given by defendants in intervention should have first been foreclosed. Code Civ.Proc. § 726.

5. Account 🔑1

In action on two notes given by defendant to plaintiff wherein defendants in intervention, to whom the money had been reloaned, admitted their liability to plaintiff for balance due plaintiff and asked for an accounting to ascertain this balance, court had jurisdiction to afford full relief. Code Civ.Proc. § 726.

6. Judgment 🔑237(1)

In action on two notes given by defendant to plaintiff wherein defendants in intervention, to whom the defendant had reloaned the money, admitted their liability for any balance due the plaintiff, separate awards could be made against the defendant and defendants in intervention even though plaintiff was entitled to have only one complete satisfaction of the amount due him.

◆

Christin & Davis and Charles A. Christin, San Francisco, for appellants N. H. Development Co. and N. Newton.

Langer & Simpson and J. C. Simpson, San Francisco, for appellant Flemming.

James E. Burns and Stephen Mana, San Francisco, for respondent.

DOOLING, Justice.

All of the defendants appeal from a judgment rendered in favor of the plaintiff. The action was commenced against defendant Flemming to recover on two promissory notes given by Flemming to plaintiff. N. H. Development Co. and Newton, its president, intervened and filed an answer and cross-complaint.

The indebtedness here sued upon is the culmination of a series of transactions, commencing in 1944, in which plaintiff gave defendant Flemming various sums of money which were in turn loaned to N. H. Development Co. and Newton on promissory notes given in the earlier transactions to one Johnson and in the later ones to one Grote. Johnson and Grote were successively managers of Tropical Fruit Center, a wholesale distributor of fruits and vegetables in San Francisco. N. H. Development Co. owns an orchard planted to oranges and olives in Butte County. The loans were made in the successive years to enable N. H. Development Co. to care for and harvest its crops and were secured by crop mortgages. Prior to 1947 after the sale of the crop in each year the loans were repaid with interest by N. H. Development Co. from the proceeds of the sale of the mortgaged crop. The money was paid to Johnson or Grote, by them turned over to Flemming who in turn accounted for it to plaintiff.

In 1947 plaintiff surrendered to Flemming two promissory notes given by her to him in earlier transactions which aggregated $7,000 and she gave him her note for $7,000. Later in the same year plaintiff gave Flemming an additional $3,000 and received her promissory note for $3,000. These two notes aggregating $10,000 are the basis of the judgment against Flemming.

This $10,000 was loaned by Grote to N. H. Development Co. and Newton and this loan was secured by a crop mortgage given to Grote. Grote later assigned the indebtedness and the crop mortgage to Flemming and Flemming testified that she in turn made a similar assignment to plaintiff, although no such assignment was produced at the trial.

By their complaint in intervention N. H. Development Co. and Newton admitted their liability to plaintiff for whatever balance was unpaid on his money which had been loaned to them by Grote, alleged that an accounting was necessary to ascertain this balance and prayed for such accounting. They further alleged that this indebtedness was secured by the continuing crop mortgage given by them to Grote in 1947 and denied Flemming's liability on the promissory notes. Later plaintiff filed an amended complaint seeking a recovery against N. H. Development Co. and Newton.

It developed on the trial that Flemming had received $2,750 from N. H. Development Co. in partial payment of its indebtedness but that this money had been kept by Flemming and no part of it paid by Flemming to plaintiff.

The court gave judgment against Flemming for $12,505 and against the other two defendants for $9,607.03. The difference in the two amounts is accounted for by a credit to N. H. Development Co. and Newton for the $2,750 paid to Flemming and a difference in the dates of Flemming's two notes and the dates, which were later, when the moneys were loaned by Grote to the other two defendants. There is no claim that the several amounts with interest thereon are not correctly calculated.

The appellant Flemming asserts that she should not be held liable on her promissory notes because the money was actually loaned to the other defendants and she was only an agent or trustee to transmit it to them. A somewhat similar contention was disposed of in Crocker Nat. Bank of San Francisco v. Say, 209 Cal. 436, 288 P. 69. The court said at pages 440–441 of 209 Cal., at page 71 of 288 P.:

[1] "Under some circumstances and in a proper action, extrinsic evidence may be introduced to establish the liability of a principal who is not a party to the contract (see Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539; Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579; Rubin v. Platt Music Co., 92 Cal. App. 203, 268 P. 396; 1 Cal.Jur., pp. 831 et seq.), but extrinsic evidence is not admissi-

ble to avoid the liability of the maker of a promissory note who signs in his individual capacity even though he was the agent of another at the time. Moreover, sufficient evidence of agency must appear on the instrument itself. Sayre v. Nichols, 7 Cal. 535, 539, 68 Am.Dec. 280; Hobson v. Hassett, 76 Cal. 203, 18 P. 320, 9 Am.St.Rep. 193; 19 Cal.Jur., pp. 823 et seq.; 1 Daniel on Negotiable Instruments, 6th ed., § 300; Meechem on Agency, 2d ed., §§ 1150, 1162; Story on Promissory Notes, § 68. The principle is so definitely settled with reference to negotiable instruments that further discussion is unnecessary."

[2] The maker of an unconditional promissory note cannot vary its terms by Parol evidence. Oakland Medical Bldg. Corp. v. Aureguy, 41 Cal.2d 521, 261 P.2d 249.

[3] The detriment suffered by Moriconi in parting with his money was a sufficient consideration for Miss Flemming's notes even though she received no personal benefit. Crocker Nat. Bank of San Francisco v. Say, supra, 209 Cal. 436, 440, 288 P. 69; Silva v. Holme, 109 Cal.App.2d 461, 466, 241 P.2d 21.

[4, 5] Appellants N. H. Development Co. and Newton admit their liability but contend that under sec. 726, Code Civ.Proc., the security of the crop mortgage should have been first foreclosed and that it was therefore error to give a money judgment against them. The ready answer is that they asked an accounting in their cross-complaint and the court in an accounting has jurisdiction to award full relief between the parties. 1 Cal.Jur.2d, Accounts and Accounting, sec. 82, p. 419. The following appeared without contradiction from the testimony of the attorney for these appellants:

"Q. Mr. Christin, what crops have been sold during the years 1948, 1949 and 1950? A. The crop in 1948 brought $6300; the crop in 1949 brought $5625, and the crop in 1950 brought $5425. * * *

"Q. What was done with those proceeds? A. I do not know. They went to the company."

It thus appears that these appellants had already realized from the sale of crops covered by the mortgage more than enough to pay the full amount of the judgment against them. It was their duty to apply these moneys to the payment of the secured indebtedness under the terms of the mortgage and the previous practice of the parties.

[6] All the appellants argue that separate awards could not be made aginst them. Where several liabilities arise against different defendants from the same transaction several awards against them may be made in the same judgment and appellants cite no cases holding to the contrary. Bank of America Nat. Trust and Savings Ass'n v. Superior Court, 20 Cal.2d 697, 128 P.2d 357, cited by appellants is not in point on this question.

It is clear that respondent should have only one complete satisfaction of the total liability. For that reason the judgment should provide that any satisfaction of the judgment against N. H. Development Co. and Newton should operate as a pro tanto satisfaction of the judgment against Flemming and any satisfaction of the judgment against Flemming which reduces the unpaid balance of said judgment below the amount of the judgment against N. H. Development Co. and Newton should operate pro tanto as a satisfaction of the latter judgment.

It is ordered that the judgment be modified to so provide and as so modified it is affirmed, respondent to have his costs on appeal.

NOURSE, P. J., and KAUFMAN, J., concur.

125 Cal.App.2d 771

CAMPBELL
v.
JEWISH COMMITTEE FOR PERSONAL SERVICE.

Civ. 15782.

District Court of Appeal, First District, Division 1, California.

June 7, 1954.

Hearing Denied Aug. 4, 1954.

Complaint seeking damages for publication of alleged libelous letter by defendant, a charitable corporation, charged with aiding in the care of mental patients, to mental hospital, which had released plaintiff's brother, inquiring as to why the hospital released such patients, thereby indicating that plaintiff's brother was not entitled to his freedom. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., sustained defendant's demurrer, and plaintiff appealed from the resultant judgment. The District Court of Appeal, Peters, P. J., held that the complaint was fatally defective because, inter alia, it showed that plaintiff did not have capacity to sue.

Affirmed.

1. Attorney and Client 🔑11

Non-lawyer could not appear as attorney for his brother in libel action.

2. Appeal and Error 🔑782

Where court granted judgment on pleading and unsuccessful litigant appealed, and thereafter formal judgment was entered, appeal, though taken from nonappealable order, would be treated as having been taken from the subsequently entered judgment.

3. Pleading 🔑46

Complaint, alleging in libel action that defendant had written a letter to superintendent of mental hospital, from which plaintiff's brother had been released, asking why the hospital released such patients, was fatally defective on ground that it disclosed on its face that it was not by real party in interest, in absence of allegation that plaintiff had been appointed guardian or had authority to sue on behalf of his brother.

4. Limitation of Actions 🔑55(1)

A libel, uttered but once, is not a continuous thing, but occurs only upon publication.

5. Limitation of Actions 🔑55(1)

Where publication of alleged libelous matter was made over six years before complaint was filed in libel action, statute of limitations barred the action, even if the alleged libelous matter resulted in confinement of certain person in mental hospital, which confinement continued to date of filing of complaint. Code Civ.Proc. § 340, subd. 3.

6. Limitation of Actions 🔑180(1)

Statute of limitations is properly raised by demurrer to complaint. Code Civ.Proc. § 340, subd. 3.

7. Limitation of Actions 🔑2(3)

California statute of limitations governed libel action instituted in California court, regardless of where cause of action arose. Code Civ.Proc. § 340, subd 3.

8. Limitation of Actions 🔑2(1)

The statute of limitations is a matter of procedure and law of forum governs. Code Civ.Proc. § 340, subd. 3.

9. Limitation of Actions 🔑55(1)

Complaint, alleging in libel action that libelous matter had been published on a date which was more than six years prior to filing of complaint, was barred by statute of limitations. Code Civ.Proc. § 340, subd. 3.

10. Libel and Slander 🔑45(1)

Letter from charitable corporation, engaged in helping mental patients in mental hospitals, to superintendant of mental hospital, which had released certain patient, inquiring as to why hospital released such patients, was a letter between interested parties, and, as such, was privileged. Civ. Code § 47, subd. 3.

11. Libel and Slander 🔑6(1)

Letter inquiring of mental hospital, which had released certain patient, as to why it released such patients, thereby indicating that patient in question was not entitled to his freedom, was not "libelous per se".

See publication Words and Phrases, for other judicial constructions and definitions of "Libelous Per Se".

12. Libel and Slander ⚿83

Libel complaint, which disclosed on its face that privilege existed between publisher and receiver of alleged libelous letter, was fatally defective, in absence of allegation of malice.

13. Libel and Slander ⚿89(1)

Allegations of special damage are indispensable in libel action where defamatory matter is not libelous per se. Civ. Code, §§ 45a, 48a, subd. 4(b).

14. Libel and Slander ⚿118

Special damages were not recoverable in libel action for plaintiff's deprivation of company of his brother and denial of opportunity of guiding the brother, which losses allegedly resulted from publication of libelous matter which caused brother to be held in mental hospital. Civ.Code, §§ 45a, 48a, subd. 4(b).

15. Libel and Slander ⚿89(1)

Complaint, seeking damages for publication of alleged libelous letter, which was not libelous per se, between parties as to whom privilege existed, was fatally defective for failure to allege any special damage recognized by the law. Civ.Code, §§ 45a, 48a, subd. 4(b).

◆

James J. Campbell, Palm Springs, in pro. per.

Walter McGovern, San Francisco, for respondents.

PETERS, Presiding Justice.

[1] The complaint in this action, labeled "Complaint for Libel," was filed April 23, 1952, names as plaintiff "James J. Campbell, Guardian of Philip Cohen," and is verified by Campbell, who appeared in the trial court and appears here *in propria persona*. The libel is alleged to have been uttered by defendant in December of 1945. It relates to Philip Cohen, the brother of Campbell, and prays for $25,000 damages. In spite of the caption, Campbell appears only on his own behalf and does not appear in any representative capacity. It affirmatively appears that Cohen is not incompetent, and that Campbell has not been appointed his guardian. Not being a lawyer, Campbell cannot appear as attorney for his brother.

Defendant, a charitable corporation, generally and specially demurred to the complaint. On June 23, 1952, the demurrer was sustained and plaintiff granted 15 days to amend. On the 15th day, July 8, 1952, plaintiff filed a document entitled "Answer to Demurrer." A reading of this document discloses that it appears to be a tardy argument made after the court had already sustained the demurrer. However, because of plaintiff's inexperience, insofar as it contains any allegations of fact, it will be considered as an attempt to amend the complaint. So interpreted, plaintiff was not in default in failing to amend.

[2] On August 8, 1952, defendant moved for and the court granted judgment on the pleadings. Formal judgment in favor of defendant was entered October 1, 1952. Plaintiff, on August 13, 1952, however, appealed from the nonappealable order of August 8, 1952. The subsequent motion of defendant to dismiss the appeal was denied on the authority of Collins v. City and County of S.F., 112 Cal.App.2d 719, 247 P.2d 362. Under the rule announced in this decision the appeal has been treated as one from the subsequently entered judgment.

Inasmuch as we have held that plaintiff is not in default for failure to amend his complaint, the problem presented on this appeal is whether the complaint and its amendments state a cause of action. Gill v. Curtis Pub. Co., 38 Cal.2d 273, 239 P.2d 630; Morris v. Harbor Boat Building Co., 112 Cal.App.2d 882, 247 P.2d 589.

Plaintiff's two briefs, both very short, contain no legal arguments or citations to support his contention that the judgment should be reversed. An examination of the complaint and its amendments, however, demonstrates that such pleadings fail to state a cause of action against defendant, and are therefore fatally defective.

The complaint alleges that it was the "duty of Defendant to render assistance to patients of State Hospitals"; that on December 10, 1945, the defendant wrote a letter to the superintendent of a designated state mental hospital in New York from which plaintiff's brother had been released, stating the following of plaintiff's brother: "Why do you turn loose patients like him * * *. That the Defendant meant thereby that the Plaintiff's brother did not merit his freedom, and should be confined indefinitely, and said letter was so understood by the Medical Superintendent, and his Staff, who read it"; that the letter was "false and defamatory"; that "Plaintiff's brother hath sustained damage by reason of said false and defamatory letter, as a result of which the Medical Superintendent has steadfastly refused to again release Plaintiff's brother and restore his freedom, in the sum of Twenty Five Thousand ($25,000.00) Dollars." Plaintiff prays for judgment in that amount.

Out of the "Answer to Demurrer" can be spelled allegations that the claimed libel has resulted in the continued confinement of plaintiff's brother; that "the real party in interest is Philip Cohen, as he is the one who has suffered damages as a result of defendant's libelous action"; that "Philip Cohen never was or now is insane or incompetent excepting that he has suffered the deteriorating influence of years of unwarranted state hospital incarceration"; that "Philip Cohen never was adjudged to be an incompetent person by any court"; that Campbell is the brother and closest interested living relative of Philip Cohen; that Campbell has suffered special damages because of the libel "by being deprived of the company of his brother, Philip Cohen; by being denied the opportunity of guiding his brother, Philip Cohen, along the paths of health, character, and the pursuit of happiness."

These pleadings, interpreted most liberally in favor of plaintiff, are fatally defective in several respects.

[3] It is obvious that the real party in interest has not sued. Philip Cohen was the subject of the alleged defamatory letter, but it is James Campbell, his brother, who has brought the action. It is alleged that Philip Cohen is not incompetent and has not been adjudged insane. Campbell does not allege that he has been appointed guardian or has any authority to sue on behalf of Philip Cohen. Thus, the complaint discloses on its face that it is not brought by the real party in interest. For that reason the general demurrer was properly sustained.

[4–9] In the second place, the complaint discloses on its face that it is barred by the statute of limitations, Code of Civil Procedure, § 340(3), properly raised by the demurrer. That section requires libel actions to be brought within one year. Here the libel is alleged to have been uttered on December 10, 1945. The complaint was not filed until April 23, 1952. Although the complaint as amended alleges that the libel is an "existing libel, actively influencing" Cohen's "continued confinement," this allegation adds nothing to the complaint. A libel, uttered but once, is not a continuous thing. The libel occurred upon publication. Such publication was made over six years before the complaint was filed. The statute of limitations of California governs, regardless of where the cause of action arose. Whatever may be the rule in other states, California has held that the statute of limitations is a matter of procedure, and that the law of the forum governs. Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264. This is also a fatal defect in the pleading.

The complaint is also defective in that it affirmatively discloses that the allegedly libelous letter was a privileged communication. Under the provisions of section 47(3) of the Civil Code a communication, without malice "to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information", is privileged.

[10] The allegedly libelous letter falls within this section. It discloses that it was addressed to the superindentent of the mental hospital where plaintiff's brother was a patient, who therefore was an interested person, by the defendant, a charitable corporation, that plaintiff alleges is engaged in the business of helping mental patients in such hospitals, also an interested agency. This is sufficient to make the alleged libel privileged. Locke v. Mitchell, 7 Cal.2d 599, 61 P.2d 922; Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916; Freeman v. Mills, 97 Cal. App.2d 161, 217 P.2d 687; Glenn v. Gibson, 75 Cal.App.2d 649, 171 P.2d 118; Brewer v. Second Baptist Church, 32 Cal.2d 791, 197 P.2d 713.

[11, 12] The letter was not libelous *per se.* Peabody v. Barham, 52 Cal.App.2d 581, 126 P.2d 668; Babcock v. McClatchy Newspapers, 82 Cal.App.2d 528, 186 P.2d 737; Washer v. Bank of America, 21 Cal. 2d 822, 136 P.2d 297, 155 A.L.R. 1338. Since this is so, and inasmuch as malice has not been alleged and the existence of the privilege is disclosed on the face of the complaint as amended, the general demurrer was properly sustained. Locke v. Mitchell, 7 Cal.2d 599, 61 P.2d 922.

[13–15] In addition to these several fatal defects plaintiff has failed to allege any special damage recognized by the law. Such allegations are indispensable where the defamatory matter is not libelous *per se.* § 45a, Civil Code. The type of special damages that may be recovered is defined in section 48a, subdivision 4(b) as follows: "'*Special damages*' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other".

The complaint alleges no damages at all to the plaintiff Campbell. The "Answer to Demurrer" alleges that Philip Cohen is the real party in interest that has suffered damage, and as special damage to plaintiff alleges that because of the confinement of Philip, the plaintiff has been deprived of the company of his brother and denied the opportunity of guiding him. Such damages are not included within the provisions of section 48a of the Civil Code above quoted.

For these several reasons the complaint was fatally defective and therefore subject to a general demurrer. The judgment on the pleadings was therefore properly granted.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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125 Cal.App.2d 753

FRANK TAYLOR, Inc.
v.
BOMALICK et al.

Civ. 19984.

District Court of Appeal, Second District, Division 2, California.

June 4, 1954.

Lessee's action against lessor and against purchaser of business conducted by lessee on leased premises. The Superior Court, Los Angeles County, William R. Gallagher, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeals, Fox, J., held that evidence sustained finding that purchaser had agreed to pay lessee the amount of any rent prepayment which lessee had made and that lessor had agreed that if purchaser were required to pay lessee the amount of such prepayment the lessor would credit the purchaser with a like amount on rentals to be paid by purchaser under new lease between him and lessor.

Affirmed.

1. Landlord and Tenant ⚷214

Where five-year lease provided for total rental of $75,000 but required that initial payment be $6,250, with monthly installments of $1,250, thereafter, until four months prior to termination of the lease, with no payments to be made thereafter if lessee were not then in default, it could be reasonably inferred that $5,000 of the initial payment was a prepayment of rent.

2. Appeal and Error ⚷1051(4)

Even though parol evidence was unnecessary to determination of meaning of written lease, admission thereof would not be deemed prejudicial where parol evidence and lease itself showed same intent of parties.

3. Sales ⚷347(1)

Fact that termination of lease cut off any rights which lessee might have had to recover prepaid rent would be immaterial to lessee's right to recover such sum from purchaser of business conducted on the premises by lessee, where such purchaser had promised to pay lessee amount of any rent prepaid.

4. Landlord and Tenant ⚷213(5)

In lessee's action against lessor and against purchaser of business conducted by lessee on leased premises, evidence sustained finding that purchaser had agreed to pay lessee the amount of any rent prepayment which lessee had made and that lessor had agreed that if purchaser were required to pay lessee the amount of such prepayment the lessor would credit the purchaser with a like amount on rentals to be paid by purchaser under new lease between him and lessor.

5. Appeal and Error ⚷882(3)

When a case is tried upon basis that certain facts exist, their existence will be assumed on appeal.

Joseph Shane, Frank Alef, Los Angeles, for appellants Bomalick.

Marvin M. Chesebro, Los Angeles, for appellant Sanchez.

Irving M. Walker, Mark Mullin, Robert A. Schlesinger, Los Angeles, for respondent.

FOX, Justice.

In 1949 plaintiff leased certain business property, for the purpose of conducting an automobile business, from the Bomalicks for a five year term. The lease contained the following provision: "2. Said Leasee shall pay as rent for said premises the sum of Seventy-Five Thousand Dollars ($75,000.00), as follows:

"$6,250.00 upon execution of this lease; $1,250.00 on April 1, 1949, and $1,250.00 on the 1st day of each and every month thereafter to and including October 1, 1953; and in the event this lease is in effect and the lessee is in possession of the demised premises, and not in default in the performance of any of the agreements herein contained on October 31, 1953, then Lessee shall not be required to pay any rent for the months commencing November 1, 1953, and ending February 28, 1954."

After plaintiff had been in possession for approximately a year the original lease was superseded by two leases. They were executed at the request of and for the convenience of the Bomalicks, so that they could arrange a loan on one of the parcels. Under the substituted leases, the property originally demised was divided into two parts and the rent referred to in the original lease was segregated between the two. No change was made in the total rent to be paid or in the dates of the substituted leases. The period and terms of the substituted leases were the same as those in the original lease, except that because of the segregation of the rent between the two leases, the amount initially paid was divided so that one substituted lease recited that the tenant had paid $6,000 against a monthly rental of $1,200, and the other recited that the tenant had paid $250 against a monthly rental of $50.

On September 27, 1951, plaintiff entered into an agreement with defendant Sanchez for the sale of its automobile business conducted on the demised premises. This agreement provides: that the sale was contingent upon the assignment of all the business' leases to Sanchez with the approval of the landlords; that Sanchez would, within a specified time, assume the obligations of plaintiff under the leases; that plaintiff would be relieved of all liability under the leases after October 1, 1951; and that upon the completion of these matters Sanchez would pay plaintiff the amount of any prepaid rent theretofore paid by plaintiff to its lessors.

An escrow was opened to facilitate the sale. Sanchez undertook to obtain the consent of the several lessors and their release of plaintiff's obligations. All of the consents and releases were obtained except those to come from the Bomalicks. Sanchez reported Mr. Bomalick would not agree to release plaintiff, and that he would not enter into a lease such as those plaintiff had signed with the Bomalicks. As an alternative, Sanchez demanded a termination of the leases, and that plaintiff execute an agreement terminating them. Mr. Taylor, president of plaintiff, pointed out to Sanchez that a termination of the leases was contrary to their agreement to buy and sell and that he expected to receive the $5,000 prepaid rent. Sanchez then said to Taylor: "I will see you get your $5,000.00, and you don't have to worry about it." Thereupon the termination agreement (bearing date of September 30, 1951) was signed by Bomalick and Taylor.

On October 22d the escrow officer pointed out to Taylor and Sanchez that the assignment of the Bomalick leases was required under their agreement. Sanchez was willing to pay the $5,000 to plaintiff but only if he could be protected against paying it again to the Bomalicks under his new lease with them. Whereupon, pursuant to Sanchez's assurance that plaintiff would get the $5,000 from either Sanchez or Bomalick, Taylor signed a guaranty that Sanchez would "not be required to pay" plaintiff and Bomalick "rent for the same period." The escrow instructions were then modified to provide that the matter of prepaid rent would be settled out of escrow. Although the escrow was closed a few days later, Sanchez failed to pay plaintiff the $5,000.

Sanchez and Bomalick later executed a new lease. It did not provide any credit for prepaid rent. Bomalick, however, gave Sanchez an agreement on the side to the effect that if the court required Sanchez to pay the $5,000 to plaintiff, Bomalick would give him credit on the lease.

The trial court gave plaintiff judgment against Sanchez for $5,000 and further decreed that upon the satisfaction of that judgment, Bomalick must credit Sanchez with $5,000 as prepaid rent on the current lease. The Bomalicks and Sanchez appeal.

Defendants argue that "The judgment as well as the findings of fact and conclusions of law are not supported by the evidence and are contrary to law." These contentions are not well founded.

[1] The court found that $5,000 out of the initial check of $6,250 which plaintiff gave Bomalick when the original lease was entered into was a prepayment of rent. Defendants challenge the sufficiency of the evidence to support this finding. From the lease it appears that the rental is $1,250 per month; that if the lease is in effect and the lessee in possession and not in default on October 31, 1953, then the lessee is not required to pay any rent for November and December, 1953, and for January and February, 1954, when the lease expired. From this arises a reasonable inference in support of the finding, that the $5,000 was paid as rental for these four months.

Furthermore, Taylor testified that Bomalick explained during the course of the negotiations that the $6,250 was for "the first and the last four months of the lease." Mr. Woodman, general manager and secretary-treasurer of plaintiff, who was present when the terms of the lease were agreed upon, testified in effect that the rental was $1,250 a month, and that the lessee was required to pay the rental for the first month and the last four months of the term of the lease. Finally, plaintiff produced a cancelled check payable to and endorsed by Bomalick, dated March 15, 1949, in the sum of $6,250. The check included the voucher notation:

"Last 4 mo. lease	$5,000.00
March '49	1,250.00
	6,250.00"

There is, therefore, abundant support, both from the terms of the original lease and the testimony of Taylor and Woodman and the check voucher, for the finding that the $5,000 was paid as prepaid rent when the lease was executed.

[2] Defendants point out that the intention of the parties to a written agreement is to be ascertained from the writing alone, if possible. They then assert "it does not appear that the intention of the parties could not be ascertained from the writing itself" in the instant case. Hence, they argue, it was not proper to admit the parol evidence to which we have referred. It is true the lease is quite clear. It may well be that parol evidence was not necessary to determine its meaning, but that did not make it prejudicial.

Defendants assert that the notation on the cancelled check is without significance. They point out it was in the handwriting of Mr. Powers (who was plaintiff's office manager) and that Mr. Taylor did not recall having directed Powers to place the notation thereon. They argue from this fact that it does not appear that Powers was authorized by plaintiff to act for it in placing the notation on the check. However, it is a reasonable inference that this check was drawn in the usual course of business and that Powers had implied authority to place the notation thereon and that it truly reflected the transaction as then understood by both plaintiff and Bomalick, in view of the fact that the latter endorsed the check and cashed it without raising any question relative to the notation. The notation is in harmony with the written lease, corroborates the testimony of Taylor and Woodman, and supports the court's finding as to the purpose for which the $5,000 was paid.

Defendants say "there was no evidence that the parties intended to modify the terms of the lease in any respect by this check" and that the notation "was not a part of the contractual relationship between the parties." Of course the parties did not intend to modify the terms of the lease by the check. It was given to complete the initial lease transaction and the notation thereon was in accordance with and reflective of such transaction.

Defendants claim there was testimony in behalf of plaintiff that the $5,000 "was paid as a deposit to secure performance of the lease" hence the court could not properly find such sum was intended as prepaid rent. They apparently refer to Taylor's testimony that Bomalick "wanted to guarantee the performance of the lease, that he knew we was (sic) good for it, * * * but he thought it would be better if we had enough deposit up to guarantee the performance of it, that we weren't going to lose any money; that the rent could be applied toward the end of the lease, and there was no chance of losing any money; all we had to do was live up to the lease." This testimony is not inconsistent with the court's finding that the $5,000 was prepaid rent. Certainly such testimony did not require a contrary finding. Actually, the prepayment of $5,000 in rent would serve "to guarantee the performance of the lease." In fact, from the standpoint of the lessor, there could hardly be a better guaranty or security than the prepayment of a substantial amount of rent.

[3] The court found, *inter alia,* that "It is not true that plaintiff at any time was advised or knew that the sums referred to in plaintiff's complaint were not paid or received as prepaid rentals or that upon the termination of said lease and the release from liability of plaintiff thereunder that plaintiff would not be entitled to receive any of said money." Appellants contend there is no legal foundation for this finding and no factual support for it. Their argument is, in the first place, that under the plain language of the lease, hereinbefore quoted, the lessee's right to occupy the premises without payment of rent during the last four months of the term of the lease was expressly made subject to the condition that the lease be then in effect; that the lease had been terminated by mutual consent; and that the effect of the termination agreement was to cut off any rights which plaintiff might have had to the $5,000. They cite Friedman v. Isenbruck, 111 Cal.App.2d 326, 244 P.2d 718; Foye v. Simpkin-

son, 89 Cal.App. 119, 264 P. 331, and Wetzler v. Patterson, 73 Cal.App. 527, 238 P. 1077, for the proposition that the lessor may retain advance payments of rent upon the termination of a lease by mutual consent. If the judgment here on appeal had been against the Bomalicks and in favor of plaintiff on the theory that the latter was entitled to recover the $5,000 which it had paid as prepaid rent notwithstanding the mutual termination of the lease, then the cited authorities would no doubt be applicable. But that is not the situation here presented nor the theory upon which this judgment was rendered. Plaintiff's judgment is against Sanchez—not against the Bomalicks. Its foundation lies in the promise of Sanchez to pay plaintiff the amount of any rent prepaid by plaintiff to its lessors. The terms of the lease between plaintiff and the Bomalicks are, of course, important in determining the amount of such prepaid rent as a means of establishing plaintiff's rights against Sanchez but not, as a basis for any judgment in plaintiff's favor against its lessors. Hence appellants' attack upon the challenged finding is without merit and their authorities wholly inapplicable.

In support of their argument that the quoted finding is error, appellants point to the testimony of Mr. Bomalick, and particularly to a telephone conversation between him and Taylor on September 26, 1951, and to what transpired on the occasion when the termination agreement was signed by them. Bomalick testified that he advised Taylor, in this telephone conversation and at various other times, that in the event of a termination of the lease there would be no refund. In view, however, of the trial court's findings, it is apparent the judge did not accept his testimony as true.

Appellants say "there is no doubt" Taylor was advised by Bomalick that plaintiff would not "get any money back if the lease were terminated at the time that the termination agreement was signed." In order to evaluate this statement it is necessary to understand just what happened on that occasion. And in determining that we must, under settled principles, view the evidence most favorable to the party successful in the court below. Mr. Woodman, a witness to that transaction, testified that Taylor signed the termination agreement and handed it to Sanchez and that the latter gave it to Bomalick, who signed it and gave it back to Sanchez. This, of course, completed the execution of the termination agreement. Following this testimony Woodman was asked the question: "What happened next, do you recall?" His answer was: "Then Mr. Taylor asked Mr. Bomalick about the $5,000, when he was going to give it to him; and Mr. Bomalick said, "You never gave me $5,000.00." In response to this statement by Bomalick, Woodman said, "Yes, we did, Joe." Of course, what was said by Bomalick *after* the execution of the termination agreement could not serve to give plaintiff knowledge before the execution thereof that upon the termination of the lease plaintiff would not get back any of its prepaid rent. On the contrary, the foregoing testimony clearly justifies the inference that Taylor believed, when he executed the termination agreement, that a refund of the prepaid rent would be forthcoming, and supports the challenged finding that plaintiff had not been previously advised to the contrary. It is asserted on behalf of Bomalick that his statement that plaintiff never gave him $5,000 was immaterial since it was admitted in the answer that plaintiff paid the lessors $6,250.00 upon the execution of the original lease. But for Bomalick to deny having received the $5,000, even though he later admitted its receipt by his answer, was not without significance, particularly in passing on his credibility and the weight to be given to his testimony.

[4] Defendants contend the evidence is insufficient to sustain the findings to the effect that (1) Sanchez agreed to pay plaintiff the prepaid rent it had paid, which was $5,000; and (2) that Bomalick agreed with Sanchez that if the latter were required to pay plaintiff the said $5,000, the Bomalicks would credit Sanchez in a like amount on the rentals to be paid by Sanchez under the new lease between him and the Bomalicks. This contention is lacking in merit.

With reference to the deal between plaintiff and Sanchez it will be recalled that their written agreement for the purchase and sale of the business required Sanchez to pay plaintiff the amount of the prepaid rent which the evidence established to be $5,000. It was later decided to handle the transaction by a termination of the leases between plaintiff and the Bomalicks and the execution of a new lease between the latter and Sanchez rather than by an assignment of the substituted leases to Sanchez and a release of plaintiff from liability thereunder, as had been contemplated initially. It does not appear that this change of modus operandi was intended to relieve Sanchez from his obligation to pay plaintiff the prepaid rent unless he was not able to get free rent from the Bomalicks for the period covered by plaintiff's prepayment. When Sanchez handed Taylor the termination agreement for his signature the latter hesitated and expressed doubt as to whether he should sign it. Sanchez thereupon advised him he had submitted said agreement to his attorney, who had assured him that it was proper and the only way the transaction could be handled. Sanchez made no suggestion that his obligation to pay plaintiff the amount of the prepaid rent was in any way affected. In fact, he then reiterated his commitment by saying to Taylor: "I will see you get your $5,000."

When Sanchez and Taylor were at the escrow office on October 22, 1951, comment was made by the latter relative to the change of procedure by which the transaction was being consummated and Taylor said to Sanchez: "What about our $5,000.-00?" Sanchez replied: "You will get your $5,000, don't you worry about it." This statement was obviously made as an inducement to get plaintiff to complete the sale. It was at this time that plaintiff gave Sanchez a letter guaranteeing that he would not be required to pay plaintiff and the Bomalicks rent for the same period. The clear inference from this circumstance is that Sanchez' obligation to pay plaintiff the prepaid rent still existed. He was to be relieved of it only in the event he was compelled to pay Bomalicks rent for the same period. This contingency had not happened and under the judgment it cannot happen.

Sanchez recognizes that he is obligated to pay the rent for the four months in question. On the witness stand he stated: "I am ready to pay the $5,000 if the court will tell me who to pay it to." He clarified the situation by this further statement to the court: "You see, your Honor, I have nothing to gain or lose one way or the other. Mr. Bomalick has given me a letter if I have to pay it to Mr. Taylor, I don't have to pay it to him. Mr. Taylor has given me a letter if I pay it to Mr. Bomalick, I don't have to pay it to him." The rent for this period had been paid by plaintiff; Sanchez agreed to repay plaintiff the amount thereof; and the Bomalicks agreed to give Sanchez credit for such payment on the same basis under the new lease between them so that Sanchez would not be required to pay the $5,000 twice. Thus under the terms of the declaratory judgment the agreements between the respective parties are effectuated, and a just and completely fair result is reached for the owners will receive rent for the entire period,—the first lessee recovers his prepaid rent and the second lessee is not required to pay double rent for any period.

Defendants contend there is no evidence to support the finding that about October 4, 1951, the parties agreed there would be no assignment of the leases. It was about that time, the exact date being immaterial, that the parties executed the termination agreement under the circumstances herein recited. From the execution of that agreement the trial court could reasonably infer that the transaction was not to be concluded by assignment of the leases as had been initially contemplated by plaintiff and Sanchez.

[5] The Bomalicks assert there is no evidence that Mr. Bomalick represents his wife in these dealings and therefore the judgment cannot stand as against her. No such suggestion was made in the trial court. The case was tried upon the theory that Mr. Bomalick spoke for the family interests. When a case is tried upon the basis that

certain facts exist their existence will be assumed on appeal. Handy v. Fitschen, 9 Cal.App.2d 637, 640, 50 P.2d 1059; Goss v. Fanoe, 114 Cal.App.2d 819, 826, 251 P.2d 337. Furthermore, without reciting the details, it may fairly be said that the facts and circumstances justified the trial court in drawing the inference that Mr. Bomalick represented his wife in this entire matter.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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125 Cal.App.2d 532

DUVAL et al.
v.
CONTRACTORS STATE LICENSE BOARD et al.

Civ. 4780.

District Court of Appeal, Fourth District, California.

May 26, 1954.

Rehearing Denied June 22, 1954.

Hearing Denied July 21, 1954.

Proceeding for a statutory writ of mandate to review validity of final order of Registrar of Contractors revoking licenses of petitioners for an alleged violation of certain provisions of the Business and Professions Code. The Superior Court, San Bernardino County, R. Bruce Findlay, J., granted a motion for change of venue, and an appeal was taken. The District Court of Appeal, Barnard, P. J., held that proper county for trial of proceeding to review order, the effect of which is to deprive citizen of right to do business, is county in which citizen carries on business and in which he will be hurt by enforcement of order.

Reversed.

Venue ⚷11

Proper county for trial of proceeding to review order, the effect of which is to deprive citizen of right to do business, is county in which citizen carries on business and in which he will be hurt by enforcement of order. Code Civ.Proc. §§ 393, (1) (b), 401, 1085 et seq., 1094.5; Government Code, §§ 11508, 16041, 16050.

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J. Frederic Rosen, Los Angeles, Cunningham, Parry & Holcomb, San Bernardino, for appellants.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Dep. Atty. Gen., for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order changing the venue of a proceeding from the superior court of San Bernardino County to the superior court of Los Angeles County.

The proceeding is one for a statutory writ of mandate, under section 1094.5 of the Code of Civil Procedure, to review the validity of a final order of the Registrar of Contractors revoking the licenses of the petitioners, for an alleged violation of certain provisions of the Business and Professions Code. The petitioners had their principal place of business in San Bernardino County with a branch office in Riverside County, and the charges arose in connection with contracts being performed in both counties. For the convenience of witnesses the administrative hearing on the charges was held in Riverside County. The hearing officer prepared a proposed decision which was forwarded to the Registrar of Contractors at his main office in Sacramento where he approved and adopted it, and made an order revoking these licenses.

In response to an alternative writ of mandate issued by the superior court of Bernardino County the respondents filed a return and a motion for change of venue. After a hearing the court granted the motion and ordered the proceeding transferred to the superior court of Los Angeles County.

On this appeal from that order, the petitioners contend that the venue of this proceeding is governed by section 393 subd. (1)(b) of the Code of Civil Procedure and rely on the decision in Cecil v. Superior Court, 59 Cal.App.2d 793, 140 P.2d 125,

129. It was there held that in such a proceeding to review an order, the effect of which is to deprive a citizen of the right to do business, the proper county for trial "is the county in which he carries on the business and in which he will be hurt by enforcement of the order." The respondents contend that the rule there applied has been changed by subsequent legislation; that in 1945 section 11508 of the Government Code and section 1094.5 of the Code of Civil Procedure were adopted on recommendation of the judicial council, the first providing that administrative hearings shall be held in Los Angeles, San Francisco or Sacramento, or nearer the place where the transaction occurred or the respondent resides at the discretion of the state agency, and the second providing for writs of mandate to test the validity of administrative orders, but saying nothing about where applications for such writs should be heard; that because of the unsatisfactory condition created by the ruling in the Cecil case the legislature, in 1945, added section 16050 to the Government Code (based in part upon former Political Code section 688); that this section made a change of venue to Sacramento County mandatory upon demand of the attorney general "in non-claim cases"; that in 1947, on suggestion of the state bar, section 401 of the Code of Civil Procedure was adopted to provide that whenever an action is required by any law to be commenced in or removed to Sacramento County it may be commenced in or tried in any county in which the attorney general maintains an office; that section 401 must be read with 16050 of the Government Code; and that these sections require the removal of this proceeding to Los Angeles County.

Section 393(1)(b) provides that the proper county for trial of an action against a public officer for an act done by him in virtue of his office is the county in which the cause, or some part thereof, arose. That has long been the law in this state, it was wisely applied in Cecil v. Superior Court, and it would seem reasonable that if the legislature had intended to change that law, by statutes adopted since 1943, it would have more definitely expressed such an intention. Section 11508 of the Government Code provides for the venue of administrative hearings before a state agency but section 1094.5 of the Code of Civil Procedure, adopted at the same time and providing for writs of mandate to test the validity of administrative orders, is significantly silent on the venue of such proceedings. Section 1094.5 was added to the chapter of the code entitled "Writ of Mandate" which contains the general rules in that connection. Section 1085, the first real section in that chapter, provides that a writ of mandate may be issued by any court except a municipal or justice court. That section would logically seem to apply to the writ of mandate described in section 1094.5, in the absence of anything showing a contrary intent. Section 1085 was again amended in 1951 without making any change in that regard.

Section 16050 of the Government Code was placed in Part 1 of Division 4, entitled "Claims Against the State" and in Chapter 3 of that part. The earlier chapters of that part relate to the filing of claims against the state and their approval by the state controller or board of control. Chapter 3 is entitled "Actions". Section 16041 provides that any person who has a claim against the state "(1) on express contract, (2) for negligence, or (3) for the taking or damaging of private property for public use", shall present a claim to the board, and that if the claim is disallowed the claimant may bring an action against the state and prosecute it to final judgment "subject to the conditions prescribed by this chapter." One of the conditions thus prescribed is found in section 16050, where it is provided that the proper court for trial of actions for the taking of private property for public use is in the county in which the property is situated, and that the place of trial "in other actions" shall be changed to Sacramento County upon written demand of the attorney general. This seems to have been intended to refer to the three kinds of actions mentioned in section 16041 and being dealt with in that chapter, giving the attorney general the right to remove those designated by (1) and (2) to Sacramento County. Section 16050 is followed by a provision in the next section to the effect that if judgment is rendered for the plaintiff no costs shall be allowed.

Section 16050 of the Government Code is the only statute which could be interpreted as requiring the trial of this proceeding in Sacramento County, and the only one to which section 401 of the Code of Civil Procedure could be applied, permitting its removal to any county in which the attorney general has an office. If these two sections must be read together as argued by the respondents, they refer to the actions on claims against the state which are mentioned in section 16041, and with which that chapter is concerned. If these sections were to be taken as disclosing an implied intention to change the rule applied in the Cecil case, and to provide that such a proceeding as this must be heard in a county where the attorney general maintains an office, that implied intention is in direct conflict with the plain provision of section 393(1)(b) of the Code of Civil Procedure and is inconsistent with the implied provision contained in section 1085 of that code. Those two sections were again amended in 1951, after the adoption of the statutes relied on by the respondents, without making any change with respect to such of their provisions as are material here. It seems unlikely that the legislature would have taken these various actions in this manner since 1943, without taking other and further action, had its intention been as now contended for by the respondents.

Statutory writs of mandate are specifically authorized to review the decisions of state-wide agencies, Code Civ.Proc. § 1094.5. That section was added to the chapter making general provisions for writs of mandate and section 1085, the first of these provisions, provides that such a writ may be issued by any court except a municipal or justice court. Section 393 of the Code of Civil Procedure clearly provides for the venue in a proceeding of this nature, which proceeding is of an entirely different nature from those mentioned in the chapter containing section 16050 of the Government Code. The rule announced in the Cecil case is sound, is in accord with common experience and practice, is of great benefit to the persons most vitally affected, and works no great hardship on the departments and officers of the state. We conclude that the subsequent legislation was not intended to change the rule applied in the Cecil case. Not only should a judicial review of a final administrative order be heard near where the matter arose and the order taken effect, but it would work an unnecessary hardship to require all such matters to be removed to one of three cities, thus adding to the court congestion there. If such a change should ever become advisable it should be accomplished by a clearly expressed legislative intent.

Whether or not Riverside County would also be a proper county, since some business was done there, is not involved here. No objection was made on that ground and the sole question here presented is whether the order of removal to Los Angeles County was proper.

The order appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.

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125 Cal.App.2d 776

PEOPLE v. JACKSON et al.

Cr. 5124.

District Court of Appeal, Second District,
Division 2, California.

June 7, 1954.

As Corrected June 21, 1954.

Rehearing Denied June 21, 1954.

Robbery prosecution. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgments of conviction, and entered orders denying motions for new trial, and defendants appealed. The District Court of Appeal, Fox, J., held, inter alia, that where defendants testified that they were elsewhere when robbery charge was committed, but their confessions, admitted in evidence, showed their connection with and participation in the robbery, and jury returned guilty verdict, court's failure to give alibi instruction was not prejudicial, since jury necessarily impliedly found confessions to be true and to have been freely and voluntarily made.

Affirmed.

1. Criminal Law ⚷736(2)

Whether a confession is free and voluntary is a preliminary question to be determined by trial court.

2. Criminal Law ⚷736(2)

Where there is conflict in evidence as to whether confession was free and voluntary, admissibility of alleged confession rests in sound discretion of trial judge.

3. Criminal Law ⚷531(3)

Evidence supported trial court's preliminary determination that confessions were free and voluntary and thus admissible.

4. Criminal Law ⚷781(4)

In robbery prosecution, jury was correctly advised as to law relating to confessions.

5. Criminal Law ⚷519(1)

Alleged fact that co-defendants were not allowed to communicate with each other or with other prisoners, while being held on robbery charge, did not vitiate their confessions, if they were otherwise without coercion.

6. Criminal Law ⚷1169(1)

Where there was no negative response from jury upon being asked whether they had heard last portion of tape recorded confessions, and no complaint from jurors that they were unable to hear, it could be inferred that they heard and understood the recordings, and, in view of fact that recorded conversations had already been testified to by officer to whom they had been made by defendants, admission of recordings was not prejudicial.

7. Criminal Law ⚷438

The fact that a recording may not be clear in its entirety does not of itself require its exclusion from evidence, since a witness may testify to part of a conversation if that is all he heard and if it appears to be intelligible.

8. Criminal Law ⚷775(2,

Ordinarily, where defendant testifies that he was elsewhere when crime charged was committed, an alibi instruction should be given.

9. Criminal Law ⚷1173(2)

Where defendants testified that they were elsewhere when robbery charged was committed, but their confessions, admitted in evidence, showed their connection with and participation in the robbery, and jury returned guilty verdict, court's failure to give alibi instruction was not prejudicial, since jury necessarily impliedly found confessions to be true and to have been freely and voluntarily made.

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Alexander L. Oster, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondents.

FOX, Justice.

At about 6:00 p. m. on January 9, 1954, while Mr. Gaige, who was in charge of the Pasadena incinerator, was counting the day's receipts, two men entered his office and robbed him. One of them struck him and grabbed what money was in sight; the other carried a revolver. They were in Gaige's office only a matter of seconds. He was unable to identify them other than that they were colored and between 25 and 35 years of age. Two other men acted as lookouts.

Thereafter the four defendants were arrested and charged with the robbery. Defendants Jackson and Simpson entered pleas of guilty. Defendants Robertson and Pickens entered pleas of not guilty but upon a trial were found guilty by the jury.

They appeal from the ensuing judgments and the orders denying their motions for a new trial.

During the course of the investigation Robertson and Pickens made statements and admissions to the police which amounted to a confession of their participation in the robbery. These statements were tape recorded without their knowledge and were played back to the jury. Appellants repudiated these confessions at the trial and testified that they were elsewhere when the crime was committed.

Appellants seek a reversal upon three grounds: (1) the admission in evidence of their alleged confessions which they claim were not free and voluntary; (2) because the tape recordings which were played to the jury were inaudible and unintelligible; and (3) because the court did not give an alibi instruction. There is no merit in any of these contentions.

Appellants argue that their confessions were not free and voluntary on the ground that they were placed in solitary confinement without formal charges being filed against them, during which time they made their incriminating statements to the police, which were recorded. It is not claimed that any force or violence was used on either appellant. The record also discloses there were no threats of force against either of them, and no promises or offers of immunity or any other inducement held out to either of appellants in connection with their respective statements.

The officers requested the jailer to place each appellant in a single cell where he could not communicate with other prisoners or trusties, and so that they could not communicate with each other. Robertson was arraigned the next morning after his arrest, advised of his constitutional rights, and served a copy of the complaint. Bail was fixed and the date for the preliminary hearing set. Pickens surrendered on April 7 after the officers had been to his home with a warrant for his arrest. He was booked and advised of the charge against him. He was arraigned on the following day.

Appellants complain that they had no light in their cells except when eating; also that there were no windows or other means of seeing outside. The jailer testified as to the physical structure of the cells, the presence of windows or other openings therein, and that when the door and window are closed the light is left on. The judge and jury were then taken through the jail facilities. The treatment given these appellants was not different from that accorded other prisoners.

[1-4] Whether a confession is free and voluntary is a preliminary question to be determined by the trial court. Where there is a conflict in the evidence as to whether a confession was free and voluntary the admissibility of the alleged confession rests in the sound discretion of the trial judge. Here there is substantial evidentiary support for the admission in evidence of the asserted confessions. People v. Cucco, 85 Cal.App.2d 448, 452, 193 P.2d 86. The jury was correctly advised as to the law relating to confessions.

[5] Appellants certainly have no complaint because of any delay in filing the formal charges against them. The jury had an opportunity to see the cells in which appellants were placed, their size and equipment and apertures for light. They thus discovered that at least portions of appellants' descriptions of the jail facilities were not correct. The jury may also have disbelieved the testimony of the defendants that the lights were turned off except when they were eating. The fact that appellants were not allowed to communicate with each other, or with other prisoners, does not vitiate their confessions, if they were otherwise without coercion. People v. Nagle, 25 Cal.2d 216, 224, 153 P.2d 344.

[6, 7] Appellants' contention that the tape recordings were not admissible in evidence is based on the assertion that they were inaudible and unintelligible. There seems to have been some difficulty in playing the recordings loud enough for all in-

terested parties to hear. Specifically, counsel for appellants claimed he could not hear a word. Just what his vantage point was as compared with that of the jury, or the condition of his hearing, does not appear. There was no complaint from any member of the jury that they could not hear and understand the playing of the recordings. When the playing was completed the prosecutor asked whether the jury heard the last portion. There was no negative response. We may assume the machine and the loud speaker were placed so as to give the jury the best possible opportunity to hear and understand the recordings—a better opportunity than counsel had. Since there was no complaint from the members of the jury it is a fair inference that they heard and understood the recordings. The fact that a recording may not be clear in its entirety does not of itself require its exclusion from evidence "since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible." People v. Porter, 105 Cal.App.2d 324, 331, 233 P.2d 102, 107. In order that appellants' interests might not be jeopardized the recordings were replayed for them and their counsel after the jury went out.

It should be pointed out that these recorded conversations had already been testified to by the officer to whom they had been made by the appellants. Further, the officer testified that the recordings conformed to the conversation he had with the respective appellants. Finally, no point was made on the motion for new trial, by affidavit, argument or otherwise, that the recordings could not be heard or understood. It is thus apparent that appellants did not at that time consider their cause prejudiced by any lack of audibility or clarity of the recordings when played for the jury.

Appellants rely on People v. Stephens, 117 Cal.App.2d 653, 256 P.2d 1033. That case is clearly distinguishable. There much of the recordings played to the jury were inaudible and unintelligible and subject to varying interpretations by the jurors. On one occasion a juror interrupted to inquire as to a certain word but the court declined to assist. There was a failure there, but not here, to present witnesses who heard the recorded conversations. Thus the jurors in the Stephens case, supra, were left to speculate as to just what testimony had actually been presented to them.

[8, 9] Appellants complain of the court's failure to give an instruction on the subject of alibi. However, from the state of the evidence, it does not appear that it was prejudicial not to give an instruction on that subject.

It is true the appellants testified they were elsewhere when the robbery was committed. Ordinarily under such circumstances an alibi instruction should be given. Here, however, the confession of the appellants showed their connection with and participation in the robbery. By their verdict the jury necessarily impliedly found the confessions were true, and that they were free and voluntary. The jury therefore disbelieved the alibi story of appellants. To have given an instruction on that subject would not have added any credence to their story and a different verdict would not have resulted. People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102, 130 A.L.R. 1485; People v. Haywood, 109 Cal.App.2d 867, 871–872, 241 P.2d 665. Hence there was no prejudice in the court's failure to give an instruction on the subject of alibi.

Appellants rely on People v. Parker, 135 Cal.App. 761, 27 P.2d 921, and People v. Visconti, 31 Cal.App. 169, 160 P. 410, 411. Both of those cases are distinguishable. In the Parker case there was not only uncertainty as to the identification of the defendant but a failure of so-called corroborating evidence to definitely connect him with the crime; whereas, in the instant case appellants actually confessed their connection with the offense charged. In the Visconti case, two witnesses testified in support of defendant's alibi; while here no one but appellants testified to the alibis. Thus in the Visconti case it was necessary for the jury to weigh the alibi testimony of independent witnesses, hence an instruction on that subject was essential. In the instant case no such situation is presented. Here the alibi testimony is so related to the confessions that the acceptance of the latter as true and uncoerced automatically established the former as untrue.

The judgments and orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.

125 Cal.App.2d 788

WATT et ux. v. PATTERSON.

Civ. 15823.

District Court of Appeal, First District, Division 1, California.

June 9, 1954.

Purchasers' action for damages, based upon vendor's allegedly fraudulent misrepresentation of material facts. The Superior Court in and for the County of Santa Clara, Byrl R. Salsman, J., rendered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that where defendant was unaware that her property was in a single-residence zone, and made no express representation that property was available for use as a rooming house, the mere fact that defendant had been operating a rooming house did not constitute an actionable misrepresentation that the house was legally available for such use.

Judgment affirmed.

1. Fraud ⚷58(1)

In purchaser's action for damages based on vendor's allegedly fraudulent misrepresentations, evidence sustained finding that vendor had not represented that ceiling rentals had been established for five dwelling units on the property.

2. Fraud ⚷3

The elements of actionable fraud, which must be pleaded and proved, are a false representation of material facts, made with knowledge of its falsity and with intent to induce reliance thereon, upon which plaintiff justifiably relies to his injury.

3. Fraud ⚷13(2, 3)

To satisfy the requirement of scienter, as element of fraud, it may be established either that defendant had actual knowledge of untruth of his statements, or that he lacked an honest belief in their truth, or that statements were carelessly and recklessly made, in a manner not warranted by information available to defendant.

4. Evidence ⚷65, 66

Fraud ⚷17

It is presumed that every property owner knows his property, its qualities and characteristics, but property owner is not required to acquire knowledge of and inform his purchaser concerning laws that affect and restrict the use of the property.

5. Fraud ⚷21

An opinion on a question of law based on facts known to both parties alike by one occupying no confidential relation toward person to whom it is addressed does not justify such person in relying upon it, and it is not a sufficient basis to support a charge of fraudulent misrepresentation.

6. Fraud ⚷9

Where vendor and purchaser were not in a confidential relation, and vendor was unaware that property was in a single-residence zone, and made no express representation that property was legally available for use as a rooming house, mere fact that vendor was operating a rooming house on property did not constitute an actionable misrepresentation that the property was legally available for such use.

7. Fraud ⚷16

Where purchaser had examined property and been put in possession of all relevant facts, vendor's lack of actual knowledge of code provision requiring one water closet for each family living in a dwelling and her failure to apprise purchaser of its existence and her lack of compliance was not an actionable misrepresentation. Health and Safety Code, § 17507.

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Foley, Foley, Andreuccetti & Foley and James W. Foley, San Jose, for appellants.

Peter Anello, San Jose, for respondent.

FRED B. WOOD, Justice.

In October, 1947, plaintiffs purchased a house and lot from the defendant. The house contained a front apartment of six rooms and a rear apartment of four rooms. There was also a garage which had been converted into a bedroom. Defendant occupied the front apartment except two bedrooms which she rented to different persons. The rear apartment and the garage-bedroom were also rented.

In April, 1950, plaintiffs filed this action for damages predicated upon asserted fraudulent misrepresentation of material facts by the defendant. They alleged that the defendant falsely informed them that the premises consisted of five rental units, four of which were and all of which could be rented and that the legal and proper rent ceiling would result in the rental of said units at a total of at least $221.50 per month. The trial court found against plaintiffs' contentions and rendered judgment for the defendant.

Plaintiffs have appealed. They contend that the court's findings of facts are without support in the evidence. They claim the evidence shows that defendant represented that rental ceilings had been fixed by the O.P.A. for each of the five units, whereas that was true only as to three of the units. They also claim the very fact that defendant was operating this property as a rooming house was a representation by her to them that it was legal to do so, whereas they later found that a municipal ordinance prohibited such a use by restricting houses in this area to use as single-family residences.

[1] *The two units for which rental ceilings had not been fixed* were the garage-bedroom and that portion of the front apartment which defendant occupied. Rental ceilings had been fixed by the O.P.A. for the middle and the rear bedrooms of the front apartment and for the rear apartment. Plaintiff Conrad Watt visited the place at least twice before buying. Defendant testified that she made a list of the ceiling rentals and gave it to Mr. Watt; that she gave him all her rent ceiling papers. Asked if she showed him the O.P.A. documents, she said "He had them all." She said she never told Mr. Watt or Mr. Brown, the real estate broker who conducted the sale, that she had a ceiling from the O.P.A. for rental of the garage-bedroom; nor did she tell either of them she had a $45 ceiling or any ceiling for the front room or the portion which she was occupying. Asked if she made any falsehoods of any kind to Mr. Watt she said, "No, sir, I did not."

Watt testified that defendant told him the part she was occupying ought to bring him at least $45; that she said she had a ceiling price on all the place there; she showed him some of the papers; she said she had a ceiling price from the O.P.A. on "most of those places in there"; "she didn't say exactly how much the ceiling price on that thing [the front room], but she says could easily bring at least $45 a month." He said she showed him some of the O.P.A. documents. He did not believe she had any for that front room. "She had something in there she said she had renting it before," had rented it for about $14 a week. He did not see an O.P.A. document in reference to the front room. He did see an O.P.A. regulation concerning the middle room and the rear room of the front apartment. And he saw the O.P.A. regulation concerning the rear apartment. He did not see any for the garage-bedroom. This testimony was not in all respects inconsistent with defendant's testimony. His assertion that she said she had a ceiling price on all of the place merely produced a conflict in the evidence which the trial judge resolved in favor of the defendant.

Plaintiffs, in their briefs, rely to a considerable extent upon a certain item which appears in the multiple listing contract prepared by Brown, the real estate broker: "Income—Gross $180.00+Apt. Expenses

25.00 mo. 'Ceiling' Rent Apt. 45.00." Brown interpreted this item as meaning that rents currently received amounted to $180 a month and that the portion of the apartment occupied by defendant had a legally established rental ceiling of $45 a month. However, our attention has not been directed to testimony of Mr. Watt indicating that he relied upon any of these recitals in the multiple listing contract or that they came to his particular attention, nor have we found any. See Bank of St. Helena v. Lilienthal-Brayton Co., 89 Cal. App. 258, 263, 264 P. 546, and cases there cited. He testified at some length concerning what he observed and what Brown and the defendant told him when he visited the property before buying it. It is a fair inference that to the extent that he relied, if at all, upon representations of the defendant, he relied upon the information which she orally furnished and the papers and documents which she delivered to him, not upon recitals appearing in the multiple listing contract. Incidentally, defendant testified that when filling in the items on the multiple listing contract Brown asked her, in case the front part were rented, if she thought it would be worth $45 a month, and she told him that in view of the fact that the rear apartment rented for $45 a month she thought the front would be worth that much, but she did not tell him there was a rental ceiling on the front apartment. In the absence of evidence or inference that Mr. Watt relied upon the recitals of the multiple listing contract, it is unnecessary to consider what those recitals would have meant to him if he had relied upon them nor what defendant's legal responsibilities, if any, for the making of those recitals might have been.

Concerning the single-family zoning ordinance restriction, there was no express representation.

It was, of course obvious that defendant was renting rooms and that she extended to some of the roomers the privilege of sharing in the use of her kitchen and other facilities. Brown said he told plaintiffs the property was being operated as a rooming house, that it was a dwelling house cut up into a rooming house. He did not tell them defendant had permission legally from the city or from the O.P.A. to operate a rooming house. He did not know what the zoning was. Defendant at no time told him. He did not make any representation to Mr. Watt as to zoning.

Defendant testified she did not know this property was in a single-family residence zone. She had never heard of zoning. She had never had an apartment house or a rooming house; this was the only property she ever owned or sold. Before she bought this place it was being used as a two-family residence. The family that owned it occupied the front apartment and rented out the rear apartment. After she had redecorated the interior she began renting the middle bedroom. That was in 1946. Whenever she was making arrangements to lease one of her rooms she always consulted the O.P.A. and they gave her authorization. They never told her she could not rent the rooms.

Asked if anything was ever said about the city zoning ordinances in the conversations between him and Brown or the defendant in connection with the sale of this property, Mr. Watt said "that's something I never heard from either one of them." He testified he had been living in this area since 1922, was familiar with this general area where he bought this property, but did not know it was an R-1 zone, a single family residence zone. Asked if he had two pieces of real property before he bought this property from defendant, he answered, "Yes."

Where here was there actionable fraud?

[2, 3] "The elements of actionable fraud, which must be pleaded and proved if a plaintiff is to prevail, consist of a false representation of a material fact, made with knowledge of its falsity and with the intent to induce reliance thereon, upon which plaintiff justifiably relies to his injury. (Citations.) The omission of a single one of these elements in an action for deceit will normaly [sic] prevent recovery. (Citations.) In order to satisfy the requirement of scienter, it may be established either that defendant had actual knowledge of the untruth of his statements,

or that he lacked an honest belief in their truth, or that the statements were carelessly and recklessly made, in a manner not warranted by the information available to defendant. (Citations.)" Wishnick v. Frye, 111 Cal.App.2d 926, 930, 245 P.2d 532, 534.

What false representation of a material fact did defendant make, with knowledge of its falsity and with intent to induce reliance thereon?

She had no knowledge of the zoning ordinance or of its restrictions as to use of this property. She made no representation, uttered no statement, expressed no opinion concerning the legality of its use as a rooming house.

Yet, plaintiffs say they "had a right to believe that * * * [defendant's] use of the premises was in all respects in full compliance with laws and ordinances applicable thereto, * * * [defendant] having said nothing to the contrary," and that she "either knew or should have known that she was using the property in violation of existing zoning, and therefore was under a duty to call that to....[plaintiffs'] attention."

[4] Whence sprang this duty affirmatively to apprise plaintiffs of the restrictions imposed by this law of which defendant was totally unaware? They seem to predicate this "duty" mainly upon the familiar rule of law that every property owner is presumed to know his property, its qualities and characteristics. Salomons v. Lumsden, 95 Cal.App.2d Supp. 924, 213 P.2d 132, the area and boundaries of land; De Bairos v. Barlin, 46 Cal.App. 655, 670, 190 P. 188, the amount of street frontage; Stirnus v. Adams, 50 Cal.App. 730, 195 P. 955, the age and condition of an orchard; Gaffney v. Graf, 73 Cal.App. 622, 238 P. 1054, the model of an automobile. But that rule does not of itself require of a property owner that he acquire knowledge of and inform his buyer concerning laws that affect and restrict the use of the property or suffer damages for his unwitting concealment.

[5] Another well established rule comes into play at this point, the rule that "an opinion [on a question of law based on facts known to both parties alike] by one occupying no confidential relation toward the person to whom it is addressed does not justify such person in relying upon it, and it is not a sufficient basis to support a charge of fraudulent misrepresentation. (Citations.)" Rheingans v. Smith, 161 Cal. 362, 365, 119 P. 494, 496. See also Smith v. Brown, 59 Cal.App.2d 836, 838, 140 P.2d 86; 12 Cal.Jur. 731, Fraud and Deceit, § 17; 23 Am.Jur. 781, Fraud and Deceit, § 27; 3 Restatement of the Law of Torts, §§ 545 (2) and 542.

[6] Here we have a question ot law,—the existence, the provisions, the meaning, and the applicability of a zoning ordinance. All of the pertinent facts (a two-apartment dwelling house, operated as a rooming house) are equally well known to both parties. Defendant made a full and detailed disclosure of her rooming house operations. There is no confidential, fiduciary or other relationship which might impose upon defendant a duty to know about this ordinance, for the benefit and protection of the plaintiffs, and to inform them of its provisions.

Of a sales transaction quite similar to this, the court in Kazwell v. Reynolds, 250 Ill.App. 174, 177, said: "The ordinance in question was a matter of record in the village where the property was located and was easily ascertainable by both plaintiff and defendant. If, as alleged in the bill of complaint, neither party knew of that fact, then it becomes the duty of the purchaser to have advised himself as to whether or not such an ordinance was in existence." See also Lincoln Trust Co. v. Williams Bldg. Corporation, 1920, 229 N.Y. 313, 128 N.E. 209; note in 175 A.L.R. 1056; 55 Am.Jur. 705, Vendor and Purchaser, § 250.

In view of these principles of law, the relationship of the parties, defendant's total unawareness of the single-residence zone ordinance, and the absence of any express representation that this house was legally available for use as a rooming house, we find no basis for holding defendant legally responsible to the plaintiffs for the loss which they putatively suffered. Under such circumstances, the mere fact that defendant was operating a rooming house furnishes no basis for a reviewing court to reverse a finding of the trial court that no actionable misrepresentation was made in respect to the uses for which the property in question was legally available.

The authorities upon which plaintiffs rely are not persuasive of a different view. In Barder v. McClung, 93 Cal.App.2d 692, 209 P.2d 808, the vendor had substantially altered a garage building and fitted it with a kitchen in knowing violation of zoning regulations and building restrictions. "The question of knowledge on the part of defendants was one of fact. The foregoing resume discloses sufficient evidence in support of the trial court's finding that defendants altered the garage building and fitted it with a kitchen, knowing that such alteration was in violation of then existing building restrictions and zoning regulations." 93 Cal.App. at page 696, 209 P.2d at page 811. "In the circumstances presented," said the court, "it was the duty of defendants to disclose to plaintiff that the rear apartment was maintained and used in violation of existing zoning ordinances. Instead, they remained silent, to their profit." 93 Cal.App. at page 697, 209 P.2d at page 811.[1] That is not a holding that the defendant in our case, under the circumstances of our case, was under a duty to ascertain the existence of the ordinance and inform plaintiffs of its provisions.

In Milmoe v. Dixon, 101 Cal.App.2d 257, 225 P.2d 273, the vendors represented that they had erected the house themselves and that it was strong and well built. The "defects as found by the trial court were of a technical nature [inadequate foundations and bolts, over-spaced wall studding, insufficient corner studding, plaster applied on an unauthorized base, improperly spliced studding, missing angle braces, and untreated mudsills] and it is unlikely that ordinary diligence on the part of the respondents [vendees] would have revealed their presence inasmuch as most were apparently not visible to the eye, since they had been concealed by outer construction and were only revealed after alterations had been commenced." 101 Cal.App.2d at page 260, 225 P.2d at page 275. The vendors also concealed the fact that they had done this construction work without the legal building permits. That concealment of structural defects and of lack of governmental building permits, inspection and approval, is actionable, furnishes no precedent for holding the defendant's conduct actionable in the instant case.

[7] Plaintiffs direct attention also to section 17507 of the Health and Safety Code which requires one water closet for each family living in a dwelling. Mr. Watt's inspection and the information freely given him put him in possession of all the relevant facts. Defendant's lack of actual knowledge of this code provision and her failure to apprise Mr. Watt of its existence is no more actionable, under the circumstances of this case, than her unawareness of the zoning ordinance and failure to tell him of its restrictions.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[1] Later cases which follow the Barder case and apply its rationale have involved specific misrepresentations of facts by the seller or concealment of material facts known to the seller which he knows are unknown to the buyer. See Bobak v. Mackey, 107 Cal.App.2d 55, 236 P.2d 626; Tatham v. Pattison, 112 Cal.App.2d 18, 21, 245 P.2d 668; Curran v. Heslop, 115 Cal.App.2d 476, 480–481, 252 P.2d 378.

125 Cal.App.2d 858

FRITZ v. THOMPSON.

Civ. 4665.

District Court of Appeal, Fourth District, California.

June 14, 1954.

Action by plaintiff against her stepmother, as executrix of estate of plaintiff's father, to recover amount of gift from father, or to recover under an alleged trust for benefit of plaintiff. The Superior Court of Fresno County, Philip Conley, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Griffin, J., held, inter alia, that where claimed oral promise of decedent to give daughter by former marriage $5,000 was conditioned on building of house costing certain amount, according to plans approved by decedent, on lot selected by plaintiff and paid for by decedent, with financing to be arranged by daughter, and house was never built or plans approved, or financing arranged, before death of decedent, there was no substantial performance, and transaction never ripened into a binding, enforceable obligation, but in any event right to sue would not arise until performance by plaintiff of whole series of acts required as conditions.

Judgment affirmed.

1. Contracts ⚷28(3)

In action by daughter of decedent against stepmother, as executrix of decedent's estate, to recover sum of $5,000 allegedly promised as gift to plaintiff to assist her in acquiring a home, evidence sustained findings adverse to plaintiff, including findings that offer of decedent to make gift did not ripen into a binding contract and did not become irrevocable by reason of any act of plaintiff prior to defendant's death, with result that there was a revocation by death.

2. Contracts ⚷221(3), 278(2)

Where claimed oral promise of decedent to give daughter by former marriage $5,000 was conditioned on building of house costing certain amount, according to plans approved by decedent, on lot selected by plaintiff and paid for by decedent, with financing to be arranged by daughter, and house was never built or plans approved, or financing arranged, before death of decedent, there was no substantial performance, and transaction never ripened into a binding, enforceable obligation, but in any event right to sue would not arise until performance by plaintiff of whole series of acts required as conditions.

3. Trusts ⚷30½(1)

An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust when none was in contemplation, particularly when full control of property was maintained during life by the alleged donor, without intent to vest any interest therein prior to death.

4. Appeal and Error ⚷1010(1)
Trusts ⚷373

As to a trust of personalty, it is for trial court to determine as question of fact whether words and acts of alleged trustor indicate with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust, and if there is any evidence consistent with its finding that a trust was not created, the finding of the trial court will prevail.

5. Trusts ⚷1

In order for owner of property to make himself trustee for benefit of another, it is necessary that owner use words or do acts clearly denoting intention to relinquish his beneficial interest in the property "in praesenti" and to hold it for benefit of another, that there be specific property to be held in trust, and an absolute parting by alleged trustor with beneficial interest which was his up to the declaration of trust.

6. Trusts ⚷14
Wills ⚷91

Declarations in letter from stepmother, who was executrix of will of plaintiff's father, that father had left certain sum in trust with stepmother, and that she would do as he wanted, indicated only stepmother's belief that it was desire of father of plaintiff to create a trust taking effect after his death, but the desire, being testamentary in character, could only be made effective by provision therefor in a properly executed will, in absence of which, no trust was created. Civ. Code, § 2221.

7. Trusts ⚷14

Declaration by plaintiff's stepmother, who was executrix of will of plaintiff's father, that certain sum was left in trust to stepmother, and that she would do as plaintiff's father wanted, was not, under all the circumstances, such a clear and unequivocal indication by stepmother to absolutely relinquish her beneficial interest in the fund "in praesenti" as would result in the creation of a trust in personalty.

8. Trusts ⚷44(1)

In action by plaintiff against her stepmother, as executrix of will of plaintiff's father, based on contention that stepmother held certain sum under trust for benefit of plaintiff, evidence warranted finding that no trust had been created by declarations of stepmother, or by delivery to stepmother by father during his lifetime of sum in trust for plaintiff.

9. Gifts ⚷49(1)

In action by plaintiff against stepmother, as executrix of plaintiff's father's estate, on basis of alleged gift made by father during his lifetime, evidence warranted conclusion that there had been no substantial act or forbearance by plaintiff prior to her father's death which would prevent, under doctrine of promissory estoppel, the revocation of father's offer by reason of his death.

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Lawrence W. Young, Fresno, for appellant.

Dearing, Jertberg & Avery, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff Barbara Jean Fritz is the daughter, by a former marriage, of decedent Elmer Butler Thompson. Defendant Francoise B. Thompson, the surviving wife, is executrix of his estate.

Plaintiff's claim against defendant executrix for $5,000 is predicated, in the first cause of action, upon a claim filed in his estate. In the second and third causes of action the allegation is that the defendant executrix holds that sum of money under some claimed trust for the benefit of plaintiff. The detailed findings of the trial court fairly set forth the nature of the claim. It found that about October 1st, 1951, before the death of decedent, in consideration of his love and affection toward plaintiff, and in order to assist her in the construction of a new home in Visalia, and with the full knowledge and approval of the defendant, as the wife of the decedent, decedent orally promised plaintiff that he would give her $1,600 for the purchase of a lot to be selected by her and approved by decedent, and that if she and her husband would build a house on such lot (the plans for which were to be approved by decedent and to cost between $14,000 and $15,000, and if the plaintiff would arrange to finance the construction of the house) the decedent would give to her at some stage of the construction to be determined by decedent, the sum of $5,000 to apply on the cost of the house; that before the death of decedent, he orally requested plaintiff to secure plans and specifications for the house, but that decedent did not, at any time prior to his death, promise her that he would immediately purchase for her a vacant lot in Visalia upon which the house was to be constructed, and that he did not, prior to his death, promise her, as claimed in her complaint, that he would immediately give her an additional sum of $5,000 in cash to be applied on the cost of the construction of the new home; that on October 1st, 1951, decedent did suggest, and plaintiff orally agreed, that she would take immediate steps toward the employment of a general contractor to construct the new home, and to obtain from the contractor plans and specifications therefor; that about said date, decedent gave to plaintiff a check in the sum of $1,600, to enable her to purchase a lot in Visalia, and that the check remained in the possession of the plaintiff until after the death of decedent, and the defendant Mrs. Thompson, on October 5, 1951, instructed the bank to honor the check; that the proceeds of the check were credited to the account of plaintiff and her husband and she used the proceeds to purchase a vacant lot in Visalia for $1,600; that no house was ever constructed on the lot by plaintiff or her husband and she never arranged to finance its construction; that about October 1st, 1951, before the death of the decedent, plaintiff did select a general contractor who she desired to construct the proposed new home, and orally instructed him to prepare plans and specifications therefor; that the contractor commenced to prepare plans and specifications beginning about October 2nd, 1951; that the work thus done by the contractor, prior to the death of the decedent, on the plans and specifications, was preliminary and not substantial, and that the principal part of the work of preparing such plans and specifications was done by the contractor after the death of the decedent and after the contractor and plaintiff knew of the death of the decedent; that a minor and unsubstantial portion of plaintiff's obligation to the contractor was incurred by plaintiff prior to the death of decedent; that plaintiff selected the contractor and made arrangements with him solely in reliance on the promise of decedent to make a gift to her as aforesaid; that the decedent did not, prior to his death, deliver to defendant, Mrs. Thompson, the executrix, the sum of $5,000 in cash in trust for plaintiff to be used by her for the immediate construction of a new home for plaintiff; that plaintiff did not, at the time referred to in her second amended complaint, intend to immediately construct her new home, and there was not due or owing from defendant Mrs. Thompson, as executrix or otherwise to plaintiff, the sum of $5,000 at any time; that defendant refused, and continues to refuse, to pay plaintiff said $5,000, although plaintiff has demanded payment of that amount; that defendant executrix, after the death of decedent, did not orally declare to plaintiff that she was holding in trust for her the sum of $5,000 in cash, to be used in the immediate construction of a new home by her in Visalia, and did not execute in writing and deliver to plaintiff a statement in which defendant declared in substance that she was holding said $5,000 in cash in trust for her to be used by her in the immediate construction of her new home.

It further found that on October 1st, 1951, Mr. Thompson, the decedent, gave to plaintiff a check for $1,600; that he died on October 3, 1951, and after his death plaintiff presented the check to the bank for payment but the bank refused to pay it because of the death of decedent; that thereafter defendant executrix instructed the bank to honor it because of the great disappointment expressed by plaintiff in being unable to cash it; that accordingly the check was honored and paid from the bank account of Thompson & Ducey.

[1] It then found that by will dated June 10th, 1947, Mr. Thompson, the deceased, made a bequest to plaintiff in the sum of $5,000, which sum was paid to her from the estate. It was then found that this bequest was not intended by decedent to be used by plaintiff for the purpose of assisting her in acquiring a home; that defendant executrix is not indebted to plaintiff in any sum whatsoever, and that the sum of $5,000 promised as a gift to plaintiff by decedent was not paid. It concluded that plaintiff was not entitled to judgment under the allegations contained in the first cause of action of her complaint since decedent's offer to make a gift to plaintiff in the sum of $5,000 did not ripen into a binding contract and did not become irrevocable by reason of any act of plaintiff prior to decedent's death, and was therefore revoked by his death. The evidence, although contradictory in certain respects, clearly supports these findings.

It is plaintiff's contention that the promise of decedent was made to assist the plaintiff in constructing her home; that when the promise was made it was the beginning of a unilateral contract; that when part performance thereof was made by plaintiff with the knowledge of decedent and defendant executrix, in employing the contractor and thereby incurring legal obligations, the contract then became a bilateral contract supported by a valid consideration, citing Wilck v. Herbert, 78 Cal. App.2d 392, 407, 178 P.2d 25; that where a valid consideration exists in a contract the amount or value of the consideration cannot be considered by the court, citing Brownfield v. McFadden, 21 Cal.App.2d 208, 214, 68 P.2d 993; and Sec. 1605, Civ.Code; that plaintiff not only suffered prejudice by incurring the obligation with the contractor to build her home, but she also expended money in paying for the draftsman; that this prejudice incurred by plaintiff was the direct result of the promise of her father to pay the $5,000; that the death of decedent cannot and did not affect the legal liability of the plaintiff to the contractor because the plaintiff in the lifetime of the decedent and with the knowledge and consent of decedent, incurred a legal liability to the contractor; that by incurring this liability during the lifetime of the decedent there became a legal contract between plaintiff and decedent to pay said amount, and that his subsequent death could not and did not relieve his estate from the payment of his legal obligation to plaintiff; that the plaintiff materially changed her position in reliance on the promise of her father, and therefore his estate is estopped from denying liability herein; that there is a moral obligation supported by sufficient consideration to compel the estate to pay said amount; that the defendant executrix, by her acts and conduct, either received $5,000 from the decedent in trust for the plaintiff or she constituted herself a trustee for said amount after the death of the decedent, citing such cases as Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158, 159, 11 P. 592; Board of Home Missions, etc. v. Manley, 129 Cal.App. 541, 543, 19 P.2d 21; Los Angeles Traction Company v. Wilshire, 135 Cal. 654, 658, 67 P. 1086; Medberry v. Olcovich, 15 Cal.App.2d 263, 59 P.2d 551, 60 P.2d 281; 5 Stanford Law Review p. 783; and 1 Bogert on Trusts p. 506, pertaining to promissory estoppel.

[2] It appears that the claimed oral promise of decedent to give plaintiff $5,000 was conditional. Those conditions were: (1) that plaintiff and her husband would build a house costing between $14,000 and $15,000 (which house was not built); (2) that it be built according to plans approved by decedent (which plans were not so approved); (3) that a lot be selected by plaintiff and paid for by decedent, and the site approved by him (which was not done); and (4) that if plaintiff would arrange to finance the construction of the house deceased would give her, at some stage of the construction to be determined by decedent, $5,000 to apply on the cost of the house. No such arrangements were ever made, and no such construction of the house was ever commenced. It is clear that the gift was conditional, that there was no substantial performance, and the transaction never ripened into a binding, enforceable obligation. Bard v. Kent, 19 Cal.2d 449, 122 P.2d 8, 139 A.L.R. 1032. Furthermore, even if it could be said that decedent must be held to be bound by contract to plaintiff by reason of part performance on her part, her right to sue for the $5,000 would not arise until she had performed the whole series of acts required as conditions, which conditions were prescribed by the decedent who made the gift. Consequently, her suit on the first cause of action at the present time would be premature. The instant action, which is predicated upon a claimed individual's promise to make a gift to another individual, may be distinguished from the cases relied upon by plaintiff, such as University of Southern California v. Bryson, 103 Cal. App. 39, 283 P. 949, holding that the note of each subscriber to a charitable religious or educational institution, in which the subscribers are all interested, is generally held to support an adequate consideration authorizing its enforcement by the promisee where each note was conditioned upon the fulfillment of the pledges of the others to raise the full amount. The general rule is that a promise to pay a subscription is ordinarily a mere offer which, in the absence of a consideration therefor, may be withdrawn at any time before acceptance; that under such circumstances the death of the promisor revokes the pledge; and that a mere individual promise to subscribe to a cause is not usually supported by a consideration and is therefore *nudum pactum* and unenforceable. University of Southern California v. Bry-

son, supra, 103 Cal.App. at page 48, 283 P. 949, and cases cited.

[3, 4] As to the second cause of action the court found, upon sufficient evidence, that decedent did not, prior to his death, deliver to the defendant executrix the sum of $5,000 in cash in trust for plaintiff. Since there was no such transfer made, and since the court found that no such trust was created, the executrix, as such, could not be compelled to pay that amount to plaintiff. An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust when none was in contemplation, particularly when the full control of the property was maintained during life, without intent to vest any interest therein prior to death. In the case of a trust in personal property, it is for the trial court to determine as a question of fact whether the words and acts of the alleged trustor indicated with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust; and if there is any evidence consistent with its finding that a trust was not created, the finding of the trial court must stand. Noble v. Learned, 153 Cal. 245, 94 P. 1047.

The third cause of action is predicated upon the claimed theory that defendant Mrs. Thompson, in November, 1951, after some conversation leading up to it, wrote a letter to plaintiff which reads in part:

> "* * * thought I'd let you know what was going on, and sincerely, I will do all I can to get you started, but I must know just what is being planned before I can obligate muself.
>
> "You will either have to get the plans and bids to me, and I will have to have some advice from Mr. Madson, Dad's advisor, or Mr. Jertberg, as really Dad left this in trust to me, I must do as he wanted, and to the best of my ability. It will have to be done on a purely business basis."

The testimony shows that plaintiff sent the plans and bids to defendant shortly thereafter, and subsequently some disagreement arose between the parties. It is contended that the language used in this letter created and constituted a trust; that under sec. 2221 of the Civil Code the necessary elements to create a trust in personal property are shown, and that plaintiff is the beneficiary of such trust; that when part of the property upon which the trust is embraced is commingled with other property of a similar nature, the trust property is identified with reasonable certainty; and that accordingly plaintiff is entitled to it, citing such cases as Weiner v. Mullaney, 59 Cal.App.2d 620, 631, 140 P.2d 704; Rollestone v. National Bank of Commerce, 299 Mo. 57, 252 S.W. 394, 398; Cahlan v. Bank of Lassen County, 11 Cal.App. 533, 105 P. 765; and 1 Bogert on Trusts, p. 506.

[5] In order for one who owns property to make himself a trustee of said property while retaining legal title, it is necessary that he use words or do acts which clearly denote his intention to relinquish his beneficial interest in the property *"in praesenti"* and to hold it for the benefit of another; that there be specific property to be held in trust by the trustor, as trustee, and an *absolute* parting by him with that beneficial interest which had been his up to the declaration of the trust. In re Lamb, 61 Cal.App. 321, 329, 215 P. 109; Estate of Webb, 49 Cal. 541; Noble v. Learned, 153 Cal. 245, 94 P. 1047; Molera v. Cooper, 173 Cal. 259, 160 P. 231.

[6] The quoted words do not indicate an intention of Mrs. Thompson to create a trust herself, but at most only indicate her belief that it was the desire of decedent to create a trust taking effect after his death. Such a desire, being testamentary in character, could only be made effective by provision therefor in a properly executed will. Noble v. Garden, 146 Cal. 225, 79 P. 883; Estate of Alberts, 38 Cal.App.2d 42, 100 P.2d 538.

[7] The trial court was justified in finding that it was not clearly and unequivocally indicated by the writing that defendant executrix had any intention to *absolutely* part with, or did relinquish her beneficial interest in the sum of $5,000 *"in praesenti"*; and that she did not hold the specified sum of $5,000 for plaintiff.

[8] Ordinarily, it is a question of fact for the trial court to determine in each case whether the evidence is of the nature required to prove a properly created trust, Estate of Alberts, supra. There is sufficient evidence to support the finding of the court in this respect.

[9] The trial court was likewise justified in holding that there was no substantial act or forbearance by plaintiff prior to decedent's death which would prevent, under the doctrine of promissory estoppel, the revocation of decedent's offer by reason of his death.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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FREEMAN v. JERGINS et al.

Civ. 19740.

District Court of Appeal, Second District, Division 3, California.

May 27, 1954.

Rehearing Denied June 14, 1954.

Hearing Denied July 21, 1954.

Action on express oral contract by which two defendants and a decedent, represented by third defendant, agreed to pay plaintiff reasonable compensation for services rendered in introducing prospective purchaser of oil stock, if sale was effected. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that contract did not call for performance of services of a broker by plaintiff, and thus was not illegal when plaintiff had no broker's license.

Judgment modified and affirmed, as modified.

Vallée, J., dissented.

1. Contracts 🔑28(3)

Work and Labor 🔑28(2)

In action on express oral contract, and a common count, for reasonable value of services rendered by plaintiff in introducing to two defendants and a decedent, represented by third defendant, an agent of investment firm which effected sale of stock held and controlled by the two defendants and decedent, evidence warranted conclusion that plaintiff was promised compensation in an unsettled amount if he would arrange the introduction, if a sale of the stock was made, and that the decedent understood that plaintiff was not acting as a mere volunteer but that he expected to receive some compensation for his services.

2. Work and Labor 🔑4(1)

Where two defendants and a decedent for whom services were rendered by plaintiff in connection with sale of stock, understood that plaintiff was not acting as a mere volunteer but expected to receive compensation for his services, and the benefit of those services was accepted, in absence of an agreement as to price, obligation of the two defendants and decedent was to pay the reasonable value of the services.

3. Contracts 🔑103, 141(1)

If a contract can be performed legally, it will not be presumed that the parties intended for it to be performed in an illegal manner, and it will not be declared void merely because it was performed in an illegal manner.

4. Brokers 🔑42

Where two defendants and a decedent agreed, by express oral contract, to pay plaintiff a reasonable compensation for finding and introducing to two defendants and decedent a prospect for purchase of oil stocks, and neither plaintiffs nor defendants contemplated that firm tendered by plaintiff would act in any other capacity than that of a purchaser, contract for payment of reasonable compensation to plaintiff was not illegal on theory that it required plaintiff to act, and to have firm tendered by him, act as brokers, even though that firm actually attempted to act as broker, and sale of stock resulted through its efforts. Corporations Code, §§ 25006, 25009 (a).

5. Brokers ⚷42

Where defendants and a decedent agreed, by express oral contract, to pay plaintiff reasonable compensation for finding and introducing to defendants and decedent a prospective purchaser of oil stock, plaintiff had fully performed when he brought about the introduction of an agent of investment firm which thereafter effected sale of a stock, and his claim for compensation was not based on services for which he was required to be licensed as a broker, and payment of reasonable compensation could not be defeated on that ground, regardless of fact that he may have engaged in activities not required of him by the agreement. Corporations Code, §§ 25006, 25009(a).

6. Brokers ⚷86(1)

In action on express oral contract for reasonable value of services rendered by plaintiff in introducing two defendants and decedent to agent of investment firm which effected sale of stock held and controlled by the two defendants and decedent, wherein it was contended that plaintiff, who did not have a broker's license, had acted in the capacity of a broker, evidence warranted conclusion that plaintiff had agreed to do and did nothing to bring about a sale except arrange an introduction, and that he did not act as a broker. Corporations Code, §§ 25006, 25009(a).

7. Brokers ⚷3, 42

Where express oral contract by which defendants and a decedent agreed to pay plaintiff a reasonable compensation for his services required plaintiff merely to find or to introduce to defendants and decedent a prospect for purchase of certain oil stock, with compensation to be payable only if sale was made to persons introduced, contract did not require plaintiff to act in the capacity of a broker within statutory definition of that term contained in Corporations Code, since a valid distinction can be made, in a proper case, between a "broker" and a "finder" of one who merely introduces parties who subsequently negotiate a sale. Corporations Code, §§ 25006, 25009(a).

8. Brokers ⚷88(1)

In action on express oral contract for reasonable value of services rendered by plaintiff in introducing two defendants and decedent to agent of investment firm which effected sale of oil stock held and controlled by the two defendants and decedent, wherein it was contended that plaintiff, who did not have a brokers license, had acted as a broker, question whether inquiries made by plaintiff of the two defendants and decedent as to whether their oil holdings were for sale amounted to a solicitation of a sale of securities or negotiating for or dealing in securities, thereby making the acts of plaintiff those of a broker, was one of fact, to be resolved by consideration of all the circumstances by the trier of facts. Corporations Code, §§ 25006, 25009.

9. Statutes ⚷212.1

It is to be presumed that legislature was familiar with court decisions at time of enacting legislation which failed to extend regulations of brokers to those persons who do no more than arrange an introduction between an owner and a prospective purchaser. Corporations Code, §§ 25006, 25009; Business and Professions Code, § 10131.

10. Brokers ⚷53

In order to earn a commission the broker must be the predominating effective cause of the sale.

11. Contracts ⚷322(3), 323(1)

In action on express oral contract for reasonable value of services rendered by plaintiffs in introducing two defendants and decedent to agent of investment firm which allegedly effected sale of oil stock held and controlled by the two defendants and decedent, wherein it appeared that firm had originally been tendered as prospect for purchase, and that its authority had been terminated by defendants before the actual purchaser engaged services of the firm which resulted in sale, question whether the investment firm was the procuring cause of the sale was one of fact, and finding that it was procuring cause was sustained by the evidence. Corporations Code, §§ 25006, 25009.

12. Appeal and Error ⚷1010(1)

A finding of trial court on question of fact, if supported by substantial evidence, is binding upon reviewing court.

13. Appeal and Error ⚷510

Trial ⚷39

Writings which are produced under a proper subpoena duces tecum and which relate to the matters in issue may be inspected by opposing counsel, and, if offered in evidence and denied admission they are to be marked for identification in that they constitute the record upon which the correctness of the ruling is to be judged, and if not marked and filed, they are not a part of the record, even though counsel who produced them was directed to keep them in his file.

14. Appeal and Error ⚷1047(5)

Error in refusing to permit inspection of writing produced under a proper subpoena duces tecum and in failing to have them marked for identification when they were denied admission in evidence, was not cured by production of the letters on appeal.

15. Appeal and Error ⚷1047(5)

In action on express oral contract for reasonable value of services rendered by plaintiff in introducing two defendants and a decedent to a party which effected sale of oil stock, wherein it appeared that plaintiff was to share his compensation with a certain attorney, refusal to permit defense counsel to inspect letters passing between plaintiff and such attorney, produced under proper subpoena duces tecum, thereby depriving defense counsel of opportunity to use them in cross-examination, though error, was not reversible error when such attorney was cross-examined at length and the letters contained nothing inconsistent with his testimony.

16. Parties ⚷51(2), 79, 82

As to an indispensable party, court is without jurisdiction to proceed with action until such person is brought in as a party, and refusal to order a necessary or proper party to be brought in may constitute an abuse of discretion.

17. Contracts ⚷175(3)

In action on express oral contract for reasonable value of services rendered by plaintiff in introducing two defendants and a decedent to agent of an investment partnership as a prospective purchaser of oil stock, resulting in ultimate sale of stock to another party, wherein it appeared that plaintiff was to share his compensation with certain attorney, and defendants contended that such attorney was an indispensable party, evidence sustained finding that such attorney was not a party to the contract between defendants and plaintiff, with result that he was neither an indispensable or a necessary party.

18. Witnesses ⚷276

In action on express oral contract by which two defendants and decedent, who owned and controlled oil stock, agreed to pay plaintiff reasonable value of services rendered in introducing prospective purchaser, if sale was effected, wherein it appeared that plaintiff was obligated to share his compensation with another party, refusal to permit examination of latter party as person for whose immediate benefit the action was prosecuted, was not error. Code Civ.Proc. § 2055.

19. Frauds, Statute of ⚷23(4)

Express oral contract by which two defendants and a decedent, who owned certain oil stock and controlled other stock, agreed to pay plaintiff reasonable compensation for finding and introducing a prospective purchaser, if sale resulted, created an original obligation, and was not a promise, as to the stock merely controlled by the defendants, to answer for the debt, default, or miscarriage of another, and thus was not invalid though not in writing. Civ.Code, §§ 1624(2), 2794.

20. New Trial ⚷90

Where defendants and decedent had agreed, by express oral contract, to pay plaintiff reasonable compensation for finding and introducing a prospective purchaser of oil stock, if sale was effected, and plaintiff produced expert testimony on issue of reasonable value, even if credibility of one of such experts was impaired by giving of false testimony, when the opinions of the experts as to reasonable compensation covered a wide range, denial of new trial because of falsity of such testimony did not constitute an abuse of discretion.

21. Appeal and Error ⚿977(5)

An order denying a motion for new trial will not be reversed in absence of a clear showing of an abuse of discretion.

22. Contracts ⚿354

Work and Labor ⚿30(4)

Where plaintiff brought action on express oral contract, and a common count, for reasonable value of services rendered under express oral contract by which defendants and decedent agreed to pay reasonable compensation for finding and introducing prospective purchaser of oil stock, if sale was effected, findings in favor of plaintiff on express agreement and also on common count created no fatal conflict, but findings on common count would be disregarded in so far as a technical conflict was created.

23. Judgments ⚿240

Where two defendants and a decedent had agreed to pay plaintiff reasonable compensation for finding and introducing prospective purchaser of oil stock, if sale was effected, and holdings of the two defendants and decedent were respectively in different amounts and there was no finding that defendants promised jointly to compensate plaintiff, the obligation of the defendants and decedent was, under the evidence, several, and granting of a joint judgment against them was error.

24. Contracts ⚿183

Where two or more parties to a contract promise separate performance, to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance shall be rendered, each is severally bound for the performance which he promises and is not bound jointly with any of the others.

25. Trial ⚿391

Findings should be confined to the determinative factual issues.

Hartke & Brant, Los Angeles, for appellant A. T. Jergins.

Clock, Waestman & Clock, Long Beach, for appellants Lowell Stanley.

Charles P. Cotton as Executor of the Estate of Charles M. Cotton, Deceased.

Mitchell, Silberberg & Knupp, and Arthur Groman, Los Angeles, for respondent Y. Frank Freeman, Jr.

SHINN, Presiding Justice.

Plaintiff recovered judgment of $149,560.84 against A. T. Jergins, Lowell Stanley and Charles P. Cotton, as executor of the Last Will and Testament of Charles M. Cotton, deceased. The amount was determined to be the reasonable value of plaintiff's services in introducing one John W. Lee, a representative of Smith, Barney & Co., a New York investment partnership (hereinafter called Smith-Barney), to defendants Jergins, Stanley and the late Charles M. Cotton, under an express oral agreement by which the three last named agreed "* * * that if a sale of the stock of the Jergins Oil Company was effected through the efforts of said Lee or the said firm of Smith, Barney & Co., said defendants would pay to plaintiff for his services in finding and arranging an introduction of said Lee to said defendants, Jergins and Stanley, and to said C. M. Cotton, a reasonable compensation, not only for the stock which stood in their own names but for that which they controlled and which they represented to be approximately 65% of the outstanding stock of the Jergins Oil Company." Plaintiff was obligated to pay Robert Troutman, Jr., an attorney of Atlanta, one-half of the compensation which he might receive, Troutman having arranged for plaintiff to meet Lee. The stock of the Jergins Oil Company was sold to Lehman Brothers of New York for more than $30,000,000. Plaintiff demanded compensation, which defendants refused to pay. The present action was brought upon the express contract, and an additional common count, both seeking compensation in the amount of the reasonable value of the services rendered. Defendants Jergins, Stanley and Charles P. Cotton, as executor, appeal.

Preliminarily it may be mentioned that the young Mr. Freeman was in the ice cream business. Neither he nor Lee nor Smith-Barney was licensed as a broker in California; Smith-Barney first appeared in the capacity of a possible purchaser of the stock; later the firm was authorized by defendants to find a purchaser for the stock of the defendants and certain of their associates, with the understanding that all the stockholders would have the same opportunity to sell; numerous efforts in this direction were unsuccessful; thereafter Lehman Brothers purchased all the stock of the company. The court found that plaintiff had performed his agreement; that the Lehman Brothers purchase resulted from the efforts of Lee and Smith-Barney; that the shares of stock owned and controlled by the three defendants amounted to 35,483 shares, and that the same sold for $14,956,084, one per cent of which sum was awarded as a judgment against the three defendants.

The questions upon the trial were the following: (1) What contract, if any, was entered into between plaintiff and defendants? (Charles M. Cotton will be referred to as a defendant.) (2) Was the contract one which had an illegal purpose, namely, the rendition of services by unlicensed persons for which a broker's license was required under California law? (3) Did the activities of plaintiff in performance of his agreement amount to the rendition of services for which a permit was required? (4) Was the purchase by Lehman Brothers effected through the efforts of Lee or Smith-Barney? (5) Was Troutman an indispensable or a necessary party to the action? (6) Was the contract with plaintiff joint or several as to the defendants? (7) Was the action barred by the statute of frauds?

The court found that the contract was in terms as stated above and that it created a joint obligation of the defendants. Findings on all other issues were in favor of plaintiff.

There was not a great deal of conflict in the evidence as to the material facts. There were two principal factual questions, namely, (1) as to the terms of the contract between plaintiff and defendants, and (2) whether the sale to Lehman Brothers resulted from the efforts of Lee or Smith-Barney. It is contended that the findings on these issues are without support in the evidence, and that all the other conclusions of the court on the material issues, factual or legal, were erroneous. There is an additional question, namely, did the court err in refusing to allow defense counsel to cross-examine Troutman under § 2055, Code of Civil Procedure, or to inspect certain letters passing between plaintiff and Troutman, and in refusing to permit the letters to be marked for identification?

In order to avoid repetition we shall state the facts which relate to the several contentions on the appeal as each contention is discussed.

[1, 2] There was evidence, consisting of the testimony of plaintiff, and certain of the defendants, as well, that plaintiff was promised compensation in an unsettled amount if he would arrange to introduce Lee to the defendants, and if, as a result of the efforts of Lee or Smith-Barney a sale of the stock was made. On behalf of Cotton it is said there was no evidence that he entered into such an agreement. Upon motion the testimony of plaintiff, Jergins, Stanley and Troutman as to occurrences prior to the death of Cotton was stricken under § 1880(3), Code of Civil Procedure. There was other evidence, however, that Cotton was fully aware of the introduction of Lee by plaintiff and the purpose of it. He was present at the first meeting when Lee told defendants that Smith-Barney would not pay anything as compensation to plaintiff and Troutman and would prefer that the matter be not discussed in their presence. The court properly inferred that Cotton understood plaintiff was not acting as a mere volunteer but expected to receive some compensation from the three defendants to whom he introduced Lee. If no amount was agreed upon, nevertheless Cotton, as well as the other defendants, accepted and had the benefit of plaintiff's services, with knowledge of the purpose of the same. In the absence of an agreement as to price the obligation of the recipient of services is

to pay the reasonable value thereof. 27 Cal.Jur. 207, 208; Muncy v. Thompson, 26 Cal.App. 634, 147 P. 1178. There was undisputed evidence that plaintiff performed the agreement on his part, and evidence from which the court could properly conclude that the amount of plaintiff's compensation was not agreed upon. We therefore conclude there was substantial evidence that the parties entered into an agreement in terms as found by the court.

Defendant Jergins has filed briefs separate from those of his co-defendants. They all assert invalidity of the contract with plaintiff, in that it called for services of plaintiff, Lee and Smith-Barney, for which they were required to be licensed under the Corporations Code, §§ 25700–25713, and that the services rendered pursuant to the employment were such as are forbidden to unlicensed persons. Plaintiff replies that his agreement did not call for the services of a broker; that he was a mere "finder," and as such was not required to have a broker's license; that he rendered no services as a broker; that his agreement with defendants did not require in its performance any services as brokers of himself or Lee or Smith-Barney; that if Smith-Barney undertook to or did act in the capacity of a broker it did not act as his agent, or in furtherance of his agreement with defendants.

In discussing this point additional facts must be stated. These may be taken from the findings which are, for the most part, merely a recital of evidentiary facts. In October, 1949, plaintiff learned from Troutman that he was in touch with people who were interested in buying valuable oil properties. He requested plaintiff to find properties for sale and promised plaintiff half of any commission he might receive. Plaintiff made inquiries of Bolsa Chica Oil Company and Russell Havenstrite, an independent operator, but was told that neither had anything to sell. Not having found any property for sale plaintiff made inquiry of Jergins in October or November, 1949 and he gave Jergins a letter which he had received from Troutman in order to show what his relations were with Troutman. In the following month he gave Jergins an additional memorandum he had received from Troutman and he offered to bring about an introduction to Troutman's people. Informed by Jergins that a sale of the Jergins Company stock would be considered, plaintiff went to Atlanta in December, 1949 and was informed that John W. Lee was representing Smith-Barney. In March, 1950 plaintiff telephoned Lee in Georgia, with the result that both Troutman and Lee came to Los Angeles, where plaintiff was introduced to Lee. In the meantime plaintiff had discussed the matter of a possible sale with Jergins several times. Plaintiff, Troutman and Lee, met with Jergins at a country club for lunch, following which they went to the home of Stanley, where Lee was introduced to Stanley and Cotton and disclosed his representation of Smith-Barney which firm, he said, would not look to the sellers for compensation in any deal that was made, and would not pay anything to Troutman or Freeman, to which Jergins stated "we will take care of Frank (plaintiff) and Troutman." Jergins had knowledge of the arrangement between plaintiff and Troutman for a division of compensation. In May, 1950 plaintiff met with defendants and the latter suggested $45,000 as compensation in the event a sale were made. Plaintiff refused to agree to this figure. (This evidence was stricken as to the estate of Cotton.) The next day Jergins informed plaintiff that defendants were willing to pay $65,000 or $72,000 (depending on the amount of stock sold), to which plaintiff refused to agree on behalf of himself and Troutman. Thereafter plaintiff was kept informed of the progress of the negotiations through telephone conversations with Troutman and Lee. Shortly after the first conference between Lee and the defendants plaintiff drove Lee to Long Beach, where the latter inspected the Jergins Trust Building, an asset of the oil company. Lee was in Los Angeles for about ten days or two weeks, during which time plaintiff loaned him the use of an automobile, and he also drove Lee to the station when he left. In their several meetings they discussed the prospects of a sale.

Lee investigated the California oil properties, upon which he reported to Smith-Barney, and he later went to Texas and inspected the Jergins properties there. After conferring with Lee, Smith-Barney sent their agent, Barten, to California where he was soon joined by Kenneth Hill of the petroleum department of the Chase National Bank and William B. Harding, a partner of Smith-Barney. After some time spent in a preliminary examination Hill, Harding and Lee left California, but Barten remained to obtain additional information. The investigation made by these gentlemen was comprehensive. During the progress of the investigation plaintiff met Barten and Hill and played golf with Hill at a country club. It was orally agreed between defendants and Barten, Hill and Harding that the investigation would be completed by the end of June, and that Smith-Barney would be allowed two weeks thereafter within which to bid, or organize a group to submit a bid for the Jergins Company stock. Barten made a lengthy report bearing date of July 12, 1950. Smith-Barney endeavored to work out some deal for purchase of the stock by a group to be organized, or a single purchaser, but failed, and finally concluded that the best prospective purchaser was Signal Oil and Gas Company located in California. Lee obtained an extension of time from Jergins to about the middle of August, without disclosing the intention to submit the property to Signal. Barten, Lee, Hill and Bernet Walker, a partner of Smith-Barney, came to Los Angeles and conducted negotiations between Signal and defendants. No agreement was reached; other negotiations were had with The Capital Company and, following their termination, additional negotiations with Signal, all of which failed to bring about an agreement. All authority of Smith-Barney to proceed further was terminated by the defendants. Thereafter Lehman Brothers, learning of the failure of negotiations with Signal, contacted Chase National Bank and Smith-Barney and obtained extensive data and reports on the Jergins' property. The events which followed up to the time Lehman Brothers consummated the purchase are not pertinent to the present discussion and will be considered later in another connection.

First to be considered is the claim that the contract sued on was illegal in that it required plaintiff to act, and to have Lee and Smith-Barney act as brokers. The court found that Lee and Troutman were brought to Los Angeles following conversations between plaintiff and Jergins in which the latter stated that if plaintiff should find a person with whom Jergins could negotiate a deal he would pay plaintiff a reasonable compensation. The agreement with the three defendants, as found by the court, was entered into after Lee and Troutman came to Los Angeles. Under the original arrangement with Jergins plaintiff was merely given the privilege of finding a prospect. When the agreement with the three defendants was made plaintiff had already found and introduced the prospect. His services were ended. His compensation was not dependent upon his rendering any future service or engaging in any further activity. Neither Lee nor Smith-Barney was employed by defendants. There was no written agreement between them and defendants. Smith-Barney was presented to defendants and was considered as a prospective buyer. Although it appears that Smith-Barney had no intention of buying the property for itself, that fact was unknown to defendants until they learned of proposed negotiations with Signal. Lee represented to defendants that a group composed of Smith-Barney and associates would consider purchasing the stock. It was not suggested in the negotiations with defendants that either plaintiff or Lee or Smith-Barney would act in the capacity of broker. Smith-Barney put out a brochure in New York in an endeavor to promote a purchase of the stock, by which it was proposed to form a new company with small capital, held entirely by Smith-Barney and associates, to act as purchaser. Such a corporation was eventually formed, owned by Lee and Smith-Barney with equal interests, but the corporation had no occasion to act in any capacity. The proposal was to have the new company take title to the stock and transfer it to the ultimate purchasers, who might or might not include Smith-Barney. The idea was for Smith-Barney to receive compensation as a capital gain, rather than as a broker's commission. All this was unknown to defendants, and it has no materiality except to explain the reason Lee represented to defendants that Smith-Barney was a prospective purchaser. It may be conceded for present purposes that Smith-Barney, in its endeavors in New York, might have made a sale in which it would have acted solely as a broker, but this would have been aside from anything it agreed with defendants to do or represented it would do, or which was expected of it by defendants. After the efforts to effect a purchase, conducted from New York, had failed Smith-Barney obtained another extension of time from defendants. When the negotiations with Signal became known to defendants they first learned that Smith-Barney proposed to act in the capacity of a broker, its compensation, if a sale were made, to come from the purchaser. Up to that time Smith-Barney had appeared to defendants as one who might either purchase the property itself or organize a group which would purchase it. There was nothing in the agreement between plaintiff and the defendants that would have required either plaintiff or Lee or Smith-Barney to act as a broker in any purchase that might be made. It is immaterial whether in the negotiations with Signal the firm was engaged in activities for which a license was required. Presentation of a proposal to an operating company had not been mentioned prior to or at the time of plaintiff's agreement with the defendants, nor was there any evidence whatever that either plaintiff or the defendants contemplated that Smith-Barney would act in the capacity of broker, or in any other capacity except that of a purchaser. Plaintiff had nothing whatever to do with the activities of Smith-Barney at any time and was not responsible for anything which that firm did or attempted to do.

Defendants' charge of illegality starts with the erroneous assumption that plaintiff agreed with defendants that Smith-Barney would do everything that was actually done by that firm, and defendants then argue that the agreement was therefore tainted with illegality. We have seen that the premise is erroneous.

[3, 4] It is well settled that if a contract can be performed legally, it will not be presumed that the parties intended for it to be performed in an illegal manner, and it will not be declared void merely because it was performed in an illegal manner. Vagim v. Brown, 63 Cal.App.2d 504, 146 P.2d 923; Dougherty v. Cross, 65 Cal. App.2d 687, 151 P.2d 654; Gardiner v. Burket, 3 Cal.App.2d 666, 40 P.2d 279; 12 Cal.Jur.2d 272; 12 Am.Jur. 647; 17 C.J.S., Contracts, § 191, p. 545. Under the facts found by the court and the applicable principles of law the conclusion that the contract did not call for the performance of any illegal act was clearly a correct one.

[5] The next phase of the question arises from the claim that plaintiff is claiming compensation for services for which he was required to be licensed, namely, offering the property of the defendants for sale and negotiating for a sale of it. Although this contention is advanced with much vigor, we are of the opinion that it is without merit. In the first place, plaintiff had done everything that he was required to do when he brought about the introduction of Lee. That constituted performance on his part, and it is that performance and nothing else for which he seeks compensation. If he did more than that it was not in performance of anything that he had undertaken to do or was required to do in order to earn his compensation. He is not suing for compensation earned as a result of his efforts in effecting a sale, but claims it solely on the basis of his introduction of Lee and the results of the efforts of Smith-Barney. Even if he had engaged in some activity that was not required of him, and which was wholly apart from the full performance of his agreement, this would not be a defense against liability of the defendants to him for the full performance of a valid agreement in a lawful manner. But aside from this, we are unable to see that plaintiff engaged in any activity which, as a matter of law, amounted to the rendition

of services, or acting in the capacity of a broker.

A "Broker" as defined by § 25006, Corporations Code, "includes every person or company, other than an agent, who, in this State, engages either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in, any security issued by others," etc. As defined by § 25009 "(a) 'Sale' or 'sell' includes every disposition, or attempt to dispose, of a security or interest in a security for value. 'Sale' or 'sell' includes all of the following, whether done directly or by an agent, circular letter, advertisement, or otherwise: An offer to sell; an attempt to sell; a solicitation of a sale; * * *."

It is not questioned by plaintiff that a single transaction for compensation as thus defined would constitute engaging in business "in part."

Defendants say that if a person takes even a slight part in the negotiations for the sale of property he is acting as a broker, and they list the following activities of plaintiff: "(1) Attended meeting at which initial negotiations between Lee and appellants took place. (2) Loaned automobile to Lee for his use in inspecting Jergins Oil Co. property. (3) Took Lee to Long Beach to inspect Jergins Trust Building and confer with company officials. (4) Brought Lee back from Long Beach and discussed Jergins Trust Building and 'the deal.' (5) Met with Lee at least twice thereafter and discussed 'the deal.' (6) Took Lee to railroad station and discussed status of transaction. (7) Played golf with Hill of Chase National Bank accompanied by Barten of Smith, Barney & Co., during their negotiations with appellants."

[6] The court found that plaintiff did not agree to do, or do, anything which would bring him within the above definition of "broker". Defendants assail this finding, contending it is contrary to all the evidence. They quote at length from Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P.2d 768, 770, in which it was held that it appeared as a matter of law that the activities of the unlicensed plaintiff in negotiating a sale of corporate stock brought him within the statutory definition of a broker and necessitated reversal of a judgment in his favor for a commission. Defendants take a few facts from that opinion and some of the acts of plaintiff, Freeman, and contend that the facts of the two cases are substantially the same. This is not so. In the cited case Rhode alleged in his complaint that he was promised a commission for finding a purchaser and "'assisting in any such sale'" and that he negotiated with the principals in respect to the sale and purchase, although these allegations were retracted by amendment of the complaint. The court said, 94 Cal.App.2d at pages 279–280, 210 P.2d at page 773: "Unquestionably, respondent offered the stock for sale. He attempted to dispose of it. He attempted to sell it. He solicited a sale of the stock by appellants. These acts were sufficient to bring him within the terms of the Act. We think also that he negotiated for the sale of the stock. He treated with others with a view to sale of the stock, which is negotiating." In the present case Freeman had only a vague idea that the company might be acquired for thirty-five or forty million dollars and advised Lee to that effect. He expressed the opinion to Lee that it was a good company and inquired as to the progress of the investigations that were being made. Being a former Georgian, he extended courtesies to Lee, arranged a cocktail party with members of his own family, at which only Atlanta affairs were discussed, drove Lee here and there and loaned him a car. He also played golf with Mr. Hill. All this took place, as previously mentioned, after he had done everything that was expected of him. Both he and Troutman were country club acquaintances, respectively, of Jergins and Lee. They exhausted their usefulness when they brought about the latter's introduction to defendants, and they were ignored in the negotiations. Neither plaintiff nor Troutman had anything to offer the highly competent and experienced men who had the business in hand. Mr. Jergins testified that he and Stanley and Cotton together handled all the negotiations with Lee and Barten, that

plaintiff was never present at any of the meetings and that he, Jergins, at no time had anything to do with plaintiff after the discussions respecting an introduction and the matter of compensation. There was abundant evidence that plaintiff agreed to do and did nothing to bring about a sale except arrange an introduction.

[7] Jergins, but not Stanley or Cotton, makes the final argument under the claim of illegality that even if plaintiff did nothing more than introduce Lee to defendants, this would have been offering defendants' property for sale and negotiating for a sale, or, in other words, acting as a broker. He says there is no such thing as a "finder" as distinguished from a "broker." He concedes that the same contention was expressly rejected in Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, 961, McKenna v. Edwards, 19 Cal.App.2d 327, 65 P.2d 810, and Crofoot v. Spivak, 113 Cal.App.2d 146, 248 P.2d 45, but contends the cases were incorrectly decided.

The Shaffer case arose under the Real Estate Brokers Act, Stats.1919, p. 1252. A real estate broker was then defined as "a person, copartnership or corporation who for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate", etc. The court said, 190 Cal. at page 573, 213 P. at page 962: "In order to come within the definition of real estate broker or real estate salesman, a party must 'sell or offer to sell, buy or offer to buy, or negotiate the purchase or sale or exchange of real estate. * * *' By the terms of their contract as pleaded the plaintiffs were only required 'to find' or 'to introduce' to defendant a person 'interested' in purchasing and who subsequently did purchase, in order to recover the sum agreed by the defendant to be paid to them. By the terms of the contract, as set forth in the complaint, the 'negotiation' of the sale was to be left entirely to defendant. Plaintiffs' only duty was to produce a prospective purchaser. * * * The acts of plaintiffs, therefore, as alleged in the complaint, fall short of those defined by the Real Estate Brokers' Act, as constituting either a real estate broker or real estate salesman."

In the McKenna case the plaintiff had arranged a conference as a result of which the owners of corporate stock sold a part of it to persons produced by plaintiff. It was held that the plaintiff was not a broker as defined by subdivision (10) of § 2(a) of the Corporate Securities Act, Stats. 1933, p. 2308, since she did nothing other than arrange a conference between the parties. The term "broker" was then defined as it is defined by § 25006, Corporations Code. The court squarely held that one who merely introduces an owner of securities and a prospective purchaser is not engaging [19 Cal.App.2d 327, 65 P.2d 811] "either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others * * *." The words "sale" and "sell" were then defined as including "every disposition, or attempt to dispose, of a security or interest in a security for value." The court therefore held that an introduction of an owner and a purchaser was not an attempt to dispose of a security. The same words are defined by section 25009, Corporations Code, as including "an offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale;" etc. In the consideration of the question now before us we draw no distinction between the phrase "attempt to dispose of" as used in the 1933 Act and "an offer to sell; an attempt to sell; a solicitation of a sale;" etc. If the former phrase did not include the mere introduction of an owner and a prospective purchaser as amounting to a "sale" neither does the definition of the word contained in section 25009, Corporations Code. In fact the phrase "attempt to dispose of" is indeed broad and all inclusive.

In the Crofoot case plaintiff had merely arranged an introduction of a prospective purchaser to whom defendant sold real estate. The court stated that the case was controlled by the decision in Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, supra. It was held that the plaintiff was not acting as a real estate broker as the term is defined by § 10131, Business & Professions Code, or as a business opportunity broker, as defined by § 10252 of that code. The court said [113 Cal.App.2d 146, 248 P.2d 46]: "As pointedly observed by the trial judge in his memorandum opinion, no license is required for the simple act of introducing one person to another—yet." The court further remarked that since the decision of the Shaffer case in 1923, the legislature had not changed the definition of a broker, so as to include within the scope of the term one whose only activity is the introduction of an owner and a prospective buyer, and the court said: "Under such circumstances we thing it clear that the legislature has acquiesced in the interpretation of the statute as given and that no justification could be found for any different interpretation now."

Appellant Jergins criticizes this decision for the reason that the court did not quote the definition of broker which was considered in the earlier case, which we have already quoted, and he says the court evidently did not take into consideration the change that was made in the definition by Statutes 1929, p. 223. A real estate broker was defined in that act as "a person, copartnership or corporation who, for a compensation, sells or offers for sale, buys, or offers to buy, lists, or solicits for prospective purchasers, or negotiates the purchase or sale or exchange of real estate," etc. The criticism is unwarranted. The court referred generally to the amendments after 1919 and said that none had been made "which would change the scope of the legislature's definition of who was a real estate broker as that definition was contained in the act current at the time the Supreme Court made its decision." The only change was the addition of the words "lists, or solicits for prospective purchasers * *." The clear holding of the court was that in adding those words the legislature did not intend them to mean the same as "introduces an owner and a prospective purchaser."

The present case cannot be distinguished from Shaffer, McKenna or Crofoot on the ground that Freeman was to be paid only if defendants made a sale through persons he introduced. The same condition was present in each of the earlier cases.

Defendant Jergins says these cases were not well considered and that the holdings in Hooper v. Mayfield, 114 Cal.App.2d 802, 251 P.2d 330, and Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P.2d 768, supra, are directly to the contrary. He says that in these two cases "the thin distinction between broker and finders was emphatically rejected." In this he is mistaken. In Hooper v. Mayfield the plaintiff was a broker without a written contract of employment. His contention was that he merely brought the parties together and therefore did not need a written contract of employment—an obviously untenable position. The court merely refused to draw a distinction between a broker who merely introduces the parties and one who is employed to negotiate and conclude a sale, so as to enable the former to recover compensation without a written contract of employment. Rhode v. Bartholomew, as we have pointed out, was not a case in which the plaintiff had merely brought the parties together. The court emphasized the fact that Rhode had done precisely what the statute says an unlicensed person may not do. Had the court been of the opinion that a mere finder is required to have a license a statement to that effect would have completely refuted the plaintiff's contention.

Although we have already written more than should be necessary on the point there is another important phase to discuss. The finding of the trial court in the present case that plaintiff did not agree to render, or render, any services as a broker is a finding that he did not sell, offer for sale, negotiate for the sale of or otherwise deal in any security. § 25006. It is a finding that he did not agree to make or make an offer to sell or an attempt to sell, and that he did not solicit a sale of the Jergins Company stock. § 25009.

We are asked to reject these findings as wholly unsupported by the evidence for the reason that the introduction arranged by plaintiff amounted to one or more of the acts which are forbidden to unlicensed persons. Reduced to essentials plaintiff's activities consisted of inquiring of three owners, including Jergins, whether their properties were for sale. No price was quoted to him by Jergins or Cotton or Stanley. He merely learned that a sale was possible and so informed Lee.

[8] The question whether such inquiries amounted to a solicitation of a sale of securities or negotiating for or dealing in securities was in the present case one of fact. Spoken or written words cannot in all cases be give the same meaning. The circumstances under which they are spoken or written, the relations of the parties, their purpose, and their understanding of the meaning of the words, all must be considered, and their significance may be a matter of inference. If a broker at the request of a customer seeks out an owner of a security his customer wishes to buy, and obtains a consent to sell and a price, it would doubtless be said that he was negotiating for or dealing in a security. Clearly it would be an activity which was subject to regulation. Upon the other hand if a mutual friend brings together one who owns a security and one who may desire to buy it, or who has a friend who might buy it, it does not result, as a matter of law, that the intermediary was negotiating for or dealing in securities, or soliciting a sale of them even though he expected to be paid for his trouble.

It would be impossible for the legislature to anticipate all the different conditions under which a business transaction might be initiated, and to enumerate all the activities which might constitute an attempt to sell or a solicitation of a sale. The latitude in which the trier of fact may act cannot be taken away by the mere definitions of words of broad meaning and uncertain application. The factual conclusions which the court drew upon this phase of the case are fully justified by the evidence. In our opinion they decide questions of fact which the legislature has left for decision by the courts in doubtful cases and they also reflect a correct understanding of the applicable law.

[9] From the time of the earliest legislation of real estate brokers and securities brokers, the legislature has refrained from extending the regulations to those persons who do no more than arrange an introduction between an owner and a prospective purchaser. The laws pertaining to real estate brokers and securities brokers have been revised or amended at nearly every session of the legislature since 1917. See, Legislative History under § 25006 and § 25009, Corporations Code, and, § 10131, Business & Professions Code. During all this time when the question has arisen the courts have uniformly held that the act of arranging an introduction between an owner and a purchaser has not been made the subject of regulation by the legislature. It is to be presumed that the legislature has been familiar with the court decisions. We are asked to hold that all those decisions have been in error, or that the legislature has by some devious and subtle means declared what could at any time have been simply stated, and is conspicuous by reason of its omission, namely, that the term "broker" includes in all cases any person who brings about an introduction of an owner of real estate or securities and a prospective buyer of the same. We agree with the former decisions. They construe a broad principle of legislative policy. The question here is the exact one they decided. They cannot be distinguished in principle. They hold, and we hold, that if the legislature had ever intended the law to be as appellant Jergins contends it is, there would long ago have been an unmistakable declaration to that effect.

We mention here that able and earnest counsel for appellants Cotton and Stanley do not join in the contention of Jergins last discussed. They contend only that plaintiff's agreement necessarily required the performance of unlawful acts, and that he did far more than merely arrange an introduction, both of which contentions have been answered.

We may add that we do not fear that adherence to former decisions will, as appellant Jergins warns us, turn loose "rascals" and "scamps" upon the "gullible securities owner" and make it easy for them to sell a "credulous widow" stock in a "salted gold mine." The legislature has not discovered the existence of such dire-conditions, nor do we believe they are foreshadowed by the business dealings between the highly proficient defendants and the inexperienced Mr. Freeman. No harm will come from the enforcement of contracts such as they entered into.

Defendants challenge the finding that the sale to Lehman Brothers resulted from the introduction of Lee to defendants and the efforts of Lee and Smith-Barney. The point makes it necessary to set forth additional facts. After the failure of the negotiations with Signal, the authority of Smith-Barney was terminated by defendants and much of the data received from defendants was returned to Stanley, but the firm and Chase National Bank still retained extensive data and the reports that had been made. Lehman Brothers, learning of the situation, went to Chase National Bank and then to Smith-Barney and received the reports on the properties, with supporting data. Lehman Brothers engaged the services of Smith-Barney for the purpose of obtaining defendants' consent to consider a bid for the property and to present it. In view of uncertainty as to future tax legislation it was understood that any bid would have to be submitted in time for action to be taken by December 29, 1950. Mr. Barten came to California on behalf of Lehman Brothers in December, and with considerable difficulty persuaded defendants to consider a bid. With the assistance of one Rosenberg, a local representative of Lehman Brothers, a bid was submitted and was accepted by defendants.

[10-12] Defendants contend that the idea of a purchase originated with Lehman Brothers, that Smith-Barney had been discharged by defendants, did not submit the property to Lehman Brothers, and that therefore the sale was not effected through any efforts on its part. The cases cited by defendants upon this point state the familiar rule that in order to earn a commission the broker must be the predominating effective cause of the sale, see Nelson v. Mayer, 101 Cal.App.2d 733, 226 P.2d 20, and cases cited. Plaintiff replies that it was not necessary to prove that his efforts were the procuring cause; it was only necessary to prove that the sale was "effected through the efforts of said Lee or the said firm of Smith, Barney & Co.," and that there was sufficient evidence to support the finding. If there is a distinction between effecting a sale through one's efforts and being the procuring cause of the sale, we are unable to recognize it. And the distinction, if one exists, would be without a difference. The finding, given a construction consistent with the judgment, means that the efforts of Lee and Smith-Barney were the procuring cause of the sale. The fact that Lehman Brothers came to Smith-Barney without solicitation is immaterial. The fact that the latter firm had been discharged is not important. It is not claiming a commission. There is no doubt as to the applicable rule of law. The question under discussion is one of fact, as to whether the sale was effected through the efforts of the persons introduced by plaintiff. If there was substantial evidence to support the finding we, of course, are bound by it. Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 18, 206 P. 653; Bail v. Glantz, 78 Cal.App. 49, 248 P. 258; Jones v. Foster, 116 Cal.App. 102, 2 P.2d 582. It was through the efforts of Smith-Barney that reports were made for that company and Chase National Bank. Those reports and all information on hand were furnished to Lehman Brothers. The court found that the latter's bid was based solely on the reports and data furnished by Chase National Bank and Smith-Barney. It was Barten who, as representative of Lehman Brothers, prevailed upon defendants to entertain the offer. Lehman Brothers did not deal with defendants except through Smith-Barney, and the latter received through Lehman Brothers for services rendered $180,000 cash and 3,200 shares of stock of the corporations which took title to the Jergins Company stock. Certainly Lehman Brothers was satisfied that the sale resulted from the efforts of Smith-Barney, and we do not see how the court could have found otherwise. But for the reports the firm made and supplied, the knowledge it had acquired and its active and effective assistance, Lehman Brothers, so far as shown by the evidence,

would never have come into contact with defendants and there would have been no sale. The finding has ample support in the evidence.

During Troutman's cross-examination numerous letters which passed between himself and plaintiff were admitted as evidence. Upon request plaintiff's counsel produced six letters written by Troutman to plaintiff after the completion of the sale, which he said related "roughly" to the transaction. They had been produced in response to a subpoena duces tecum. Defense counsel requested an opportunity to inspect them for possible use in cross-examination. Plaintiff's counsel objected upon the general ground that they were written after the deal was closed and were incompetent, irrelevant and immaterial. Upon request of defense counsel the letters were handed to the court. After reading them the court sustained the objection. Defense counsel requested that the letters be marked for identification. The court ruled that they would not be marked for identification but that they should remain in the file of plaintiff's counsel. Defense counsel then requested permission to inspect the letters and plaintiff's counsel replied that the request would be taken under consideration. Troutman was recalled for further cross-examination and defense counsel informed the court that inspection of the letters had been refused. Again the court ruled that the letters were inadmissible. They were not marked for identification. The rulings of the court are assigned as error.

[13] The procedure is, within our experience, unprecedented. We understand it to be the invariable practice to permit inspection of writings which are produced under a proper subpoena duces tecum and which, admittedly, relate to the matters in issue. If they are offered in evidence and denied admission they are to be marked for identification. They constitute the record upon which the correctness of the ruling is to be judged. If they are not marked for identification and filed, they are not a part of the record, even though counsel who produced them is directed to keep them in his file.

[14] The letters were produced by plaintiff's counsel on the argument of the appeal and, as directed by the court, were lodged with the clerk of this court. Plaintiff, asserting that he "has never had anything to hide", offered the letters for the court's inspection and moved for augmentation of the record. Counsel for defendants properly refused to stipulate that the letters be considered by this court as a part of the record on appeal. The procedure in the court below was manifestly in error. Defense counsel desired to read the letters while Troutman was under cross-examination and was denied that privilege. The error is not cured by production of the letters at this time. Defendants properly object to the consideration of the letters. There is no occasion for them to enter into a stipulation which would waive the claim of error.

We have been obliged to read the letters and have ordered them to be filed by the clerk as a part of the record. In no other way can it be determined whether the ruling of the court was seriously prejudicial and we must, of course, rule upon that question. The letters in question are under dates of January 16th and 26th, February 5th, May 29th, July 9th and August 1st of 1951 and were written by Troutman to Freeman. They relate to conversations of Troutman with Lee and report a friendly attitude on the part of Lee, and his belief that Troutman and plaintiff should be compensated for their services; they discuss the matter of depositions and other preparations for trial; they emphasize the necessity of showing that Barten, who had gone over to Lehman Brothers, was acting for Smith-Barney in the Jergins' transaction; they express curiosity as to the compensation received by Lee and Smith-Barney. The letters contain such expressions as "attain our gold" (goal), "our position in this matter", "we might accept his offer" (speaking of a possible offer of settlement), "we have no worry"; and in referring to Lee, "he believes that we are entitled to win the case. * * *" These expressions could be construed as indicating a belief on Troutman's part that the promises of the defendants ran in his favor as well as in favor of Freeman, and that they were joint promisees. Upon the other hand Troutman knew that Freeman alone was the plaintiff in the action, and we find in the letters the following: "Mr. Lee told me that he had talked with Mr. Barten and had told him of the controversy between you and Mr. Jergins"; "Mr. Lee told me that he had seen Mr. Barten in New York three days ago and that Mr. Barten had told him that he did not see how Mr. Jergins could prevent paying for your services and could prevent stating that the deal was completed through the Smith-Barney connection which you provided to Mr. Jergins." While the letters show that Troutman regarded the prosecution of the claim as in his interest as well as in the interest of Freeman there was nothing in them contradictory of the fact that he was to receive half of whatever Freeman should receive, and the further fact that defendants' agreement was with Freeman, alone. Other matters were mentioned such as a possible settlement to be arranged through Mr. Cotton, and there were references to other schemes which Troutman and Freeman had in mind.

[15] We are satisfied that defendants suffered no substantial prejudice in being deprived of the use of the letters in the cross-examination of Troutman or in their exclusion as evidence. Troutman was cross-examined at length. The letters contained nothing that was inconsistent with his testimony or that of any other witness for plaintiff. It is difficult, therefore, to account for the contumacious refusal of plaintiff's attorney to allow the letters to be inspected by defense counsel.

By answer defendant Jergins pleaded non-joinder of parties in that Troutman was not joined as a plaintiff. Defendants Stanley and Cotton also pleaded non-joinder of parties but did not name anyone who should be joined as a plaintiff or defendant. No motion was made to bring in Troutman or any other person as a party.

[16] The court found: "Said Robert B. Troutman, Jr., was not a party to the agreement between plaintiff and defendants and had and has no rights thereunder against the defendants, and was and is not a proper or necessary party in said action." Defendants contend that Troutman was an indispensable party, or at least a necessary party plaintiff; if he was the first, the court was without jurisdiction to proceed with the action until he was brought in as a party, Warner v. Pacific Tel. & Tel. Co., 121 Cal.App.2d 497, 263 P.2d 465; if the second, it may have been an abuse of discretion not to order him brought in, Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 106 P.2d 879. They assail the above finding as without support in the evidence. The record does not sustain their contention.

[17] In the initial letter which Troutman wrote to plaintiff he promised plaintiff one-half of any commission he might receive. He did not request plaintiff to make any arrangement under which either he or plaintiff would receive compensation from the seller if a sale should be made. He was working with Lee as a representative of Smith-Barney and presumably was aware of the fact that that firm would expect to be compensated by the buyers. Before Troutman or Lee came to California plaintiff had discussed with Jergins his connection with Troutman and had shown Jergins communications from the latter. The court found that Jergins informed plaintiff that he would be "* * * interested in having plaintiff find a person or persons who might be interested in, and to or through whom the said defendant might possibly effect, a sale of said properties and in having plaintiff introduce such persons," and that if he could negotiate and effect a sale of the stock he would pay plaintiff a reasonable compensation for the introduction. Plaintiff was the one who was relied upon to arrange the introduction and he was the one to whom the promise was made. When it was learned that compensation might be earned by plaintiff under his agreement with defendants an arrangement was made between plaintiff and Troutman for a division of whatever plaintiff might receive. Defendants were aware of this arrangement but they dealt only with plaintiff. Plaintiff, so far as disclosed by the evidence, could have

made any agreement for compensation he wished. Performance of that agreement by defendants would have fulfilled their obligation. Troutman left the matter in the hands of plaintiff. Defendants evidently so understood the matter; they did not consider it necessary to consult Troutman nor did Troutman deem it necessary to discuss the matter with them. Defendants made no promise to Troutman. Thus neither defendants nor Troutman considered it necessary for Troutman to give his consent to any agreement between plaintiff and defendants respecting compensation. Any claim Troutman had was against plaintiff and not defendants. It is true that plaintiff rejected offers of compensation made by defendants, one for $45,000 and the other on a basis that might amount to as much as $72,000, and that he gave as his reason that he would not agree to the offers on behalf of Troutman. It is also true that Jergins stated that the defendants would compensate plaintiff and Troutman, but the court was not required to find from this evidence that Troutman was one of the contracting parties. The court could have regarded plaintiff's attitude in the matter as merely indicating his desire to make an arrangement for compensation which he believed would be satisfactory to Troutman, or as an excuse for not agreeing to defendants' proposals. We conclude, therefore, that the finding that Troutman was not a party to the contract was fully justified by the evidence.

This finding disposes of the contention of defendants that Troutman was either an indispensable party or a necessary party to the action. Since defendants' assumption that he was one or the other is in error there is no occasion to discuss the principles of law and procedure which apply in the cases of indispensable or necessary parties to litigation. The fears expressed by defendant Jergins that defendants may be subjected to demands upon them made by Troutman appear to be groundless. One has only to review the case in retrospect to see that any such claim by Troutman would be unfounded. He was present and was a witness during the trial and no suggestion came from him of any claim against the defendants. From the very beginning he left all the arrangements for compensation to plaintiff and the latter was free to make an agreement in which he would be the sole promisee. But whether plaintiff's compensation was for a price agreed upon or for the reasonable value of his services Troutman, having stood by and acquiesced in everything that plaintiff did, could in no event have a claim for more than one-half of whatever plaintiff might receive, and this claim, as we say, would be against plaintiff rather than defendants.

[18] Defendant Jergins sought to examine Troutman under section 2055, Code of Civil Procedure, as a person for whose immediate benefit the action was prosecuted. Upon objection the court ruled that he was not subject to examination under section 2055. The ruling is assigned as error. Since the rights of Troutman were limited as above set forth and he had no claim upon defendants, the court properly held that he was not a party for whose immediate benefit the action was prosecuted and that he was not subject to examination under section 2055, Code of Civil Procedure. The action was not for the enforcement of any claim of Troutman against the defendants. Defendant Jergins says "we have never contended that Troutman was a third party beneficiary." Defendants Stanley and Cotton do not contend that Troutman was a third party beneficiary. On motion of defendant Cotton the court struck out the testimony of plaintiff as that of a party to the action, and the testimony of Troutman as that of a person in whose behalf the action was prosecuted against the executor of Cotton's estate insofar as the testimony related to matters or facts occurring before the death of Cotton. Code Civ.Proc. sec. 1880(3). Although this ruling as to the testimony of Troutman was inconsistent with the ruling that he could not be examined under section 2055, Code of Civil Procedure, the inconsistency is immaterial. Since Troutman's testimony was stricken Cotton cannot complain. The ruling barring Troutman's examination was correct as to Jergins since he contends only that Troutman was a joint

promisee, and Stanley does not complain of it.

[19] The point is made by Stanley and Cotton that the promise of the defendants to compensate plaintiff for his services insofar as it related to sales of stock controlled but not owned by defendants was void since it was not in writing. A promise to answer for the debt, default or miscarriage of another is invalid unless it is in writing, Civ.Code, § 1624(2), but it is deemed an original obligation and need not be in writing "Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person". Civ.Code, § 2794. The stockholders, other than defendants, made no promise to plaintiff and had no obligation to him. Defendants did not agree to pay any debt owed to plaintiff by others. It is not questioned that if there was an agreement it was that defendants would compensate plaintiff on the basis of stock they owned and also the stock sold by the several groups which they represented. It was necessary to deliver a controlling stock interest in order to make a sale. Defendants' promise was not without consideration. The court found it to be an original obligation. The finding has ample support in the evidence.

[20, 21] Motions for a new trial were made and denied. The notice of Jergins specified, with other grounds, newly discovered evidence. The supporting affidavits related to the testimony given by one of plaintiff's experts, J. Morris Jackson, and purported to establish that the witness had given false testimony. Jackson valued plaintiff's services at two and a half per cent of $31,000,000 or $775,000, basing his opinion in part upon his own experience and his statement that he had received a commission of $100,000 for negotiating a sale of stock of Roberts Public Markets, Inc. to Fitzsimmons Stores Ltd. for $1,900,000; he qualified that statement by reducing the amount he had received to $50,000. The affidavits on the motion, supported by documentary evidence, were to the effect that Jackson had received only $14,000 in the transaction. It may be granted there was a sufficient showing made that Jackson had given false testimony and that his credibility was considerably impaired by the facts stated in the affidavits, but that fact alone would have been an insufficient reason for a new trial. It was for the trial judge to determine whether his finding as to the value of plaintiff's services would have been the same had Jackson testified to the facts revealed in the affidavits, or whether it would have been the same had he known Jackson to be an untrustworthy witness. This is clearly a situation in which the discretion of the trial judge, as exercised, is controlling. The opinions of the experts covered a wide range, namely, $775,000, $503,750, $635,000, $20,000 to $25,000, $20,000 to $30,000, $10,000 to $25,000. The trial court was not impressed by any of these opinions. It is evident that the finding would have been the same had there been no expert testimony. If the opinion of Jackson was deemed worthless, when it was assumed he was a truthful witness, proof that he stretched the facts, as well as his estimate of value, could not have caused the court to think less of his opinion. It is scarcely necessary to add that an order denying a motion for a new trial will not be reversed in the absence of a clear showing of abuse of discretion. There was no abuse of discretion.

We have considered the contention of defendant Cotton that no sufficient claim was presented to him as executor, and find it to be without merit. It is predicated upon the assumption that the oral agreement was invalid since it called for broker's services. We are of the same opinion respecting the contention that the contract sued on was for the sale of goods or choses in action and was required to be in writing. Civ.Code, §§ 1624a, 1724.

[22] Although the court found in favor of plaintiff on the first cause of action, which alleged an express agreement to pay plaintiff a reasonable compensation, and also on the common count, there is no fatal conflict. The findings on the common count will be disregarded insofar as they create a technical conflict. Baird v. Ocequeda, 8 Cal.2d 700, 67 P.2d 1055.

[23] The final contention of Stanley and Cotton is that it was error to grant a joint judgment against them. We agree. The court found that defendants owned and controlled stock as follows: Jergins 22,499 shares, Cotton 11,769 shares and Stanley 1,215 shares, and fixed plaintiff's compensation on the basis of the amount paid to defendants, namely 1 per cent of $14,956,084.50 or $149,560.84.

There was no finding that defendants promised jointly to compensate plaintiff. There was a conclusion of law that plaintiff was entitled to recover from the defendants jointly and severally but it is evident from the findings that this conclusion was not intended as a finding of fact. From the evidentiary facts found and the undisputed evidence it clearly appears that the obligation of the defendants was several. The conclusion of law was in error.

[24] The Jergins interests received $9,483,328.50, the Cotton interests $4,960,633.50 and the Stanley interests $512,122.50. The ownership of each group was entirely separate from the ownership of the other groups. Each of the three defendants was present to speak for himself and his own group and did not speak for the other groups. There was a contribution of the several interests to the total, but no promise made by any of the defendants on behalf of the others. Each group sold at a specific price the stock it deposited pursuant to the offer. There was no agreement with plaintiff as to the number of shares that would be deposited nor any agreement to pay him a definite sum. There was no express agreement creating a joint liability and no community of ownership or interest from which it could be inferred that Cotton and Stanley intended to obligate themselves to pay, or were expected to pay more than their proportionate shares of plaintiff's compensation. "Where two or more parties to a contract promise separate performance, to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance shall be rendered, each is severally bound for the performance which he promises and is not bound jointly with any of the others." Restatement, Contracts, § 113. Plaintiff does not question that this is the rule as to a several obligation.

Since the amount of the judgment was fixed upon the basis of the benefits received by the defendants, and the amounts of the several benefits were determined, the judgment should have been against the defendants severally and in accordance with their respective interests.

[25] We deem it appropriate to observe that the findings, instead of being confined to the few ultimate factual issues, consist of nine pages of findings as to meetings, conversations, discussions, telephone calls, statements of many persons, and the unrelated activities of the parties and numerous participants in the transaction. Even then, as an attempted statement of the important evidentiary facts, it is manifestly incomplete. So we remark again that findings should be confined to the determinative factual issues, and that all else is redundant, confusing and poor practice. Anyone who is uninformed, or in doubt as to the correctness of this statement, would profit by reading law on the subject. Anderson v. Badger, 84 Cal.App.2d 736, 191 P.2d 768; Robbins v. Holther, 98 Cal.App.2d 674, 220 P.2d 585; Crummer v. Besser Mfg. Co., 100 Cal.App.2d 189, 223 P.2d 100; Eggeman v. Binford, 106 Cal.App.2d 556, 235 P.2d 409; Alles v. Hipp, 108 Cal.App.2d 730, 239 P.2d 451; Sanal v. Meador, 108 Cal.App.2d 820, 239 P.2d 908; Swanson v. Wheeler, 112 Cal.App.2d 43, 245 P.2d 699; Denbo v. Senness, 120 Cal.App.2d 863, 262 P.2d 31. (See 100 or more cases collected in 24 Cal.Jur., p. 968 et seq. and 10-year Supplement.)

The judgment is modified to run against A. T. Jergins for $94,833.29, against the estate of Charles M. Cotton for $49,606.33 (payable in due course of administration), and against Lowell Stanley for $5,121.22; as modified the judgment is affirmed, plaintiff to have costs against A. T. Jergins; defendants Cotton and Stanley to recover their costs from plaintiff.

WOOD, J., concurs.

VALLÉE, Justice.

I dissent. I am of the opinion that plaintiff, whether he be called a "finder," an "introducer," or what not, was a broker within the meaning of the Corporate Securities Act and that he was required to have a license. A broker includes every person, other than an agent, who engages either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in, any security issued by others. Corp.Code, § 25006. "Sale" includes every "attempt to dispose" of a security, and it includes "an attempt to sell" and "a solicitation of a sale". Corp.Code, § 25009. As alleged and found, plaintiff's right to compensation was dependent not merely on his arranging an introduction of Lee to defendants but on the introduction resulting in the sale of the stock through the efforts of Lee or Smith, Barney & Co. If introducing one person to another for a consideration with the avowed purpose of having them negotiate with each other for the sale of stock, the consideration being contingent on a sale, is not "otherwise dealing in" (as distinguished from "offering for sale" and "negotiating for the sale of"), is not an "attempt to dispose" of the stock, is not "an attempt to sell" the stock, is not "a solicitation of a sale",—then these phrases are meaningless. "Dealing in" is having to do with, being concerned with, making arrangements for. Webster's Inter.Dict. 2d ed. To "attempt" means to endeavor to do a thing. (Idem.) To "solicit" means to endeavor to obtain by asking. (Idem.) To "endeavor" is to strive to achieve. (Idem.) What was plaintiff's purpose in finding a prospective purchaser? He was having to do with, being concerned with, making arrangements for, sale of the stock. He was striving to achieve a sale of the stock; he was attempting to sell it, to dispose of it; he was soliciting a sale. He had no other purpose.

A person whose business it is to bring buyer and seller together is a broker. Eaton v. Yount, 48 Cal.App. 221, 224, 191 P. 1009. The fact that plaintiff had no authority to effect a sale is of no consequence in determining whether he was a broker. (8 Am.Jur. 1011, § 51 et seq.; Holway v. Malloy, 70 Cal.App.2d 317, 160 P.2d 893; Mason v. Mazel, 82 Cal.App.2d 769, 187 P.2d 98. The duty of a broker, in the absence of an agreement enlarging his duties, is merely to bring the principals together to negotiate with each other for the purpose of making a contract. 12 C.J.S., Brokers, § 6, p. 10.

Under plaintiff's contract his right to compensation was expressly made contingent on the introduction resulting in the sale of the stock through the efforts of Lee or Smith, Barney & Co. Plaintiff approached defendants and inquired whether they were interested in selling their Jergins Oil Company stock, and ascertained that they were interested in doing so. He persuaded Lee to come to California for the purpose of negotiating with defendants with respect to the sale of the stock. He introduced Lee to defendants in California for the purpose of having them negotiate for the sale of the stock. I think it obvious that plaintiff was "otherwise dealing in" a security and that he attempted to dispose of it, attempted to sell it, and solicited the sale of it. The finding that plaintiff did not agree to render, or render, any services as a broker is not supported by the evidence. The evidence as to plaintiff's activities is uncontradicted. There is nothing doubtful about the facts. The question whether on the uncontradicted evidence plaintiff was a broker is one of law, not of fact.

Neither Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, nor McKenna v. Edwards, 19 Cal.App.2d 327, 65 P.2d 810, nor Crofoot v. Spivak, 113 Cal.App.2d 146, 248 P.2d 45, decides the question in this case. Shaffer construed the Real Estate Brokers' Act of 1919 which defined a real estate broker as a person who, for compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate. The 1919 act did not define the word "sale" and it did not contain the phrases "otherwise dealing in," "attempt to dispose," "attempt to sell," or "solicitation of a sale". McKenna arose under the Corporate Securities Act as amended in 1933. Stats.1933, p. 2308. The court relied entirely on the definition of a broker and on Shaffer v. Beinhorn. At that time the definition of "sale" read substantially the same as it did in 1949 when plaintiff made the contract, but the court gave no consideration whatever to the effect of the phrases "attempt to dispose," "attempt to sell," or "solicitation of a sale". Neither the definition of a sale nor these phrases were mentioned in the opinion. The decision was premised solely on the fact that the plaintiff did not negotiate the sale of stock. The Crofoot case arose under the Real Estate Brokers' Act as it existed in 1948. The court merely followed Shaffer v. Beinhorn, saying that since it was decided the Legislature had made "no amendments to the pertinent language of the enactment which would change the scope of the Legislature's definition of who was a real estate broker as that definition was contained in the act current at the time the Supreme Court made its decision." The Real Estate Brokers' Act did not then nor does it now contain a definition of "sale," as does the Corporate Securities Act. Bus. & Prof.Code, §§ 10130–10221. The court overlooked entirely the 1929 amendment to the Real Estate Brokers' Act which broadened the definition of a real estate broker to include one who does a single act for a compensation of "listing or soliciting prospective purchasers." Stats.1929, ch. 130, p. 224, § 2; Bus. & Prof.Code, § 10134.

I am also of the opinion that the purchase by Lehman Brothers was not effected through the efforts of either Lee or Smith, Barney & Co. I agree that Troutman was not an indispensable or necessary party; that the contract was several; that there was no prejudicial error in refusing to permit Jergins to examine Troutman under section 2055 of the Code of Civil Procedure; that defendants' promise was not to answer for the debt, default, or miscarriage of another; that it was error not to mark the Troutman letters for identification, but that defendants suffered no substantial prejudice in not being able to use them; that the newly discovered evidence did not compel the granting of a new trial; and that the findings are a hodgepodge.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

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125 Cal.App.2d 852

TREMAYNE
v.
AMERICAN SMW CORP. et al.

Civ. 19946.

District Court of Appeal, Second District, Division 2, California.
June 14, 1954.

Action to recover upon a written guaranty of an account. The Superior Court of Los Angeles County, Otto J. Emme, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that written guaranty of account had never been cancelled.

Judgment affirmed.

1. Appeal and Error ⚷931(1)

Where judgment was rendered in favor of plaintiff in an action to recover upon written guaranty of an account, appellate court viewed evidence in light most favorable to plaintiff.

2. Evidence ⚷89

The presumption that a letter duly mailed was received by an addressee is not a conclusive one, but may be rebutted by satisfactory evidence to the contrary, and it is a question of fact for the trial court to determine whether the presumption was overcome by the evidence introduced by the addressee that it was not received. Code Civ.Proc. § 1963, subd. 24.

3. Evidence ⚷89

In action to recover upon written guaranty of an account, testimony of office manager of company to which guaranty was made as to procedure of handling incoming mail together with testimony that letter allegedly mailed by guarantor cancelling guaranty had never been received was sufficient to rebut the presumption that the letter duly mailed by guarantor was received by company. Code Civ.Proc. § 1963, subd. 24.

4. Guaranty ⚷25(3)

In action to recover upon written guaranty of account, evidence sustained finding that notice of termination of guarantor's liability was not given to company to which guaranty was made.

◆

Earl C. Broady and Rufus W. Johnson, Los Angeles, for appellants.

Boris Raynes and Samuel C. Colby, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to recover upon a written guaranty of an account, after trial before the court without a jury, defendants Timothy L. Woods and James Woods, hereinafter referred to as defendants, appeal.

*Facts:** Defendant American SMW corporation became indebted to plaintiffs' assignor for goods, wares and merchandise furnished to said defendants in the sum of $7,533.14. Defendants guaranteed the foregoing account by a writing reading as follows:

"In consideration of the extension of credit to American SMW Corp., whose business is conducted at 118 W. 5th Street, Santa Ana, California and in which corporation we are financially interested, we hereby, jointly and severally, guarantee to Mahl Manufacturing Co. payment when due of its account with said American SMW Corp.

"We hereby waive notice of nonpayment and notice of failure of collection of said account. This is a continuing guarantee and shall be in force and effect until cancelled in writing.

"In witness whereof we have hereunto set our hands and seals in the City of Los Angeles, State of California, this 5th day of September, 1950."

The foregoing guaranty was not cancelled by defendants prior to the time the above mentioned indebtedness was incurred.

Question: Was this finding of the trial court sustained by substantial evidence: "That it is not true that defendants Timothy L. Woods and James Woods cancelled their written guaranty by serving on plaintiff's assignor a notice in writing of cancellation of said written guaranty"?

Yes. Defendants introduced evidence that a letter cancelling their guaranty duly stamped and addressed to plaintiff was deposited in a United States mail box in the City of Los Angeles on December 14, 1950, between the hours of 8:00 and 9:00 p. m., and that the letter had a return address on it but was never returned to them.

Fred J. Carpenter, credit manager and office manager for the Mahl Manufacturing Company, testified that in the handling of incoming mail by the Mahl Manufacturing Company this procedure was followed: The postman delivered all the mail to the telephone operator who then delivered it to Miss Paula Young, Mr. Carpenter's secretary, who in turn opened it, sorted it into piles on her desk which were then inspected by Mr. Carpenter to see how the accounts were affected, after which the mail was distributed to various departments. He also testified that the letter mailed by defendants on December 14, 1950, had never been received in his office.

[2] The foregoing testimony sustains the above finding.

The presumption in the Code of Civil Procedure, § 1963(24), that a letter duly mailed was received by an addressee is not a conclusive one, but may be rebutted by satisfactory evidence to the contrary. It is a question of fact for the trial court to determine whether the presumption that the letter duly mailed was received by the addressee was overcome by the evidence introduced by the addressee that it was not received. (Grade v. Mariposa County, 132 Cal. 75, 76, 64 P. 117; Frieden v. Cluett, Peabody & Co., 142 Va. 738, 128 S.E. 61, 64; McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 A. 107, 109, 18 A.L.R. 1125.)

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[1] The evidence is viewed in the light most favorable to plaintiff (respondent) pursuant to the rules set forth in In re Estate of Isenberg, 63 Cal.App.2d 214, 216[2], 146 P.2d 424. See also cases cited in 6 West's Cal.Dig. (1951) Appeal and Error ⚷931, p. 422.

[3] Mr. Carpenter's testimony constituted substantial evidence to sustain the above finding.

[4] Therefore since defendants' guaranty was a continuing one it remained in force until notice of termination of the guarantor's liability was given to plaintiff. This, under the findings of the trial court, which were sustained by substantial evidence, was not done.

Since defendants have stipulated to the existence of the other elements of plaintiff's cause of action, the judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

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124 Cal.App.2d Supp. 909

PEOPLE v. ROGERS.

Cr. A. 19.

Appellate Department, Superior Court,
San Bernardino County, California.
April 30, 1954.

Defendant was convicted of engaging in the business of contracting and acting in capacity of a contractor without a license in violation of Business and Professions Code, § 7028. The Justice Court of Victor Judicial District entered judgment, and defendant appealed. The Superior Court, Appellate Department, Mitchell, J., held that defendant who was an artisan trained in his profession as a mason, acted as an independent contractor within purview of Business and Professions Code and not as employee when he built chimney and fireplace for another for agreed compensation.

Judgment affirmed.

1. Master and Servant 🔑68

"Wages" may be defined as compensation given to a hired person for his services, remuneration payable for a given period, or compensation paid a person hired to do work or business. Labor Code, § 200.

See publication Words and Phrases, for other judicial constructions and definitions of "Wage".

2. Licenses 🔑11(5)

One who renders services for a specified recompense for a specified result under the control of his principal as to the result of his work only and not as to the means by which result is accomplished is an independent "contractor" within purview of Business and Professions Code provision requiring a license to act in the capacity of a contractor, even though work is done on premises in possession of principal and under supervision of architect and principal has right to make alterations, deviations, additions, and omissions from contract. Business and Professions Code, §§ 7026, 7028, 7053; Labor Code, § 3000.

3. Licenses 🔑11(5)

Where artisan trained in his profession as a mason built a chimney and fireplace for another for a specified compensation, though employer furnished materials and helped on the job, artisan acted not as an "employee" but as an independent "contractor" within purview of Business and Professions Code provision requiring a license to act in the capacity of a contractor. Business and Professions Code, §§ 7026, 7028, 7053; Labor Code, §§ 200, 3000.

See publication Words and Phrases, for other judicial constructions and definitions of "Contractor".

◆

Lowell E. Lathrop, Dist. Atty., T. M. Haldorson, Deputy Dist. Atty., San Bernardino, for plaintiff.

Theo. G. Krumm, San Bernardino, for defendant.

MITCHELL, Judge.

In a complaint filed in the Justice Court of the Victor Judicial District it is alleged that the defendant engaged in the business of contracting and acted in the capacity of a contractor without having a license therefor in violation of Section 7028 of the Business and Professions Code.

A contractor is defined in Section 7026 of the Business and Professions Code as follows:

> "The term contractor * * * is synonymous with the term 'builder' * * * a contractor is any person, who * * * submit(s) a bid [or offers] to * * * construct * * * any * * * structure * * * or improvement, or * * * any part thereof * * *."

According to the Statement of Facts the defendant agreed with one Russell to erect a chimney and fireplace for the sum of $100 if Russell would furnish the materials and would help on the job.

The work was done and the defendant received the agreed compensation.

Appellant argues that he was not acting as a contractor but was, rather, an employee.

Section 7053 of the Business and Professions Code provides as follows:

> "This chapter does not apply to any person who engages in the activities herein regulated, as an employee with wages as his sole compensation."

The term "wages" is defined in Section 200 of the Labor Code as follows:

> "'Wages' includes all amounts for labor performed by *employees* of every description, whether the amount is fixed or ascertained by the standard of time, task, piece * * * or other method of calculation."

[1] Blacks Law Dictionary defines wages as

> "A compensation given to a hired person for his services;
>
> "Remuneration payable for a given period."
>
> "Compensation * * * paid a * * person hired to do work or business."

Servant is defined in Section 3000 of the Labor Code as

> "A servant is one who is employed to render personal service to his employer, other than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the employer, who is called his master."

[2] Independent Contractor:

> "The essential element of the definition of an 'independent contractor' is that he has control of the work under the contract, and this may be the case though working on premises still in possession of the owner". Louthan v. Hewes, 138 Cal. 116, 70 P. 1065, 1066.
>
> "'The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.' * * The fact that the work is to be done under the supervision of an architect, or that the employer has the right to make alterations, deviations, additions, and omissions from the contract, does not change the relation from that of independent contractor to that of a mere servant." Green v. Soule, 145 Cal. 96, 78 P. 337, 339.
>
> "'One who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which result is accomplished' is an independent contractor." Hartford Accident & Indemnity Co. v. Industrial A. C., 93 Cal. App. 313, 269 P. 733, 734; Flickenger v. Industrial A. C., 181 Cal. 425, 184 P. 851, 19 A.L.R. 1150; Fidelity & Casualty Co. v. Industrial A. C., 191 Cal. 404, 216 P. 578, 43 A.L.R. 1304.

The defendant was an artisan, trained in his profession as a mason.

He engaged to build a specified structure, to accomplish a specified result, for a specified compensation.

[3] The trial Court found that the defendant was not an employee but was, in fact, an independent contractor.

The judgment is affirmed.

COUGHLIN and HILLIARD, JJ., concurring.

125 Cal.App.2d Supp. 907

BAIRD et al. v. MAGUIRE et al.

Civ. A–18.

Appellate Department, Superior Court,
San Bernardino County, California.
June 3, 1954.

Action in claim and delivery for possession of an automobile. From a judgment of the Municipal Court of the San Bernardino Judicial District, W. E. Balcom, J., for defendants, plaintiffs appealed. The Superior Court, Appellate Department, Coughlin, J., held that where the record does not include a settled statement of facts or a reporter's transcript of oral proceedings before the trial court, the evidence must be presumed to have been sufficient to sustain the judgment.

Judgment affirmed.

Appeal and Error 🔑907(3)

Where record on appeal, does not include settled statement of facts or reporter's transcript of oral proceedings before trial court, appellate court must presume that evidence was sufficient to sustain judgment appealed from.

◆

Swing & Gillespie, San Bernardino, for appellants.

H. R. Griffin, San Bernardino, for respondents.

COUGHLIN, Judge.

This is an appeal from a judgment in favor of the defendants in a claim and delivery action involving the possession of an automobile.

The appellants contend that the evidence is not sufficient to sustain this judgment. The record before this Court does not include either a settled statement of facts or a reporter's transcript of the oral proceedings before the trial court. Under these circumstances on appeal it must be presumed that the evidence was sufficient to sustain the judgment.

The judgment is affirmed.

HILLIARD and MITCHELL, JJ., concurred.

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125 Cal.App.2d Supp. 908

DAVISON et ux. v. ANDERSON et al.

No. 52321.

Appellate Department, Superior Court,
Stanislaus County, California.
June 9, 1954.

Bankrupt filed a petition to be discharged from judgment. The Municipal Court of Modesto Judicial District, Leslie K. Floyd, J., entered an order cancelling judgment and cancelling writ of execution, and the judgment creditors appealed. The Superior Court, Appellate Department, Halbert, J., held that where chattel mortgagor was adjudged a bankrupt and was granted his discharge in bankruptcy, and thereafter mortgagees were granted permission in bankruptcy proceeding to institute foreclosure action, and mortgagees brought foreclosure action seeking deficiency judgment, and mortgagor filed answer, which did not mention his bankruptcy, and he stipulated that judgment might be entered against him, and deficiency judgment was entered against him, mortgagor was not entitled to have judgment cancelled under statute providing that if it appears on hearing that bankrupt has been discharged from payment of judgment or debt, on which judgment was recovered, order must be made directing that judgment be cancelled and discharged of record.

Judgment reversed and cause remanded with directions.

1. Statutes 🔑182

A common-sense construction, which brings about justice, should always be placed on legislation.

2. Stipulations 🔑10

Where chattel mortgagor was adjudged a bankrupt and was granted his discharge in bankruptcy, and thereafter mortgagees were granted permission in bankruptcy proceeding to institute foreclosure action, and mortgagees brought foreclosure action seeking deficiency judgment, and mortgagor filed answer, which did not mention his bankruptcy, and he stipulated that judgment might be entered against him, and deficiency judgment was entered against him, mortgagor's moral obligation to pay deficiency judgment was ample consideration for the stipulation. Civ.Code, § 1606.

3. Stipulations 🔑**18(9)**

Stipulation for a judgment is a consent to entry of judgment and is a waiver of errors by party consenting thereto.

4. Appeal and Error 🔑**154(4)**

Judgment entered in accordance with stipulation will not be disturbed on appeal.

5. Appeal and Error 🔑**934(1)**

Where chattel mortgagor was adjudged a bankrupt and was granted his discharge in bankruptcy, and thereafter mortgagees were granted permission in bankruptcy proceeding to institute foreclosure action, and mortgagees brought foreclosure action seeking deficiency judgment, and mortgagor filed answer, which did not mention his bankruptcy, and he stipulated that judgment might be entered against him, and deficiency judgment was entered against him, and mortgagor never, at any time, sought relief from judgment under statute, on ground that judgment was entered through mistake, inadvertence, surprise, or excusable neglect, court would presume that judgment, as entered, correctly and properly reflected the stipulation. Code Civ.Proc. § 473.

6. Bankruptcy 🔑**435**

Where chattel mortgagor was adjudged a bankrupt and was granted his discharge in bankruptcy, and thereafter mortgagees were granted permission in bankruptcy proceeding to institute foreclosure action, and mortgagees brought foreclosure action seeking deficiency judgment, and mortgagor filed answer, which did not mention his bankruptcy, and he stipulated that judgment might be entered against him, it was duty of mortgagor, if he wished to take advantage of his discharge in bankruptcy as a defense, to plead his discharge, since it was a plea in bar and was therefore required to be specially and affirmatively pleaded.

7. Bankruptcy 🔑**435**

A bankrupt debtor, who actually appears in an action on a debt claimed by him to be discharged in bankruptcy, must plead that defense in the action, and, if he fails to do so, he waives his right to claim relief under statute providing that if it appears on hearing that bankrupt has been discharged from payment of judgment or debt on which judgment was recovered, an order must be made directing judgment to be canceled and discharged of record. Code Civ.Proc. § 675b.

8. Bankruptcy 🔑**433(7)**

Where chattel mortgagor was adjudged a bankrupt and was granted his discharge in bankruptcy, and thereafter mortgagees were granted permission in bankruptcy proceeding to institute foreclosure action, and mortgagees brought foreclosure action seeking deficiency judgment, and mortgagor filed answer, which did not mention his bankruptcy, and he stipulated that judgment might be entered against him, and deficiency judgment was entered against him, mortgagor was not entitled to have judgment canceled under statute providing that if it appears on hearing that bankrupt has been discharged from payment of judgment or debt on which judgment was recovered, order must be made directing that judgment be canceled and discharged of record. Code Civ.Proc. § 675b.

Gilbert Moody, Turlock, for appellant.

Daniel E. O'Connell, Turlock, for respondent.

HALBERT, Judge.

This is an appeal from an order of the trial court cancelling a judgment and writ of execution under the provisions of Code of Civil Procedure Section 675b. This order was in favor of, and relates solely to the defendant, Clifford C. Anderson, who is also known as C. C. Anderson. Hereinafter he will be referred to as respondent, and the plaintiffs will be referred to as appellants.

This proceeding arose out of an action to foreclose a chattel mortgage given by respondent and his wife to appellants. Since the sequence of the prior events relating to this case will have a strong bearing upon the ultimate decision, a brief history of the case is necessary.

The respondent was adjudged a bankrupt on July 26, 1951, and he was granted his discharge in bankruptcy on April 11, 1952. On May 29, 1952, the appellants were granted permission in the bankruptcy proceeding to institute the present action. This action was commenced on September 10, 1952, by a complaint for forecolsure wherein the usual relief, including a deficiency judgment, was prayed for by appellants. On October 24, 1952, respondent filed his answer. The answer was, for all practical purposes, a general denial, the matter of bankruptcy not being mentioned in it. On February 2, 1953, the case was called for trial, and the respondent then stipulated without reservation that judgment might be entered against him. On March 20, 1953, judgment was entered against respondent granting appellants all relief asked for in the complaint, including the right to seek a deficiency judgment. A foreclosure sale was then had in accordance with the judgment, and a return on the sale was made to the trial court. The appellants thereafter sought and obtained a deficiency judgment against the respondent on August 6, 1953. The respondent had notice of all these proceedings, but made no objection to them prior to filing the proceeding out of which this appeal grows. On August 20, 1953, respondent filed the instant proceeding seeking his discharge from the judgment under the provisions of Section 675b of the Code of Civil Procedure, and the trial court granted his motion of February 15, 1954. This appeal followed.

[1-4] The only issue on this appeal is whether, under the record in this case, the respondent was entitled to the relief granted him. We think he was not. The only way that the relief granted respondent can be sustained is to place a strained construction upon the provisions of Code of Civil Procedure Section 675b. This, we believe, is neither required nor proper. A commonsense construction, which brings about justice, should always be placed upon legislation. The pertinent portions of Code of Civil Procedure Section 675b read as follows:

> "If it appears upon the hearing that he [the bankrupt] has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record".

Obviously, the judgment in this case was not discharged by respondent's discharge in bankruptcy, for the action upon which it is founded was not commenced until after the respondent had been granted his discharge in bankruptcy. The sole question, then, is whether the debt upon which the judgment is founded was discharged, and if so, whether the judgment itself must therefore fall. The record indicates that the debt was discharged, but under the peculiar facts of this case, the respondent can obtain no comfort from that fact, for he stipulated that judgment might be entered against him on this debt after he had received his discharge in bankruptcy. His stipulation that judgment might be entered against him is tantamount to an acknowledgment of the debt, and an agreement to pay it. There was ample consideration for this new agreement, for even though the remedy to enforce the debt, discharged by the proceedings in bankruptcy, was gone, the moral obligation to pay the debt remained, and constituted sufficient consideration to support the new promise to pay. Civil Code, Sec. 1606; 12 Cal.Jur.2d 235; Lambert v. Schmalz, 118 Cal. 33, 50 P. 13. Furthermore, a stipulation for a judgment is a consent to the entry of the judgment and is a waiver of errors by the party consenting thereto. Such a judgment so entered will not be disturbed on appeal. Morrow v. Learned, 76 Cal.App. 538, 245 P. 442; 13 Cal.Jur. 878.

[5, 6] As we view the record in this case, the respondent had full knowledge of all of the proceedings and affirmatively participated in them. He never, at any time, sought relief from the judgment under Code of Civil Procedure Section 473 on the ground that it was entered through mistake, inadvertence, surprise or excusable neglect. Such being the case, we must presume that the judgment as entered correctly and prop-

erly reflected the stipulation between the parties at the time the case came on for trial. Likewise, the respondent never at any time prior to the entry of judgment sought to plead the defense of his discharge in bankruptcy. If he wished to take advantage of his discharge in bankruptcy as a defense, it was his duty to plead it, for it is a plea in bar, and must therefore be specially and affirmatively pleaded. Luse v. Peters, 219 Cal. 625, 28 P.2d 357; Tuttle v. Scott, 119 Cal. 586, 51 P. 849; Holmes v. Justice Court, 19 Cal.App.2d 362, 65 P.2d 820.

[7, 8] Respondent has cited to us several authorities which hold that the provisions of Section 675b of the Code of Civil Procedure are available to him, even when the action against him is brought on a discharged debt after his discharge in bankruptcy; and this, even though this action actually goes to a default judgment. We appreciate that problem and have considered it, but the authorities cited by him do not approach the problem here. In all of the authorities that have been cited to us, the judgment was entered after default of the debtor. No authority has been called to our attention, and we are unable to find any authority, which holds that a bankrupt debtor may appear in an action brought by his creditor on a discharged debt, stipulate for judgment, and then, after the judgment has been entered on his stipulation, seek relief under the provisions of Sec. 675b of the Code of Civil Procedure. There are a host of cases holding that if a debtor fails to affirmatively plead the bar of his discharge in bankruptcy and the case goes to judgment, he has waived his right to that defense. Maryland Casualty Co. v. Lipscomb, 40 Cal.App.2d 171, 104 P.2d 525; Harrell v. Hoagland, 18 Cal.App.2d 721, 64 P.2d 953; Holmes v. Justice Court, 19 Cal.App.2d 362, 65 P.2d 820; Tuttle v. Scott, 119 Cal. 586, 51 P. 849. We do not think the rule should be otherwise in situations such as we now have before us. We think that any bankrupt debtor who actually appears in an action on a debt claimed by him to be discharged in bankruptcy must plead that defense in the action, and if he fails to do so, he waives his right to claim relief under Code of Civil Procedure Sec. 675b. Any other rule would allow the bankrupt debtor to lure his creditor into the expenditure of needless time, effort and money, to trifle with the Court, and to needlessly take up time of all concerned, only to have him defeat the claim by the identical defense that he could have raised long before in the very same proceeding. This, we believe, would be a travesty on justice, and common sense dictates that it should not be permitted.

Accordingly, the order of the trial court cancelling the judgment in this case, and cancelling the writ of execution issued on said judgment, insofar as they apply to the respondent, is reversed, and the cause is remanded to the trial court with directions to enter an order denying the respondent the relief sought by him under the provisions of Code of Civil Procedure Sec. 675b.

HAWKINS, P. J., and CHAMBERLAIN, J., concurred.

43 Cal.2d 77

HARROLD v. HARROLD.

Sac. 6317.

Supreme Court of California.
In Bank.
June 15, 1954.

Divorce proceeding by wife on ground of extreme cruelty. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment awarding wife 51.13% of the total estate in full settlement of her community interest, and wife appealed from such award. The Supreme Court, Shenk, J., held that award did not constitute an abuse of trial court's discretion in apportioning the community estate nor was it violative of statute providing that, if decree is rendered on such ground or certain others, community property shall be assigned in such proportions as court may deem just, but in other cases, community must be divided equally.

Judgment affirmed.

Edmonds, J., dissented.

Prior opinion 261 P.2d 800.

See also 117 Cal.App.2d 664, 256 P.2d 626.

1. Husband and Wife 🔑257

In making allocation to community estate, where husband is operating business which is his separate property, income from such business is allocated to community or separate property in accordance with extent to which it is allocable to husband's efforts or his capital investment.

2. Husband and Wife 🔑264

Where community estate, as determined in divorce proceeding, was made up of husband's earnings totalling $89,904 from automobile enterprises one of which, during accounting period, had profits of $100,000 to $135,000, and of which husband was virtually owner and could have allocated greater salary to himself, but husband's withdrawal was larger than that of prior period when profits were greater, and husband did not take active management in routine operations of such enterprise, finding that only such withdrawals were allocable to husband's personal earnings in determining community of state would be sustained.

3. Husband and Wife 🔑272(1)

When divorce is pending, power of husband over community property exists until entry of final decree. Civ.Code, §§ 161a, 172, 172a, 1915.

4. Divorce 🔑252

Where community funds were not invested nor did they earn any interest or have any increment during accounting period involved in divorce proceeding, which was brought by wife on ground of extreme cruelty, husband, who had the community funds in his possession by virtue of power given to him to manage and control such property for benefit of community, was not using money of wife within meaning of statute defining interest as compensation allowed by law or fixed by parties for use, forbearance, or detention of money, and, therefore, wife was not entitled to interest on her share of the community property accumulating during such accounting period. Civ.Code, §§ 161a, 172, 172a, 1915.

5. Divorce 🔑252

Where wife had been awarded divorce on grounds of extreme cruelty, award to her of 51.13% of the community property did not constitute an abuse of trial court's discretion in apportioning the community estate nor was it violative of statute providing that, if decree is rendered on such ground or certain others, community property shall be assigned in such proportions as court may deem just, but in other cases, community must be divided equally. Civ. Code, § 146, subds. 1, 2.

6. Divorce 🔑182

Statute which provides that, when one year has expired after entry of interlocutory judgment, court, upon motion of either party or upon its own motion, may enter final judgment granting divorce, but, if any appeal is taken from the interlocutory judgment or motion for new trial, final judgment shall not be entered until such motion or appeal has been finally disposed of, is applicable regardless whether appeal is a limited one or one from the whole of the judgment. Civ.Code, § 132.

7. Divorce ⚷184(1)

Where interlocutory decree from which an appeal was taken, was, in so far as it ordered the dissolution of bonds of matrimony, affirmed, it became law of case. Civ. Code, § 132.

8. Divorce ⚷182

Where, in divorce proceeding, matters involving items of additional accounting period and pro rata division of community property were adjudicated on subsequent hearing as directed by the District Court of Appeal, appeal from such adjudication did not in any proper sense constitute an appeal as contemplated by Legislature in enacting statute providing that an appeal would stay entry of final decree. Civ.Code, § 132.

9. Divorce ⚷188

Where divorce is granted on ground of extreme cruelty, trial court has wide discretion in allowing expenses and cost as well as in the dividing of community property. Civ.Code, § 146, subds. 1, 2.

◆

David Livingston and Louis F. DiResta, San Francisco, for plaintiff and appellant.

Devlin, Diepenbrock & Wulff and A. I. Diepenbrock, Sacramento, for defendant and appellant.

SHENK, Presiding Justice.

In this action for divorce a decree was entered of date November 1, 1951, purporting to conform to the direction of the District Court of Appeal on a former appeal by the plaintiff from certain financial provisions of the interlocutory decree.

Plaintiff and defendant were married on November 26, 1936. They separated for the first time in the fall of 1944. In June, 1945, they entered into a separation agreement which purported to settle all present and future property rights arising out of the marital relationship. In September, 1945, they became reconciled but in March, 1948, again separated. Thereafter the plaintiff commenced the present action for divorce, charging extreme cruelty. The interlocutory decree was entered on February 15, 1949. By that decree the trial court found and concluded that by reason of their reconciliation, the parties had abandoned the executory provisions of the separation agreement. It made an award of $400 a month for five years for the support and maintenance of the plaintiff. It divided the community property equally between the parties. The plaintiff appealed from the financial provisions of the judgment and only from that portion thereof denying her the full relief demanded. The defendant did not appeal. The District Court of Appeal held that in an action for divorce on the ground of extreme cruelty the non-offending party is entitled to more than one-half of the community property, citing Tipton v. Tipton, 209 Cal. 443, 288 P. 65, and that the trial court should have considered the earnings of the defendant accruing prior to the entry of the final decree in determining the community estate. Harrold v. Harrold, 100 Cal.App.2d 601, 224 P.2d 66. The pertinent portions of the judgment of the District Court of Appeal are on page 609 of 100 Cal.App.2d, on page 71 of 224 P.2d and are as follows: "* * * the interlocutory judgment is affirmed, except * * * as to that portion relating to a division of the community estate, which is remanded to the trial court with instructions to determine the division of the amount of the community estate as indicated herein * * *."

Before retrial the parties stipulated that the accounting should cover a period from July 31, 1948, to three months prior to the date of the final decree. From findings made following the retrial the court concluded and ordered that the final decree be entered on November 1, 1951, and that the accounting period should terminate on August 1, 1951. It found that during this period the sum of $89,904 accrued to the community; that $88,224 remained in the community estate, and ordered that the defendant pay to the plaintiff $45,112 as her share. By this division she was awarded 51.13% of the total estate in full settlement of her community property interest.

The plaintiff's appeal is from that part of the judgment "which specified that the plaintiff shall have and receive from the defendant the sum of $45,112.00." She makes ten contentions. Six relate to the court's determination of the amount allocable to community earnings out of the defendant's total income. These contentions will be disposed of before consideration of the others.

The community estate is made up of the defendant's earnings from two automobile enterprises which were the defendant's separate property. Other income from these businesses was determined to be a return on the investment of his separate capital. Numerous exhibits consisting of the defendant's books, records and income tax returns were introduced in evidence, and it is apparent that the court's findings were based to a large extent upon these exhibits. The plaintiff seeks to show that the defendant's earnings as contrasted with the return from his investment in these businesses were far greater than found by the court.

[1] The rule of law applicable to the allocation to the community estate under these circumstances is stated in Huber v. Huber, 27 Cal.2d 784, at page 792, 167 P.2d 708, at page 713, as follows: "In regard to earnings, the rule is that where the husband is operating a business which is his separate property, income from such business is allocated to community or separate property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment. In re Estate of Gold, 170 Cal. 621, 151 P. 12; Witaschek v. Witaschek, 56 Cal.App.2d 277, 132 P.2d 600; 3 Cal.Jur. 10-Yr. Supp., Community Property, § 46."

During the accounting period the defendant received from one of his enterprises, the Northern Motor Company, a salary of $1,000 per month for a period of nine months, after which the company ceased doing business and was dissolved. The defendant received from his other business, the Ellsworth Harrold Co., a salary of $2,000 a month until June 15, 1950, and thereafter until the end of the accounting period $2,200 a month. In addition he received a bonus of $11,374 for 1950 and $1,430 for attendance at various corporate directors' meetings. These earnings totaled $89,904, all of which the court found to be community property.

[2] The profits of the Ellsworth Harrold Co. varied from approximately $100,000 to $135,000 during the accounting period. It produced practically all of the defendant's income other than his community earnings. There is substantial evidence to the effect that the company owes its prosperity in a large part to a Ford dealer's franchise; that this business is staffed with competent administrative personnel; that the defendant does not take an active part in its routine operations; that he frequently absents himself on personal matters, and that he is primarily concerned with policy matters in the operation of the business. The defendant is virtually the sole owner of the company, and is in a position where he can allocate a greater salary to himself if he chooses to do so. The plaintiff contends that "the court cannot accept as conclusive the arbitrary determination by Harrold as to the amount of his salary." She urges the consideration of evidence at variance with that above indicated. But it is sufficient if the trial court has duly considered the divergent factual situations and has been impressed by the evidence more favorable to the defendant. This evidence is substantial and the finding based thereon that $89,904 is allocable to personal earnings by virtue of the defendant's efforts should not be disturbed on appeal. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183.

On the prior appeal the District Court of Appeal held that the defendant's salaries fairly represented his contribution to income of his businesses. It stated at pages 607 and 608 of 100 Cal.App.2d, at page 70 of 224 P.2d: "We are convinced from our examination of the record that the trial court conscientiously endeavored to follow the rule as enunciated in the Huber case and to make an equitable allocation of personal income and community earnings as was warranted under the particular facts and circumstances disclosed in the present case." The quoted language served as a guide to the trial court in the present proceedings. The allocation to average annual community earnings, including bonuses, during the present accounting period is greater than in the prior proceedings, although the overall average income of the defendant's businesses had decreased. In these circumstances, the above quoted language is equally applicable to this appeal.

[3, 4] The plaintiff's seventh contention is that she is entitled to interest on her share of the community property accumulating during the accounting period. By this contention she does not seek to recover her share of interest earned from an investment of community property. See Civ. Code, §§ 164, 687. It does not appear that the community funds here involved were invested or earned any interest or increment. The recovery sought is based upon the defendant's control and use of the plaintiff's "present, existing and equal" interest in the community property as it is accumulated. See Civ.Code § 161a. While the defendant had the community funds in his possession he did so by virtue of the power given him to manage and control such property for the benefit of the community. Civ.Code, §§ 161a, 172 and 172a. When a divorce is pending the power of a husband over the community property exists until the entry of a final decree. Lord v. Hough, 43 Cal. 581; Chance v. Kobsted, 66 Cal.App. 434, 437, 226 P. 632; In re Cummings, D.C., 84 F.Supp. 65, 69. Interest is defined in Section 1915 of the Civil Code as "the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." It is apparent that the defendant was not using the money of the plaintiff within the meaning of that section and she is not entitled to interest thereon.

The plaintiff's eighth contention is that since she was awarded the divorce on grounds of extreme cruelty she should be awarded substantially more than one-half of the community property under the mandate of the decision in the prior appeal. Civil Code Section 146 provides in part: "* * * One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." In all other cases the community property must be divided equally between the parties. Civ.Code, supra, § 146, subd. Two. It is stated in the opinion of the court on the prior appeal, 100 Cal.App.2d at page 608, 224 P.2d at page 70: "The inference derived from this code section is that the non-offending party is entitled to more than one-half of the community property where the divorce is granted on the ground of extreme cruelty. Tipton v. Tipton, 209 Cal. 443, 288 P. 65 * * *." In support of her argument that she properly should be awarded "substantially" more than one-half of the community property, the plaintiff relies on a statement in Quagelli v. Quagelli, 1929, 99 Cal.App. 172, at page 176, 277 P. 1089, at page 1091: "* * * in all cases the uniform rule has been that when the decree is on the ground of extreme cruelty the award to the unoffending spouse must be substantially greater than that to the one who is at fault." The plaintiff asserts that the 51.13 per cent awarded her is not "substantially greater" than the 48.87 per cent retained by the defendant.

[5] In Gorman v. Gorman, 134 Cal. 378, 66 P. 313, it was held that though Section 146 impliedly requires that more than half of the community property be awarded to the innocent party, it does not otherwise limit the discretion of the trial court in making the award; that the portion should depend upon the particular circumstances of each case, and that this court would be slow to interfere with an exercise of legal discretion by the trial court. See also Crouch v. Crouch, 1944, 63 Cal.App.2d 747, 756, 147 P.2d 678. The Quagelli case, supra, upon which the plaintiff relies, recognizes the foregoing principle in the following language at page 176 of 99 Cal.App., at page 1091 of 277 P.: "What the difference should be depends upon the circumstances of each case, and that is a matter to be determined by the trial court in the first instance * * *." It cannot be said as a matter of law that the award to the plaintiff in the present case is not in com-

pliance with statutory provisions, nor that an examination of the record reveals an abuse of discretion in apportioning the community estate.

The plaintiff's final contentions are that under the mandate on the prior appeal the trial court erred in not entering a new interlocutory decree, and in entering the final decree on November 1, 1951. More than two years and ten months elapsed between the interlocutory decree and the entry of the final decree by the trial court. Section 132 of the Civil Code states in part: "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce * * *, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."

[6] It appears that the provisions of Section 132 are as applicable whether the appeal is a limited one or an appeal from the whole of the judgment. In Webster v. Webster, 216 Cal. 485, 14 P.2d 522, the plaintiff appealed only from that portion of the interlocutory decree determining the property rights of the parties. While the appeal was pending a "final decree" of divorce was entered by the trial court. The court held the entry to be improper and stated at page 494 of 216 Cal., at page 525 of 14 P.2d: "Section 132 of the Civil Code prohibits the entry of a final decree of divorce 'if *any* appeal is taken (and pending) from the interlocutory judgment.' This section has been held to preclude the entry of a final decree though the appeal be only from that portion of the interlocutory decree determining the property rights of the parties." See also Cory v. Cory, 71 Cal.App.2d 309, 162 P.2d 497; Ritter v. Ritter, 103 Cal.App. 583, 284 P. 950; Newell v. Superior Court, 27 Cal.App. 343, 149 P. 998.

Section 132, as interpreted by the Webster and other cases, provides that the final decree cannot be entered at certain designated times but it does not specify when it may be entered following a reversal on appeal. Here it was entered on the same day as the judgment on retrial of the designated financial issues. Neither Section 132 nor the cases construing it expressly prohibit the entry at that time. The question is whether the Legislature intended by implication or otherwise to delay the entry of the final judgment beyond such a time, when it enacted the section. The determination of this question requires an investigation into the purpose and reason for providing a period of delay between the entry of the initial and the final decrees in divorce actions in this state.

The entry of an interlocutory decree prior to the entry of a final decree of divorce was first provided for in 1903, Stats. 1903, pp. 75 & 76, by adding Sections 131 and 132 to the Civil Code. Two years later, in Grannis v. Superior Court, 146 Cal. 245, 79 P. 891, this court at some length assigned reasons for the addition of the new sections. See also Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880; Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28. It appears from those early cases that the purpose of the 1903 legislation was based upon a policy of the state which does not favor a hasty dissolution of the bonds of matrimony, not from the standpoint of property considerations affected by the marriage, but from the standpoint of past and future personal relationships. In later cases the following language appears: "'The provision contained in section 132, Civil Code, * * * was adopted in recognition of the fact that in granting a divorce the court has a variety of duties to perform affecting the property rights of the parties and the future welfare of those parties and their children; and it was deemed advisable that in such cases all of those matters, as far as possible, should be finally adjusted in connection with the granting of a divorce.'" Webster v. Webster, supra, 216 Cal. 485, 494, 14 P.2d 522, 525, quoting from Newell v. Superior Court, 27 Cal.App. 343, 345, 149 P. 998.

[7, 8] It is to be noted that in both the Webster and the Newell cases a final decree was entered during the pendency of an appeal from an interlocutory judgment, and

the entry of a final judgment at that time was prohibited by the clear language of Section 132. We are not concerned in the present case with an appeal from the interlocutory decree as such. That decree, insofar as it ordered the dissolution of the bonds of matrimony, was affirmed and became the law of the case. Any question in connection therewith was and is no longer open, including the right to the final decree as affected by property matters. Such matters, involving items of the additional accounting period and the pro rata division of the community property, were adjudicated on the subsequent hearing as directed by the District Court of Appeal. This appeal from that adjudication does not in any proper sense constitute an appeal as contemplated by the Legislature in enacting Section 132 such as would stay the entry of the final decree, since none of the stated purposes of such a stay are here applicable. See Webster v. Webster, supra, 216 Cal. 485, 494, 14 P.2d 522; Pereira v. Pereira, supra, 156 Cal. 1, 9, 103 P. 488; Grannis v. Superior Court, supra, 146 Cal. 245, 248, 79 P. 891.

From the foregoing it is apparent that there is no sufficient reason why the trial court should delay the entry of the final decree beyond the express prohibitions of Section 132. Furthermore there appears to be good reason for its entry at the time of judgment in the accounting determination. If, as the plaintiff seeks to accomplish, the prohibitions of Section 132 are applied to the present appeal in the same manner as to the interlocutory decree heretofore affirmed, the final decree could not be entered until any appeal taken herefrom had been determined or the time for appeal had expired. On this theory an appeal would extend the period during which the defendant's earnings might accumulate to the community and, even though the judgment be affirmed, would necessitate another accounting by the trial court of the community estate accumulating since the close of the previous accounting period and during the time the appeal was pending. By appealing again and again from such judgments the plaintiff might extend her marital status indefinitely for the purpose of sharing in the earnings of the defendant. In the present case there have been two appeals and more than five years have elapsed since the entry of the interlocutory decree. There is nothing in Section 132 of the Civil Code, nor in the cases dealing with the problem, which indicates that under the circumstances here presented a new interlocutory decree should be entered.

Our attention has been directed to the decision in DeVall v. DeVall, 102 Cal.App.2d 53, 226 P.2d 605. The judgment there granted an interlocutory decree of divorce and thereafter a new trial was ordered on the defendant's motion. The second trial was limited to the consideration of a question involving the division of community property. At the termination thereof the court signed an order to the effect that the previous interlocutory decree remain in effect. On the same day the court, on its own motion, granted the final decree of divorce, more than a year having elapsed since the entry of the original interlocutory decree. On appeal it was held that the entry of the final decree before the expiration of the time for appeal from the second judgment was improper. The essential factual difference in the present case is that here there has been an affirmance of the interlocutory decree severing the marital relationship, whereas in the DeVall case there was an interlocutory decree still appealable at the time the final decree was entered.

[9] The defendant's sole contention on his appeal is that he had legitimate and substantial expenses which should have been deducted from the total community estate before a division was made. These expenses include alimony, court costs and counsel fees awarded to the plaintiff, and all sorts of personal expenses. The trial court found that the defendant was not entitled to an offset for personal expenses since no such allowance was made to the plaintiff, and that there would be no difference in the final result if there had been a monthly division of the community income to offset current expenses or a single division of total community income during the accounting period. When a divorce is granted on the ground of extreme cruelty

the trial court has a wide discretion in the allowance of expenses and costs as well as in the division of community property within established rules. It cannot be said on the record here presented that this discretion has been abused.

The judgment is affirmed.

CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur.

I agree with the holding in the majority opinion that the trial court properly entered a final decree of divorce, but am of the opinion that in reaching this result we should overrule Webster v. Webster, 216 Cal. 485, 487, 14 P.2d 522. In the Webster case, as in the present one, the appeal was only from the part of the interlocutory decree dividing the community property. The majority opinion distinguishes the Webster case on the ground that there the final decree of divorce was entered during the pendency of an appeal from the interlocutory decree, whereas in the present case the final decree was entered after a judgment on retrial following an order of the District Court of Appeal stating that "the interlocutory judgment is affirmed, except * * * as to that portion relating to a division of the community estate * * *." Harrold v. Harrold, 101 Cal.App.2d 601, 609, 224 P.2d 66, 71. The majority opinion states that this order affirmed the part of the interlocutory decree dissolving the marriage and holds that an appeal from the order entered after the retrial of the property issues is not such an appeal as will stay the entry of a final decree under section 132 of the Civil Code.

Since plaintiff's first appeal was from only that part of the interlocutory decree dividing the community property, the part of that decree dissolving the marriage was not before the District Court of Appeal for review. American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 216, 246 P.2d 935; G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 667, 143 P. 1025; Whalen v. Smith, 163 Cal. 360, 362, 125 P. 904. It could not, therefore, affirm that part of the interlocutory decree, and its order reversed the only part of that decree that was before it for review. Ibid.; Denman v. Smith, 14 Cal.2d 752, 755, 97 P.2d 451. Following that reversal and a retrial of the issues, the trial court ordered a division of the community property. The present appeal is again from only that part of the judgment dividing the community property. The situation is the same as if the part of the interlocutory decree dividing the community property were appealed from for the first time. The fact that there was a prior appeal, a reversal, and a partial new trial cannot avoid the prohibitory effect of section 132, if that section was properly construed in the Webster case. Even if there were several appeals and parts of the interlocutory decree were actually affirmed, the word "any" in section 132, as interpreted in the Webster case, would prohibit the entry of a final decree of divorce, for under that case the final decree cannot be entered if an appeal from *any* part of the interlocutory decree is pending.

The majority opinion distinguishes DeVall v. DeVall, 102 Cal.App.2d 53, 226 P.2d 605, from the present case on the same ground it distinguishes the Webster case by saying that in the DeVall case there was an interlocutory decree still appealable at the time the final decree was entered, whereas in the present case the part of the interlocutory decree dissolving the marriage had been affirmed on the prior appeal. In the DeVall case a new trial on the issues relating to the division of the community property was granted after the entry of the interlocutory decree. At the conclusion of the new trial it was ordered that the previous interlocutory decree remain in effect, and on the same day, but more than one year after the entry of the original interlocutory decree, a final decree of divorce was entered. This final decree was reversed on appeal, on the authority of Webster v. Webster, supra; Newell v. Superior Court, 27 Cal.App. 343, 149 P. 998; Ritter v. Ritter, 103 Cal.App. 583, 284 P. 950; and Cory v. Cory, 71 Cal.App.2d 309, 162 P.2d 497. Section 132 states that "if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, *nor then, if the motion has been granted or judgment reversed.*" In the DeVall case the motion for a new trial was granted, and it was held on appeal, following the reasoning of the Webster case, that a final decree of divorce could not be entered until one year had elapsed from the time of entry of the judgment on new trial. In the present case the interlocutory decree was reversed on appeal, but the majority hold that a final decree of divorce can be entered before one year has elapsed from the entry of the judgment on retrial. This holding is irreconcilable with that in the DeVall case, and is inconsistent with the reasoning of the Webster case.

In my opinion the interpretation given section 132 in the Webster case was erroneous. Since section 132 is concerned solely with the dissolution of the marital relationship of the parties, it should be interpreted to mean that only when an appeal is taken from the provisions of the interlocutory decree dissolving the marriage is the entry of a final decree of divorce prohibited until that appeal is finally disposed of by affirmance or by retrial, or in case of another appeal by affirmance thereof. Furthermore, the principal reason given for the holding in the Webster case is not persuasive. In that case it was said "'that in granting a divorce the court has a variety of duties to perform affecting the property rights of the parties and the future welfare of those parties and their children; and it was deemed advisable [by the Legislature] that in such cases all of those matters, as far as possible, should be finally adjusted in connection with the granting of a divorce.'" Webster v. Webster, 216 Cal. 485, 494, 14 P.2d 522, 525. There is no basis for this statement in either the statutes or other cases of this court. Neither alimony nor custody of children are "finally adjusted" at the time of granting a final decree of divorce; both can be modified at any time thereafter. Civil Code, §§ 138, 139. Moreover the trial court is not required to divide the community property or decide the problem of custody at the time of the interlocutory decree, but can determine those matters in separate actions. Pereira v. Pereira, 156 Cal. 1, 10, 103 P. 488, 23 L.R. A.,N.S., 880; Brown v. Brown, 170 Cal. 1, 4, 147 P. 1168; Elms v. Elms, 4 Cal.2d 681, 685, 52 P.2d 223, 102 A.L.R. 811. Even if the Legislature deemed it advisable that property rights and custody should be finally adjusted in the divorce action, that objective is defeated by the Webster rule. If the parties, or the court, foresee long litigation over those matters, they may leave them to be determined later or in separate actions to avoid prolonging indefinitely the dissolution of the marriage.

The only other reason given in support of the holding in the Webster case is that the Legislature favors the prolongation of the marriage. The Legislature, however, by the express terms of section 132 fixed the expiration of a one year period after the entry of the interlocutory decree as the time for the entry of the final decree of divorce in the absence of an appeal from the trial court's determination that a divorce should be granted. Section 132 also expresses a legislative policy favoring the restoration of the parties to the status of single persons and enabling them to remarry after the expiration of the one year period. As amply illustrated by the present case, the Webster rule permits the frustration of these policies by a litigious spouse's repeated appeals from the provisions of the interlocutory decree dividing the community property. In my opinion the obvious purpose of the appeal and new trial provision of section 132 is to prevent the dissolution of the marriage until the right thereto is finally settled. Once it is finally determined that a divorce is proper and the one year period has elapsed, the purpose of section 132 is fully accomplished.

The holding in the Webster case is also out of harmony with the general rules giving finality to severable parts of judgments not appealed from or not subject to a motion for a new trial. If a partial appeal is taken from a judgment in which the issues determined are severable, the parts not appealed from become final and are beyond the scope of review of the appellate court. American Enterprises, Inc., v. Van Winkle, supra, 39 Cal.2d 210, 216, 246

P.2d 935; G. Ganahl Lumber Co. v. Weinsveig, supra, 168 Cal. 664, 667, 143 P. 1025; Whalen v. Smith, supra, 163 Cal. 360, 362, 125 P. 904. If the part appealed from is reversed, and a new trial is had on the issues involved therein the parts not appealed from are not affected. Smith v. Anglo-California Trust Co., 205 Cal. 496, 505, 271 P. 898; Neill v. Five C Refining Co., 79 Cal.App.2d 191, 194, 179 P.2d 818. Similarly, a new trial may be had on the issues involved in a severable part of a judgment without affecting the other parts. Code Civ.Proc. §§ 657, 662.

Section 132 should be interpreted in the light of these general rules, and they should apply to judgments in divorce actions, for there are no persuasive reasons for assuming that section 132 establishes an exception to them. The reliance in the Webster case on the use of the word "any" in that section is not persuasive. In the light of the purpose of section 132 and the rules governing partial appeals, it means "any" appeal from the part of the interlocutory decree dissolving the marriage. Moreover, authority for appeals from interlocutory decrees in divorce actions is given in the same section of the Code of Civil Procedure that grants authority for appeals from judgments generally. § 963(2). In divorce actions, the frequent appeals from the part of the interlocutory decree dividing the community property demonstrate that it is ordinarily severable from the part decreeing a dissolution of the marriage. E. g., Pereira v. Pereira, supra, 156 Cal. 1, 10, 103 P. 488; Elms v. Elms, supra, 4 Cal. 2d 681, 685, 52 P.2d 223; Wilson v. Wilson, 76 Cal.App.2d 119, 122, 172 P.2d 568. As the majority opinion concedes, in the present case these issues are not so interwoven or interdependent that they cannot be considered independently of one another.

The Webster case should be overruled and the Newell, Cory, Ritter, and DeVall cases disapproved, and it should be held that a final decree of divorce can be entered at any time after the expiration of one year from the entry of the interlocutory decree, when, as here, there is no appeal from provisions of the interlocutory decree dissolving the marriage and the issues involved in an appeal from the provisions of the interlocutory decree dividing the property are severable from those involved in the dissolution of the marriage.

SCHAUER, J., concurs.

EDMONDS, Presiding Justice (dissenting).

It may well be better social policy to allow the entry of a final decree of divorce when an appeal is pending from only the provisions of the interlocutory decree dealing with property rights. But the Legislature has stated in language too clear to be misunderstood that "if *any* appeal is taken from the interlocutory judgment" the final decree may not be entered until the appeal is finally disposed of. Civ.Code, § 132 (emphasis added). Consistently, the section has been so construed and applied for over twenty years. Webster v. Webster, 216 Cal. 485, 14 P.2d 522, and cases following that decision.

It seems evident that the section is capable of abuse by a wife who may prolong the marriage status almost indefinitely by a series of appeals, and thus continue to enjoy a share in the husband's earnings. Justice Traynor would allow the final decree to be entered pending an appeal from the property parts of the interlocutory judgment, according to principles relating generally to partial appeals. Justice Shenk would allow that decree to be entered after an appeal has been taken and decided, although the result of the appeal has been to remand the cause for further proceedings. Both solutions ignore the specific mandate of section 132; both solutions to that extent amount to a judicially legislated repeal of the section.

It is fundamental that the courts should not substitute their standards of social policy for those of the Legislature. In the present situation, that body has clearly stated that there shall be no final decree until the final disposition of *any* appeal from the interlocutory judgment. If the social policy of the state should be to allow the parties to obtain a final judgment of divorce notwithstanding unsettled issues as to property rights, the remedy is for the

Legislature to amend section 132 accordingly.

I would reverse the judgment insofar as it purports to direct the entry of a final judgment of divorce.

43 Cal.2d 45

CHASTAIN v. BELMONT.

L. A. 23097.

Supreme Court of California.
In Bank.

June 11, 1954.

Rehearing Denied July 7, 1954.

Action for conversion of oranges of plaintiff's 1950 crop, picked by defendant in alleged violation of a contract claimed by plaintiff to cover his 1949 crop only for consignment to defendant of all merchantable oranges grown by plaintiff during the contract term. Defendant filed a cross-complaint for money due on a book account and liquidated damages for plaintiff's alleged breach of the contract. From a judgment of the Superior Court, Orange County, Kenneth E. Morrison, J., for defendant on the cross-complaint, both parties appealed. The Supreme Court, Carter, J., held that the evidence was insufficient to support the trial court's finding and conclusion that defendant's contractual guarantee of payment to plaintiff of a specified sum per field box for all fruit received and accepted by defendant during the current season extended to the 1950 crop.

Judgment reversed in part with directions.

Prior opinion, Cal.App., 264 P.2d 137.

1. Evidence 🔑433(6), 434(8)

Though a contract has been reduced to writing by parties, parol evidence is admissible to show fraud, accident or mistake.

2. Evidence 🔑448

Parol evidence is admissible to aid in interpretation of ambiguous contract or writing.

3. Evidence 🔑434(8)

Fraud in execution or inducement of written contract may be shown.

4. Reformation of Instruments 🔑41

Revision of written contract may be sought, where mistake or imperfection of writing is put in issue by pleadings.

5. Evidence 🔑450(11)

A written contract for consignment of all oranges grown by consignor during contract term to packing house operator, with provisions that contract covered merchantable fruit only, that consignee or his agent should be sole judge of merchantability, and that consignee guaranteed consignor specified sum per field box of all fruit accepted during current season only and agreed to pay consignor amount received from sale of fruit after certain deductions, was ambiguous on its face, so that parol evidence was admissible to show that contract expressed parties' oral agreement that such guarantee extended to all fruit picked.

6. Sales 🔑52(7)

In action by one contracting in 1949 to consign all oranges grown by him during contract term to packing house operator for conversion of oranges of plaintiff's 1950 crop picked by defendant consignee, plaintiff's testimony was sufficient to support trial court's finding of truth of allegations of plaintiff's defenses to defendant's cross-complaint as to fraud in defendant's agent's representations that defendant would guarantee plaintiff specified minimum sum per field box of oranges and pay him any proceeds of sale of fruit in excess of amount required to meet such guarantee and pay costs and expenses.

7. Sales 🔑8

A contract providing that orange grower agreed to consign all merchantable oranges grown in his orchard to packing house operator, who agreed to pay grower amount received from sale of fruit after certain deductions and guaranteed him specified sum per field box of all fruit accepted during current season, was contract of purchase and sale rather than of consignment.

8. Trover and Conversion ⟹68

In action by one contracting in 1949 to consign all oranges grown by him during contract term to defendant packing house operator for conversion of oranges of plaintiff's 1950 crop picked by defendant, trial court's findings of truth of allegations of plaintiff's affirmative defenses to defendant's cross-complaint that defendant's agent falsely represented that defendant would guarantee plaintiff specified minimum sum per field box of oranges and pay him any additional proceeds of defendant's sale of fruit, that written contract expressed such oral agreement, and that exhibit attached to cross-complaint was true copy of contract signed by plaintiff except for provision therein that it covered 1949 crop only, were not inconsistent and hence did not preclude judgment for plaintiff.

9. Sales ⟹87(3)

In action for conversion of oranges of plaintiff's 1950 crop, picked by defendant in alleged violation of 1949 contract for plaintiff's consignment to defendant of all merchantable oranges grown by plaintiff during contract term in consideration of payment to plaintiff of amount received from sale of fruit, after certain deductions, by defendant, who guaranteed plaintiff specified minimum sum per field box of all fruit accepted during current season only, evidence supported trial court's finding that guarantee covered all fruit picked during 1949 season, but not finding that guarantee extended to 1950 crop.

10. Principal and Agent ⟹166(1)

A principal, to be held liable for his agent's unauthorized act on ground of principal's ratification thereof, must have knowledge of material facts involved at time of alleged ratification.

11. Damages ⟹157(3)

A party relying on liquidated damage provision of contract has burden of pleading and proving that fixing of damages caused by breach of contract was impracticable or extremely difficult when contract was entered into. Civ.Code, § 1671.

12. Damages ⟹222

In action for conversion of oranges by defendant, who filed cross-complaint for liquidated damages for plaintiff's withholding of portion of his orange crop from defendant and disposition thereof elsewhere in alleged violation of contract to consign all oranges grown by plaintiff to defendant, trial court's finding that fixing of damages for such breach of contract was impracticable and difficult because of insufficiency of defendant's books and records was unimportant, in view of allegations of cross-complaint, supported by defendant's testimony, that it was impracticable and extremely difficult to fix such damages when contract was made. Civ.Code, § 1671.

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Harvey, Rimel & Johnston and Fred D. Johnston, Santa Ana, for plaintiff and appellant.

G. V. Weikert, Los Angeles, and S. B. Kaufman, Anaheim, for defendant and respondent.

CARTER, Justice.

Plaintiff, A. W. Chastain, brought an action for damages for conversion against defendant, Frank Belmont. Defendant cross-complained for "Money on a Book Account and for Liquidated Damages." Findings of fact, conclusions of law, and a judgment were entered, and both parties appealed.

The pleadings show that the parties entered into a certain agreement entitled a "Consignment Contract" in August, 1949. The construction and interpretation of this contract is, essentially, the only point involved in the case.

The contract provided, in part, as follows:

"In consideration of the mutual covenants herein assumed, the undersigned Grower [A. W. Chastain] agrees to and does hereby consign to Frank Belmont, doing business as Granada Packing House hereinafter referred to as Shipper, of Anaheim, California, all oranges now growing and to be grown during the term of this contract of his citrus orchard consisting of 15 acres. * * *

"This contract covers the citrus fruit growing and to be grown on said grove on and after the date of this contract and until this contract is terminated by the Grower in the following manner: The Grower, if he is not indebted to the Shipper, may terminate this contract by giving Shipper written notice to that effect during the last ten days of November of any subsequent year and in such event this contract shall be automatically converted into a prorate contract, covering the fruit to be grown on said orchard during the following season.

This contract *covers merchantable fruit only and the Shipper or his agent shall be the sole judge as to the merchantability of said fruit, and shall decide at the time of processing what shall be accepted as merchantable fruit. Since frozen fruit goes into by-products, same is not accepted as merchantable.* * * *

"Shipper agrees to pay to the Grower the total amount received from the sale of said fruit, after deducting therefrom all sums of money (1) paid out or advanced hereunder, or (2) loaned or advanced to or for the use and benefit of the Grower, or (3) paid out for picking and processing said fruit, also deducting * * * [enumerated charges]. Should the fruit hereby consigned be not sufficient to repay said Shipper all sums, amounts or charges above mentioned, Grower agrees to pay any balance to Shipper within 10 days after notification by Shipper of the amount due, and in the event of his failure to pay same within 10 days after such notification the term of this contract shall be extended to cover the following season and shall thereafter be further extended to cover succeeding seasons while Grower remains indebted to Shipper. * * *

"Grower agrees to pay the Shipper as liquidated damages, the sum of thirty-five cents (35¢) for each and every commercial package or box (known to the trade as 'standard field box') or the equivalent thereof of citrus fruit, which the Grower may dispose of, sell, market or consign to any person other than the Shipper named herein or that Grower may remove or permit to be removed from said citrus orchard or fail to deliver to said Shipper, it being specifically agreed that it is impracticable and extremely difficult to fix the actual damage which would there be suffered by the Shipper.

"*Shipper guarantees to Grower 1.00 per field box for 3519 cu. inch box*[1] for all citrus fruit received and accepted as per contract for and during current season only.

"This contract supercedes [sic] and supplants all preliminary or other prior arrangements or agreements, oral or written, and no verbal representation or guarantee by either party or the agent of either party to the execution of this agreement or during its performance, shall be recognized by, or binding upon, either party. The terms of this contract cannot be changed or altered by any provisions added hereto *unless such additional provisions are personally approved in writing by the Grower and Frank Belmont.*" (Emphasis added.)

This contract was signed by A. W. Chastain, as Grower, and by Herb Miller on behalf of Granada Packing House. On the back of *the copy of the contract retained by Chastain* were these words: "This contract covers 1949 crop only. Herb Miller."

Chastain sued for damages for conversion alleging that Belmont had picked 1226 field boxes of Valencia oranges of Chastain's 1950 crop. Belmont's cross-complaint alleged the written contract; that Chastain was indebted to him in the sum of $5,297.60—the balance due him by reason of a $6,000 advance made to Chastain at the time the contract was entered into; and for liquidated damages under the contract at the rate of 35¢ per box for the balance of the 1950 crop of Valencia oranges which Chastain had withheld from him and disposed of elsewhere.

It is Chastain's position that the $1 field box guarantee applies to *all* oranges picked by Belmont. Belmont, on the other hand, contends that the guarantee applies only to *merchantable* fruit as to which he, as Shipper, was the sole judge. Under Chastain's theory, he admittedly owed $1,034, which was allegedly the balance due Belmont from the $6,000 advance made after the various deductions had been taken care of.

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[1] Written in pencil.

The trial court concluded (the findings of fact will be set forth at length in the succeeding pages) that the contract was, in reality, one of purchase and sale; that it was in effect and covered the 1950 crop; that Belmont owed Chastain $1.00 per box for *all* oranges picked by him in 1949 and 1950; that Chastain owed Belmont, as liquidated damages, the sum of 35¢ for each of the 2,049 boxes which he had prevented Belmont from picking and had disposed of elsewhere. Belmont was awarded judgment on his cross-complaint against Chastain in the sum of $620.79 together with costs. Belmont appeals from the judgment only in so far as it awarded him the sum of $620.79 instead of $5,085.14 plus interest. Chastain appeals from the judgment only in so far as it awarded Belmont liquidated damages and costs.

Belmont's Appeal

Belmont contends that under the consignment contract the guarantee was limited to that portion of the 1949 crop of fruit classified by him as merchantable and that certain findings of fact made by the trial court with reference to the contract were confusing, conflicting, self-contradictory and unsupported by the evidence.

Finding XX complained of found as true all the allegations of Chastain's first, second and third affirmative defenses to Belmont's cross-complaint except the allegation that the contract was one of consignment. As to the contract, the court found it to be one of purchase and sale.

In the first affirmative defense just referred to, Chastain alleged that he had at first refused to sell his 1949 crop of oranges when approached by defendant's agent because he had been offered a guarantee of $1 per smaller field box net on the trees and that he had so advised defendant's agent. Chastain alleged that defendant, through his agents and servants, represented to him that if he would execute the consignment contract, "cross-complainant would guarantee to cross-defendant a minimum of $1.00 per field box for a 3519 cubic inch box," and that after certain deductions were made if the fruit when sold "brought sufficient money, not only to meet the guarantee of $1.00 per box, but to pay said costs and expenses, that the additional returns would then be paid to cross-defendant; that cross-defendant agreed to cross-complainant's proposal." It is also alleged that when the contract was presented to him, defendant's agent represented that the contract expressed the oral agreement of the parties; that these representations were false and were made to cheat and defraud him and with the intention that he rely thereon; that had he not believed the representations he would not have executed the contract or agreed to sell his fruit to defendant; that he did not learn that the contract did not conform to the oral agreement until he received a statement from the defendant in January, 1950. It is also alleged that immediately upon ascertaining the number of field boxes which had been picked by defendant, he offered to repay the defendant the difference between the number of field boxes picked at the guaranteed price of $1 per box and the sum of $6,000 advanced by defendant.

In Chastain's second affirmative defense, it is alleged (after incorporating the allegations of the first two paragraphs of the first affirmative defense) that at the time of the execution of the agreement, defendant and his agents knew that the written agreement did not conform to the intention of the parties and that they knew that he, Chastain, thought the written instrument did express the intention of the parties.

As a *"third affirmative and inconsistent defense"* (emphasis added) it is alleged (after incorporating paragraphs one and two of the first) that "'Exhibit A' (the contract) attached to the cross-complaint, is a true copy of the written instrument signed by cross-defendant, except that the instrument signed by cross-defendant does not have the figures and date appearing immediately to the right of the signature of 'A. W. Chastain,' and except that the instrument signed by cross-defendant contains the following:

"This instrument covers 1949 crop only. Herb Miller."

It is also alleged here that under the provisions of the written contract as signed, Belmont agreed to pay the sum of $1 per 3519 cubic inch field box for all fruit picked.

Belmont argues that for the sole and exclusive purpose of attempting to prove fraud, Chastain was permitted over objection to testify to conversations alleged to have taken place with Belmont's field agent prior to the execution of the agreement; that no express finding of fraud was made by the trial court; that if the findings as made are interpreted as a finding of fraud, then such findings are not supported by the evidence. It is contended that such parol evidence was improperly admitted inasmuch as there had been no allegations that the contract was ambiguous.

[1–5] Plaintiff Chastain alleged that defendant Belmont's agent had represented to him that the contract expressed the oral agreement between them—that the $1 guaranteee extended to all fruit picked and to each 3519 cubic inch field box. In this regard the pertinent provisions of the contract (and which are found in three different places therein) are: "This contract covers merchantable fruit only and the Shipper or his agent shall be the sole judge as to the merchantability of said fruit, and shall decide at the time of processing what shall be accepted as merchantable fruit. Since frozen fruit goes in byproducts same is not accepted as merchantable." And "Shipper guarantees to Grower 1.00 per field box for 3,519 cu. Inch Box for all citrus fruit received and accepted as per contract for and during current season only." Another paragraph of the contract (heretofore quoted) provides that Shipper agrees to pay to the Grower the total amount received from the sale of the fruit "after deducting therefrom all sums of money (1) paid out or advanced * * * etc." Plaintiff alleges that he had been led to believe, because of representations made by defendant's agent, that these provisions meant that he was to receive $1 per field box of 3519 cubic inches for all fruit taken by defendant. Although a contract has been reduced to writing by the parties, parol evidence is admissible to show fraud, accident or mistake. Crawford v. France, 219 Cal. 439, 442, 27 P.2d 645. Parol evidence is also admissible to aid in the interpretation of an ambiguous contract or writing, California Employment, etc., Comm. v. Walters, 64 Cal.App.2d 554, 559, 149 P.2d 17, 19. As the court said in California Employment, etc., Comm. v. Walters, supra, "[t]he very fact, however, that plaintiff questioned the meaning of certain words and clauses used in framing the agreement in itself shows that it was ambiguous. Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 147 P.2d 84." The first paragraph above quoted could be construed as contended for by defendant and still be ambiguous inasmuch as the only expression as to what did not constitute merchantable fruit is the reference to frozen fruit. The second paragraph above quoted provides for a guarantee of $1 per box of all fruit received and accepted as *per contract*. Another provision of the contract provides that it covers "the citrus fruit growing and to be grown on said grove on and after the date of this contract. * * *" Still another provision of the contract provided that plaintiff was to receive the total amount received from the sale of the fruit after certain deductions had been made. Fraud in the execution or inducement of a written contract may be shown, and revision of a written contract may be sought, where mistake or imperfection of the writing is put in issue by the pleadings. Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 513, 24 P.2d 163. Plaintiff alleged that certain misrepresentations were made to him concerning the meaning of the contract he signed; that such representations were that the contract expressed the true intent of the parties. It would appear from the quoted portions that the contract was ambiguous on its face and that parol evidence was properly admitted in clarification thereof. In Groover v. Belmont, 114 Cal. App.2d 623, 625, 626, 250 P.2d 686, 688, the court ordered the plaintiff to amend her answer to the cross-complaint in order to conform to proof. She then alleged in greater detail mistake, fraudulent representations and concealment on the part of defendant. The facts in that case were substantially similar to those involved here with the same question involved—whether defendant Frank Belmont had guaranteed a certain price (35¢) for every field box or only for every field box of merchantable fruit with defendant the sole judge of merchantability. Defendant argued there, as here, that since there was no ambiguity, inconsistency or uncertainty in the contract, parol evidence was not admissible. The court held "The oral evidence was properly admitted here. The written contract was ambiguous in many respects and there was an obvious inconsistency between the provisions contained in the fine print and the provision written in longhand. The latter guaranteed 35¢ per field box to the grower for the fruit taken, while the former provided that the packer should pay the grower only what was left after deducting numerous charges, and after eliminating any fruit which the packer might prefer to consider as unmerchantable. Moreover, mistake, misrepresentation and fraud were alleged and the validity and nature of the agreement was the fact in dispute." In the case of Groover v. Belmont, supra, as hereinbefore noted, the court points out that there is an obvious inconsistency between the provision to pay a certain price per box and that which provides that Belmont shall pay to the grower (plaintiff here) only what was left after deducting numerous charges and eliminating any fruit which the packer might prefer to consider as unmerchantable.

It would appear from the foregoing that parol evidence was properly admitted under the allegation of fraud, and to clarify the patent ambiguity of the contract which was attached as an exhibit to the answer to the cross-complaint.

[6] In answer to defendant's contention that the finding of the trial court concerning his alleged fraud was not supported by the evidence, it appears that Chastain's testimony, which has been set forth heretofore, amply supports the finding. This testimony, if believed, as it apparently was, was sufficient to support the finding. Miller, defendant's agent, testified in a manner which was called "equivocal in a marked degree" by the District Court of Appeal in referring to the testimony of one Ogilvie, defendant's agent involved in the case of Groover v. Belmont, supra.

[7] Belmont next contends that there was not one word of testimony to support the trial court's finding that the contract was one of purchase and sale rather than of consignment. Chastain argues that the point is immaterial. Plaintiff, however, alleged in his answer to the cross-complaint (First Affirmative Defense) that defendant, through his agent "requested of cross-defendant that he *sell* to cross-complainant his 1949 crop of oranges. * * *" and that "cross-complainant *paid* to cross-defendant the sum of $6,000.00 as *payment* for cross-defendant's crop of fruit estimated to be six thousand (6000) boxes. * * *" In Jackson v. Belmont, 108 Cal.App.2d 288, 238 P.2d 1084, 1086, substantially the same contract as the one presently under consideration was involved. The court there said, quoting from White v. Ardzrooni, 71 Cal. App. 393, 400, 235 P. 461: "'The writing itself provides for a minimum guaranteed price. If deductions were to be made from the guaranteed price, then that term in the written agreement would become practically meaningless. We think the true construction of the instrument, and which carries out the intention of the parties, to be that the defendants undertook to guarantee certain returns to the growers for the grapes to be handled by them and were to be compensated out of whatever sums might be realized over and above such guaranteed prices. If this be not true, then the grower had no guaranteed price.'" In the present case, Chastain testified that Miller, defendant's agent, told him he would get $1 per box net with the understanding that if his fruit brought more than the $1 per box plus the charges for processing, etc., he would receive that amount in addition to the $1 guarantee. The check for $6,000 received by Chastain at the time of entering into the contract was marked "Accommodation advance." In Jackson v. Belmont, supra, defendant's agent had made substantially the same representations to the plaintiff there. The court held that the word "retain" in reference to the minimum guarantee was

absolutely foreign to the word "consignment" and that in the event the written part of a contract was inconsistent with the printed part, the written part should govern. In the written part there, as here, is found the provision for the guarantee of $1 per box for all fruit received and accepted. The court concluded that the contract was an agreement for sale and delivery and not one of consignment.

[8] Belmont's next contention is that the three affirmative defenses cannot all be true, and that in finding them to be true the findings of the trial court are so inconsistent that a judgment based on them cannot stand. This argument is based on the fact that in the first two affirmative defenses, plaintiff alleges the false representations on the part of defendant's agent, as heretofore set forth, together with the fact that the contract was represented to plaintiff as containing the agreement which had been orally agreed upon, and the fact that the third affirmative defense (called by plaintiff an "inconsistent defense") alleges that "Exhibit A attached to the cross-complaint, is a true copy of the written instrument signed by cross-defendant, except that the instrument signed by cross-defendant * * contains the following: This instrument covers 1949 crop only. Herb Miller."

It appears to us that there is no inconsistency in these findings. Plaintiff could do nothing other than admit that the contract was the one he had signed. He does not admit that defendant's construction of the contract is the correct, or true, one, but alleges that he was led to believe that its *meaning* was as it had been represented to him. Defendant's position is that by this allegation plaintiff is alleging that the contract signed by him *conformed* to the oral agreement of the parties. It is apparent from a reading of the allegation that no such interpretation can be placed thereon.

[9] **It is** next contended by Belmont that the contract was in full effect for the 1950 crop, but that under the contract the guarantee did not extend to that crop. Belmont's argument that the contract covered the 1950 crop is three-fold. He contends, first, that Chastain did not terminate the contract in the manner provided therein for its termination; and, secondly, that the contract provides that if the Grower fails to pay any balance due the Shipper within 10 days after notification of the amount due, "the term of this contract shall thereafter be further extended to cover succeeding seasons while Grower remains indebted to Shipper"; and thirdly, that the contract specifically provides that the guarantee applies "for and during current season only."

The evidence shows that approximately 30 days after the 1949 fruit crop had been picked by Belmont, Chastain offered to settle up with Miller if the statement were ready; that in January, 1950, Chastain wrote Belmont a check for $1,034 (the difference between $1 per box for 4,966 boxes picked and the $6000 advanced by Belmont) which was not accepted by Belmont and the trial court so found. The trial court found there was no written notice of termination during the last ten days of November as provided for by the contract and this finding is supported by the evidence.

The trial court found that the copy of the contract retained by Chastain contained the words "This contract covers the year 1949 only. Herb Miller" but that the qualification had not been personally approved in writing by Frank Belmont (as required by the contract); that the contract was in full force and effect for the year 1950; that Chastain failed and refused to deliver the 1950 crop of oranges. It was found that the 1949 crop of oranges totaled 4966 field boxes; that Belmont picked 1226 field boxes of oranges from the 1950 crop; that plaintiff picked 2049 boxes of the 1950 crop.

It was also found (Finding of Fact No. XVII) that the contract contained a provision for liquidated damages (which has been heretofore set forth) and that by reason of the nondelivery of 2049 boxes of the 1950 crop, Belmont became entitled to thirty-five cents per field box for the undelivered oranges.

Finding No. XIX sums up the "true and correct statement of the account between the parties" as follows:

"Defendant and cross-complainant advanced to plaintiff and cross-defendant the sum of $6,000.00. Plaintiff and cross-defendant is entitled to a credit for 4,966 field boxes of oranges picked in 1949 at $1.00 per field box under the guarantee provisions of said contract, leaving a balance of $1,034.00 owing at the end of the 1949 picking season. Defendant and cross-complainant is entitled to interest on said last mentioned sum at the rate of 7% per annum, to June 28, 1950, in the sum of $47.65. Defendant and cross-complainant is also entitled to a credit of 35¢ per field box on the 2,049 field boxes of oranges of the 1950 crop which plaintiff and cross-defendant withheld from defendant and cross-complainant, as liquidated damages under said contract, in the sum of $717.15. From this total of $1,798.80, plaintiff and cross-defendant is entitled to have deducted the sum of $1,226.00 for the 1,226 field boxes of oranges of the 1950 crop which defendant and cross-complainant picked, under the guarantee provisions of said contract leaving a balance of $572.80 owing, plus $47.99 interest to October 16, 1951, making a total of $620.70 [sic] due, owing and unpaid from plaintiff and cross-defendant to defendant and cross-complainant."

Although Chastain prayed for reformation of the contract, the trial court did not purport to reform it. In this regard, it should be noted that plaintiff alleged that the proposed written contract was to cover the 1949 crop only. *The trial court found this to be true, but at the same time found the contract covered the 1950 crop.* Finding No. XXI provides, however, that all allegations inconsistent with the "foregoing findings of fact are * * * untrue."

The trial court found that a contract was entered into between the parties on August 4, 1949, and that the copy marked Exhibit "A" was a true copy except for certain exceptions (not material for this particular discussion). The trial court also found that the $1 guarantee extended to each and every field box of not only the 1949 crop of oranges, but that of 1950, although the contract specifically set forth that the guarantee applied to the current (1949) season only.

In this respect, it should be noted that plaintiff objects to the holding that the contract applied to the 1950 crop and to the award to defendant of 35¢ per box as liquidated damages for oranges picked by plaintiff during that season but has no complaint concerning the award to himself of the $1 guarantee per box for oranges picked by Belmont during that time.

Belmont concluded his cross-complaint with a prayer for judgment in the sum of $5,297.60 plus 7% interest per annum until paid and for judgment in the sum of $1,750 as liquidated damages and for costs. On appeal, he contends that to the balance of $4,367.99 "owed by Chastain to Belmont" there should be added the liquidated damages awarded to Belmont by the trial court in the sum of $717.15, "making a total of $5,085.14. And to that total there should be added interest on the sum of $4,367.99, at the rate of 7% per annum from April 30, 1951, to the date of the judgment."

The essence of the holding of the trial court is that the $1 per box covered every field box of fruit picked during the 1949 and 1950 seasons. In view of the parol evidence admitted to clarify the ambiguity in the contract, it would appear that the finding as to the 1949 crop was sustained by the evidence and that it was a proper interpretation of the contract. In view of the clear wording of the contract that the guarantee was to extend to the current crop only, we do not see how the guarantee could be said to cover the 1226 boxes picked by Belmont in 1950.

Chastain's Appeal

Plaintiff Chastain's position is that the contract did not cover the 1950 crop by reason of the limiting clause placed there by defendant's agent. The record shows that Miller, the agent, had not advised Belmont that he had so limited the coverage of the contract. It should also be noted that the record shows that the clause was placed there after Chastain had signed the contract on his own behalf and after Miller had signed it on behalf of Granada Packing House. The limiting sentence is signed by Miller only and not on behalf of the Granada Packing House or defendant Belmont. The contract also contains a provision that any changes, or additions, must be personally approved in writing by both the Grower and "Frank Belmont." It appears to us from the findings of fact that the trial court found the contract covered the 1950 fruit crop because this provision had not been complied with.

[10] Chastain contends that the $1 guarantee should apply to every field box picked by Belmont during the 1949 season. He says that "The court's conclusion with reference to the continuing existence of the contract appears to be wrong." He argues that Belmont is chargeable with his agent's act in placing the 1949 limitation on the contract by reason of his ratification of the contract "as made." As we have heretofore pointed out, the record shows that Belmont's copy of the contract did not contain the limiting clause and the agent testified that he had not informed Belmont that he had limited the coverage of the contract to the 1949 crop. Belmont's testimony on the subject was extremely equivocal and evasive as to whether or not he knew his agent had placed the limiting clause on the contract. A principal must have knowledge of material facts at the time of the alleged ratification (Mechem Outlines Agency, § 136) in order to be held liable for the unauthorized act of another.

[11, 12] Chastain contends that Belmont cannot bring himself within the exception contained in section 1671 of the Civil Code ("The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage") because the difficulty in determining the actual damage was caused by Belmont. In this regard it should be noted that the trial court found "that such impracticability and difficulty [in fixing damages] results from the insufficiency of the books and records kept by the said Belmont and *from no other reason.*" (Emphasis added.) This finding appears to be amply sustained by the evidence. Chastain argues correctly that the person relying on a liquidated damage provision has the burden of pleading and proving that *when the contract was entered into,* the fixing of damages was impracticable or extremely difficult. Inasmuch as the time the contract is entered into is the material time so far as the validity of a provision for liquidated damages is concerned, the finding of the trial court would appear to be of no importance. Belmont alleged, in his cross-complaint, that at the time the contract was entered into it was impracticable and extremely difficult to fix damages in the event of the breach of such a contract, and his testimony, while vague and incoherent, *could* be said to bear out his allegations. The trial court found, in addition to the finding hereinbefore set forth, "[t]hat at all times it was and now is impracticable and extremely difficult to fix the amount of damage or loss. * * *" Chastain argues, of course, that the amount fixed amounted to a penalty, rather than a provision for liquidated damages.

Chastain's final argument is that the judgment should be modified by deducting therefrom the sum of $717.15 (the amount allowed, with interest, as liquidated damages) and that his, Chastain's, net judgment would therefore be the sum of $96.45 and that Belmont should not recover costs.

It appears that the judgment must be reversed because of the lack of evidence to support the finding and conclusion that the guarantee of $1 per box extended to the 1950 crop of oranges.

We have concluded that inasmuch as the $1 per box guarantee did not extend to, and cover, the 1950 crop of oranges, the judgment must be reversed insofar as it holds that Chastain is entitled to recover from Belmont $1 per box for the oranges picked by Belmont from Chastain's 1950 crop. The trial court is directed to determine the sole issue of the reasonable market value of the boxes of oranges picked by Belmont from Chastain's 1950 crop and offset the amount so determined against the amounts heretofore determined to be owing from Chastain to Belmont and enter judgment accordingly. Each party to bear his own costs on this appeal.

SHENK, Acting C. J., and SCHAUER and SPENCE, JJ., and BRAY, J. pro tem., concur.

EDMONDS, J., concurs in the judgment.

PEOPLE, BY AND THROUGH THE DEPARTMENT OF PUBLIC WORKS

v.

THOMPSON et al.

L. A. 22992.

Supreme Court of California.
In Bank.

June 11, 1954.

As Modified on Denial of Rehearing
July 7, 1954.

The People of the State of California, acting by and through the Department of Public Works, brought condemnation proceedings to condemn realty for a freeway. The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment adverse to the People of the State of California, and the People of the State of California appealed. The Supreme Court, Schauer, J., held that where the state had only an easement for old highway, which divided tract of realty into two portions, and the state sought to condemn the fee of the old highway and an additional strip for purpose of construction of a freeway, the two portions of tract divided by the old highway were "contiguous" so that owners of the realty were entitled to severance damages.

Judgment affirmed.

Edmonds and Traynor, JJ., dissented.

Prior Opinion, 260 P.2d 658.

1. Eminent Domain ⟹95, 112

In eminent domain proceeding, condemnor must pay owners of realty taken not only value of realty taken but also, if realty sought to be condemned constitutes only a part of a larger parcel, damages accruing to portion not sought to be condemned, by reason of severance from portion sought to be condemned, and construction of improvement in manner proposed by condemnor. Code Civ.Proc. § 1248, subd. 2.

2. Eminent Domain ⟹95

In order to entitle owner of realty to severance damages when part of his realty is condemned, contiguity is ordinarily essential, and owner is not entitled to severance damages for injury to other separate and independent parcels. Code Civ.Proc. § 1248, subd. 2.

3. Highways ⟹80

Where owners of realty in consideration of $10, conveyed to the state a strip of realty across their realty for highway purposes, and deed provided that as further consideration for the granting of the right of way, the state would abandon old highway right of way, and that owners would waive all claim for damage or compensation because of establishment of new highway, and at time of execution of deed there was in effect a statute providing that, by taking or accepting land for a highway, the public acquires only the right of way and incidents necessary to enjoy and maintain the highway, conveyance of strip of realty conveyed only an easement and not the fee. Streets and Highways Code, § 905.

4. Eminent Domain ⟹113

Where highway is laid out through a tract of realty, owner is entitled to compensation in condemnation proceeding, not only for value of realty actually taken, but also for the damage, if any, accruing to the remainder, as measured by difference in value of entire tract before and after the taking. Code Civ.Proc. § 1248, subd. 2.

5. Eminent Domain ⟹147

In condemnation of realty encumbered by easements, owner of realty is entitled only to value of realty in its then existing condition and not the value as though the realty were held as an unencumbered whole.

6. Eminent Domain ⟹95

Where the state had only an easement for old highway, which divided tract of realty into two portions, and in condemnation proceeding the state sought to condemn the fee of the old highway and an additional strip for purpose of construction of a freeway, the two portions of the tract divided by the old highway were "contiguous" so that owners of the realty were entitled to severance damages. Streets and Highways Code, § 23.5; Code Civ.Proc. § 1248, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Contiguous".

7. Eminent Domain ⟹202(1)

In condemnation proceedings, wherein owners of realty were entitled to severance damages, testimony of expert witnesses of owners of realty that in arriving at their opinions as to severance damages, they considered that free passage across old highway between two portions of realty in question was cut off by condemnation of additional realty for proposed freeway, thus lessening the value of remaining realty as a unit for residental and business purposes, was relevant to issue of market value. Streets and Highways Code, § 23.5; Code Civ.Proc. § 1248, subd. 2.

8. Eminent Domain ⚷137

The measure of severance damages resulting from condemnation of portion of realty is the diminution in market value of the realty not condemned. Code Civ.Proc. § 1248, subd. 2.

9. Trial ⚷235(7)

In condemnation proceeding, instruction that jury was not bound by the opinion of an expert witness, who testified as to severance damages, but that jury should give such opinion the weight, which jury deemed the opinion entitled, and then jury could reject the opinion if, in jury's judgment, reasons given for opinion were unsound was not erroneous.

10. Evidence ⚷571(10)

In condemnation proceeding, jury was not bound to accept testimony of any of the expert witnesses who testified as to severance damages. Code Civ.Proc. § 1248, subd. 2.

11. Eminent Domain ⚷262(5)

In condemnation proceeding by the state to condemn realty for construction of a freeway, instruction concerning allowance of special benefits to owners of realty was not prejudicially erroneous. Streets and Highways Code, § 23.5; Code Civ.Proc. § 1248, subd. 2.

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Robert E. Reed, Sacramento, George C. Hadley, Herbert J. Williams, Albert J. Day, R. B. Pegram and John N. McLaurin, Los Angeles, for appellant.

Holbrook, Tarr & O'Neill and Leslie R. Tarr, Los Angeles, for respondents.

SCHAUER, Justice.

This is an eminent domain proceeding to condemn for freeway purposes approximately 17 (possibly 23) acres[1] of land (designated in the complaint and herein as Parcel 2A) out of a 100 acre tract owned by defendants. The trial court ruled that by the taking of Parcel 2A defendants became entitled not only to the value of that parcel but also to severance damages, if any, to their remaining property. A jury found that the value of Parcel 2A was $12,000; that the damages to defendants' remaining property amounted to $17,500; and that there were no benefits to defendants' remaining property. The state appeals from the ensuing judgment. The principal contention of the plaintiff is that the land of defendants from which Parcel 2A was taken, insofar as concerns the portion of it situated west of existing Highway 101, should not be considered as one larger parcel for the purpose of allowing severance damages.[2] We have concluded that the judgment should be affirmed.

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[1] There is some uncertainty in the pleadings, exhibits and briefs as to the number of acres being condemned but the exact area is immaterial to the disposition of the appeal. The state alleges in its complaint that Parcel 2A contains "12.73 acres in addition to 4.27 acres now used and acknowledged as public road [being the fee title to the land of defendants upon which the right of way for existing Highway 101 is imposed]." There is also a contention, discussed in detail in the opinion, that the state (plaintiff) already owns fee title to the land underlying existing Highway 101 which land, nevertheless, is included in the parcel now sought to be condemned.

The complaint further alleges that "As much of the herein described property as lies within the boundaries of streets or highways, is subject to an easement or prescriptive right of the public for use for such purpose" and that "Parcels 1, 2–A * * * include only parts of entire parcels of property."

[2] The exact contention of plaintiff is stated as follows: "For the purpose of converting Highway 101 into a freeway, the State Highway Department, appellant herein, filed this proceeding to acquire a part of respondents' property which has been described and referred to as Parcel 2–A. By the proposed tak-

The land owned by defendants is crossed by existing Highway 101, which runs north-south. Their land west of Highway 101 is beach property. A "highway easement" for drainage of a creek under Highway 101 crosses the beach property from the highway to the Pacific Ocean; the portion of the beach property north of the drainage easement consists of .99 acres and the portion lying south of such easement consists of 7.24 acres. Of defendants' land east of the existing highway, the northerly half thereof, consisting of approximately 35 acres, is used for farming; the southerly 35 acres are swamp land. Highway 101 is an ordinary three-lane highway over which at any point defendants can pass back and forth between their beach property and their landward property. As noted above, there is a controversy (hereinafter discussed) as to whether the State of California by a 1924 deed acquired the fee title to the land under Highway 101, or whether it acquired only a right of way with fee title remaining in defendants. The complaint seeks and the judgment orders condemnation in fee of Parcel 2A, which consists of both a strip of land (comprising 12.73 acres) east of existing Highway 101 and of the underlying fee to the land now used for that highway and for drainage purposes.

Construction of the freeway[3] will make the following changes in the existing situation: A second strip of road for northbound traffic only will be constructed east of the existing Highway 101 roadway. This old roadway will be used for southbound traffic only. A fence will be built along the entire easterly line of Parcel 2A except for the northerly 361.33 feet thereof; along the 361.33 feet there will be a service road connecting "at approximately the northerly line of defendants' property" by an underpass with each of the roadways which will constitute the freeway. At "approximately the southerly line of defendants' property" the separate roadways which will constitute the freeway will be joined. Except at these widely separated points the freeway, as it relates to defendants' property, cannot be crossed.

The trial court held that for the purpose of determining the value of Parcel 2A and severance damages all defendants' property on both sides of Highway 101 was "one contiguous and entire tract * * *, subject to the easement for highway purposes"; that the taking of Parcel 2A and construction of the proposed improvement will sever defendants' remaining property into three separate, noncontiguous parcels and "will substantially impair defendants' rights of access." From the factual standpoint this holding obviously is correct. We are satisfied, for reasons hereinafter elaborated, that prior to this proceeding the state did not possess fee title to the land underlying Highway 101. The only question as to this aspect of the matter, therefore, is a legal one. Does the existence of the present roadway, with the right of way therefor, preclude the allowance of severance damages in respect to the remainder of the tract? We think not.

[1, 2] In an eminent domain proceeding the condemnor must pay the owners of the property taken not only the value of the property taken but also "If the property sought to be condemned constitutes only a

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ing 12.73 acres were carved out of respondents' property on the landward side of existing State Highway 101, and all abutter's rights of access appurtenant to the remainder of this landward property were extinguished except that the northerly 361.33 feet thereof was to abut upon and have access to a newly created frontage road. In addition this parcel included, within its description, the underlying fee to all existing State highway easements. All of the property sought to be taken, except the underlying fee to the beach easement, consisted of landward property. *No abutter's rights of access were taken from beach property.*" It is the last sentence which poses the principal argument.

[3] Streets and Highways Code, section 23.5: " 'Freeway' means a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access."

part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff." (Code Civ.Proc., § 1248, par. 2.) Under section 1248 "contiguity is ordinarily essential, and the owner is not entitled to severance damages for injury to other separate and independent parcels. [Citations.]" (People v. Ocean Shore Railroad (1948), 32 Cal.2d 406, 423, 196 P.2d 570, 6 A.L.R.2d 1179.

As previously indicated, the People urge that the beach property and the landward property are not one parcel because they are "separated" by existing Highway 101. It becomes necessary, then, to determine whether the existence of this roadway is as a matter of law a separation. Obviously, since it permits unlimited access back and forth across the roadway, from any part of defendants' tract to any other part thereof, it is not factually a true or complete separation.

The state acquired its rights to Highway 101 by a 1924 deed from defendants' predecessors in interest which, according to an argument by the People (although, as hereinabove shown, not in accordance with the allegations and prayer of the complaint), physically divided the property by conveying to the state a fee simple title to the strip of land which is used for Highway 101. The document of conveyance is entitled "Grant Deed." It provides that the grantors, in consideration of $10, "hereby *grant* to The State of California *the real property* * * * described as follows: * * * It is hereby agreed that as a further consideration for the *granting of said right of way,* the State * * * [will abandon] the *old highway right of way* which is * * * not included within the 80′ strip of land described herein"; grantors "hereby waive all claim for damage or compensation for and on account of the establishment of *said State highway.*" (Italics added.)

At the time of the execution of the 1924 deed section 2631 of the Political Code[4] provided, "By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided."

[3] It is clear that, as ruled by the trial court, the deed, read as a whole and in the light of former section 2631 and the decisions construing and applying that section, was intended to and did convey only an easement. Numerous cases have recognized that while that section was in effect the public by acquiring land for a highway acquired only the rights described in such section. (See Wright v. Austin (1904), 143 Cal. 236, 238–240, 76 P. 1023, 65 L.R.A. 949; Gurnsey v. Northern California Power Co. (1911), 160 Cal. 699, 705, 117 P. 906, 36 L.R.A.,N.S., 185; Olaine v. McGraw (1913), 164 Cal. 424, 428, 129 P. 460; Porter v. City of Los Angeles (1920), 182 Cal. 515, 519, 189 P. 105; City of Oakland v. Schenck (1925), 197 Cal. 456, 461, 241 P. 545; City of Burlingame v. Norberg (1930), 210 Cal. 105, 108, 290 P. 587; People v. Olsen (1930), 109 Cal.App. 523, 532, 293 P. 645; People v. Church (1943), 57 Cal.App.2d Supp. 1032, 1035, 136 P.2d 139.)

The People rely upon the statement in Moakley v. Los Angeles Pacific Ry. Co. (1934), 139 Cal.App. 421, 424, 34 P.2d 218, that "The term 'right of way' is frequently used to describe not only the easement but as well the strip of land itself occupied by such use." But the court in the Moakley case concluded that the deed there considered conveyed only an easement, not the fee.

The People also cite Palmer v. Los Angeles, etc., Ry. Co. (1921), 55 Cal.App. 519, 521, 203 P. 1012, and Midstate Oil Co. v.

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[4] In 1935 section 2631 was amended to limit its application to county highways, and was reenacted as section 905 of the Streets and Highways Code.

Ocean Shore R. R. Co. (1928), 93 Cal.App. 704, 708, 270 P. 216. Those cases concern grant deeds to railroads which in their descriptions of the land include the term "right of way." In each case it was held that the use of the term did not limit the interest conveyed to a mere easement. The cases are not controlling here, for there was no limitation similar to former section 2631 as to the interest which the railroads could accept; they could acquire a fee by purchase, although if they did resort to eminent domain they could have acquired only an easement. (City of Oakland v. Schenck (1925), supra, 197 Cal. 456, 466, 241 P. 545.)

The People also rely upon Las Posas Water Co. v. County of Ventura (1929), 97 Cal.App. 296, 275 P. 817. That case, however, as appears from the numerous authorities hereinabove cited, is out of line with both earlier and later decisions of this court. The deed there considered provided that the grantors "remise, release and forever quitclaim, unto the said party of the second part, and its successors, all that certain strip or parcel of land * * * Together with all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said parties of the first part of, in or to the said premises and every part and parcel thereof, with the appurtenances" (97 Cal.App. at page 298, 275 P. at page 817.) It was held that this was a conveyance, or perhaps a quitclaim, of the fee and that the provision of the habendum clause that the land was to be held "as a public highway" did not limit the granted or quitclaimed fee title. Concerning former section 2631 of the Political Code, quoted supra, the court said (97 Cal.App. at page 300, 275 P. at page 818), "It has been said that this section is only the formulation of the general rule laid down in the books and decided cases, when treating of highways as easements. (Citation.) It is not new law, but simply means that, by taking or accepting an easement over land for a highway, the public (the people of the state) acquire only the right of way, etc. It should be borne in mind that this section has no reference to the fee title to the land, which is servient to the easement. The fee title may belong to the owner of the adjacent property, or it may belong to one who owns only the property which is subject to the easement itself. It may be owned by a private individual or corporation, or by the county, or by the state."

To apply the quoted language of the Las Posas case to the present situation would require us to refuse to give effect to the plain provision of former section 2631 of the Political Code that "By taking or accepting land for a highway, the public acquire *only the right of way,* and the incidents necessary to enjoying and maintaining the same * * *" (Italics added.) Obviously, if that section is applicable at all it is applicable here; it was, indeed, an idle enactment if it meant merely that the public acquired only a right of way for a highway when the deed expressly conveyed only a right of way for a highway. Moreover, as declared by this court in Parks v. Gates (1921), 186 Cal. 151, 154, 199 P. 40, not mentioned in the Las Posas decision, "There is no dispute under the authorities that a direct grant of a 'right of way' for a road carries with it only an easement in the land. Rights of way are classified as easements by section 801 of the Civil Code and section 2631 of the Political Code. Nothing passes by a grant of a right of way 'but that which is necessary for its reasonable and proper enjoyment.' [Citations.] * * * Under the rules of construction the whole instrument must be read together to determine the effect of a deed, and the *habendum* may be resorted to as a limitation upon the estate granted." In that case the deed provided that the grantor "Does grant, bargain and convey: [description of land] * * * This grant is for the ——— of granting * * * a right of way." The trial court's decision that the deed conveyed only an easement for right of way for road purposes was upheld on appeal. In the present case we hold that the court likewise correctly determined that the deed in question conveyed only an easement, and that any contrary implications in the Las Posas case (which, incidentally, was decided prior to the enactment, in 1933, of section 363u of the Political Code (now Sts. & Hy. Code, § 104)) must be disapproved.

The People, relying upon County of San Mateo v. Christen (1937), 22 Cal.App.2d 375, 380, 71 P.2d 88, contend further that even if the 1924 deed conveyed only an easement, such easement destroyed the physical contiguity of defendants' land and also, as an incident of such destruction, their right to severance damages for the taking and separation here accomplished insofar as relates to the beach property. In the Christen case the defendant in 1910 and 1913, by separate purchases, had acquired lots on opposite sides of a public street which street had been delineated on a subdivision map filed for record in 1872, but which had never been improved and was not open to travel. Defendant used the entire tract as a unit. Whether his use of the street land was as a trespasser or otherwise does not appear, nor is it shown in whom the fee title to such street land was vested. The county condemned land on one side of the delineated street for a highway. On appeal the court appears to have been of the view that under the circumstances there shown the lands on opposite sides of the street were not physically contiguous, even though the street had never been opened or improved, for it held that the case was not controlled by City of Stockton v. Marengo (1934), 137 Cal.App. 760, 766, 31 P.2d 467 [citing 2 Lewis on Eminent Domain, 2d ed., sec. 475, p. 1032 and 20 C.J., sec. 190, p. 735, and quoting and following the proposition that "The mere platting of a tract of land on a map into lots and blocks does not constitute such a division of it into separate lots that the owner's damage must be limited to the particular lot a portion of which, as shown on the map, is actually taken", but was controlled by City of Oakland v. Pacific Coast Lumber, etc., Co. (1915), 171 Cal. 392, 398, 153 P. 705 [no severance damages allowed for physically non-contiguous property devoted to a unified use with the property condemned], and East Bay Municipal Utility Dist. v. Kieffer (1929), 99 Cal.App. 240, 247–248, 278 P. 476, 279 P. 178 [no severance damages allowed for land separated from the land condemned by a tract which defendant had only an option to purchase], and that proof of damages had properly been limited to the land on the same side of the street as that condemned. However, since in the Christen case the lots had been separately platted and had been acquired at different times, and the court neither discussed nor apparently considered either the provisions of section 2631 of the Political Code or the matter of fee title to the land underlying the unopened street, the holding is not persuasive in the present controversy.

No California case has been found which concerns severance damages where physically contiguous land is crossed by an easement for a street or highway which is in actual use but which permits unlimited access at all points. In other jurisdictions it has been held, "If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actively devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract.

"In a number of cases this view has been applied where the division was by a street or highway in which the owner held the land on both sides of it and owned the fee in the street or highway." (Annotation, 6 A.L.R.2d 1197, 1201.)

So also, in 18 American Jurisprudence 910–911, section 270, the general rule is stated: "In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test and * * * it is not considered a separate and independent parcel merely because it was * * * separated by an imaginary line, or even if the two tracts are separated by a highway * * * But it has been held that, in awarding damages for condemnation of a right of way across that portion of a farm which lies on one side of a highway, on which are the farm buildings, the damages to property not taken are properly limited to the remainder of such portion, to the exclusion of the land on the other side of the highway, where there is no evidence that such land will be damaged or decreased in value."

[4, 5] Since in this case the plaintiff is taking not only the strip of land adjacent to the existing Highway 101 but also the fee title to the land on which the right of way for such existing highway is imposed it becomes necessary to consider the rules applicable to that situation. In 29 C.J.S., Eminent Domain at the pages and in the sections respectively indicated we find these pertinent statements: (p. 1008, § 152) "Where a * * * highway is laid out through a tract of land, the owner is entitled to compensation not only for the value of the land actually taken, but also for the damage, if any, accruing to the remainder, as measured by the difference in the value of the entire tract before and after the taking. Each case must be governed by its own circumstances." And (p. 986, § 143) "In the taking of property encumbered by easements the owner is entitled only to the value of the property in its then existing condition and not the value as though the property were held as an unencumbered whole."

Arising from not the same facts but from relationships similar enough to suggest that the same principle might well govern, is City of Los Angeles v. Allen (1917), 32 Cal.App. 553, 561, 163 P. 697, wherein the late Justice Conrey (then presiding justice of the District Court of Appeal) said: "There is an important difference between the extension of a street crossing over a railroad track and a taking for the purpose of constructing a street longitudinally covering a right of way. 'The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together' * * * The corporation having the original right is not, when the land is occupied concurrently by another corporation, entitled to recover the value of the land as measured by the most advantageous use to which it could be put. The true measure of damages in each case is the decrease in the value of the use of the land for the first purpose by reason of its being concurrently used for the second purpose." To the same effect see People v. Tulare Packing Co. (1938), 25 Cal.App.2d 717, 728, 78 P.2d 763.

Here the trial court fully and carefully instructed the jury that: "The defendants have no right as against the State * * * to perpetuate the highway along * * * their property as such highway now exists. The defendants are not entitled to any damages by reason of the fact that the traffic on Coast Highway * * * 101 will, after construction of the proposed new improvement, proceed in separated roadways along and in front of their property * * * [and] defendants are not entitled to any damages resulting from a diversion from or loss of traffic to their property arising from the separation of the highway into separated lanes * * *

"The defendants as owners of real property abutting upon a State highway have as an easement or appurtenance to their property the right of access to and from the highway upon which their property fronts or abuts * * * In order for the defendants to be entitled to damages * * * for the taking or impairment of such right of access you must find that their property has actually decreased in value by reason of a substantial impairment or a taking of the private, as distinguished from the public, right of access.

"The underlying fee, described in parcel 2–A, is burdened with an easement for highway purposes. The defendants, as owners of the underlying fee, have the right to use the land over which the easement runs, provided the use is not inconsistent with the use of the easement.

"It is within the powers of the * * * State * * * to keep the highways free from encroachments, and to determine what constitutes an encroachment * * *

"It is for you to determine from all the evidence * * * and in accordance with the instructions * * * the value, if any, to be given to the underlying fee burdened with the easement for highway purposes * * *

"After you have determined the market value of the property designated as parcel 2–A, and owned by the defendants, sought to be taken by this proceeding, you must then ascertain and assess the amount of damages, if any, to the remaining property. This damage, if any, will be determined by ascertaining the market value of the property not taken as it was on * * * the date of issuance of summons herein, and by deducting therefrom the market value of the said remaining property after the severance of the part taken and the construction of the highway in the manner proposed by the plaintiff * * *

"If you find that market value of the remaining property is not diminished or decreased by the taking of a portion of the property and the construction of the improvement in the manner proposed, then the defendants are not entitled to recover anything in this action except the market value of the land sought to be taken * * *"

We are satisfied that the instructions quoted stated the proper rule to be applied where, as here, the facts show that there is actually one parcel crossed by an easement. Obviously both the beach area and the landward area are affected in some measure by the taking of the land, including the fee to the land on which the Highway 101 easement was already imposed, and the building of a fenced freeway which, except for use of a roundabout service road at the north and of the roadway joinder at the south, will completely stop the free passage by defendant from one portion of his land to another. This taking and construction affects directly defendants' access to and from their beach property as well as the landward property; such taking and improvement effect a separation of the property and a curtailment of ingress and egress which did not theretofore exist. It became a question of fact then, which the court properly left to the jury, whether severance damage occurred and, if so, in what amount.

If the only easement over defendants' land had been an occasionally used pedestrian trail there would be few if any who would assert that the right of way or easement for the trail constituted such a division of the land as to render its several parts noncontiguous. The change in degree of the burden of the easement from a seldom used trail to a paved and heavily traveled state highway is great, even though the highway still admits of completely free access at all points from one area of defendants' land to the other; but the degree of furtherance of separation of the land is much greater when the change is from a mere unfenced roadway to a fenced freeway which completely precludes access from one part of defendants' land to the other except by the use of a service road and of the roadway joinder, than is caused by a change from a trail to an unfenced roadway.

The People contend, however, that it is the California rule that the land not only must be physically contiguous but also it must be used for one general purpose to constitute a single parcel for the purpose of severance damages. In this connection the trial court found, upon adequate evidence, "that said property is undeveloped and only a part has been used for agricultural purposes; that no unity of use existed between said abutting lands, nor has said land been divided by separate uses." More specifically, part of the landward property was used for farming, the swamp was used only for the display of signboards, and the beach property up to the time of taking had not been put to any independent or specific use.

[6] It has been held that even though a lot owned by defendants is actually contiguous to another tract owned by them, from which a strip is condemned, nevertheless where there is actual diversity of use the lot cannot be considered as part of the tract for the purpose of severance damages. (City of Stockton v. Marengo (1934), supra, 137 Cal.App. 760, 767, 31 P.2d 467.) However, in the Marengo case the main tract was used by defendants for the purpose of farming, while the lot which was held not to be a part of the tract for

severance damage purposes was separated from the larger tract by a fence and was occupied by and used as a gas station, which was leased to strangers to the eminent domain proceedings. By contrast, there is in the present case no actual diversity or division of use, but simply a failure to use some of the property. Furthermore, here, all of the parts of defendants' land were directly contiguous to some taking: (1) The landward area was contiguous to the strip taken for the northbound traffic roadways, the parkway and service road, and (2) the beach area was contiguous to the fee underlying Highway 101 which was taken as a part of the entire project to the end of making a freeway with no ingress or egress and crossing rights where previously only a crossable highway on a right of way had existed. Under the circumstances of this case there appears to have been no error in the view that the property could and should be considered as one parcel.

[7, 8] Defendants' expert witnesses were allowed to testify, over objection, that in arriving at their opinions as to severance damages, they considered that the free passage across the highway between the beach property and the landward property was cut off, thus lessening the value of the property for development as a unit for residential and business purposes, and their testimonies indicated the greater value of the properties had they not been separated by the freeway and fence. This testimony was relevant (when the property is regarded as a unit) to the issue of market value (see People v. La Macchia (1953) 41 Cal.2d 738, 750, 751, 264 P.2d 15), and it is the diminution in market value of the property not condemned which is the measure of severance damages. (People v. Ricciardi (1943) 23 Cal.2d 390, 401, 144 P. 2d 799.)

The People object to the instruction, given in connection with the instructions as to opinion testimony of experts, that "You are not bound * * * by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound." They rely upon Housing Authority of City of Oakland v. Forbes (1942) 51 Cal.App.2d 1, 10, 124 P.2d 194, and the opinion of this court denying a hearing in Los Angeles City High School Dist. v. Schumann (1926) 78 Cal.App. 353, 362, 248 P. 737. In each of those cases approval was withheld from an instruction that the jury in its discretion could reject the testimony of an expert as to value if it appeared that the opinion was not based upon such a thorough knowledge of all facts relating to the property as would enable the witness "to express a true opinion as to its market value"; in each of those cases, however, the appellate court held that the giving of the instruction was not ground for reversal.

[9, 10] It is unnecessary to discuss whether the instructions given in the Forbes and Schumann cases were properly disapproved. It is sufficient to point out that the instruction complained of in the present case did not, as the People suggest, permit the jury arbitrarily to disregard testimony as to value, or lead them to believe that expert testimony was of less weight than other testimony. There were four expert witnesses who gave their opinions as to the value of Parcel 2A, as to severance damages, and as to benefits to the remaining property resulting from the improvements. Pursuant to the findings of the jury the amounts awarded defendants were greater than those to which the People's two witnesses testified and less than those to which the defendants' two witnesses testified. This award has ample support; manifestly the jury were not bound to accept the testimony of any one of the four witnesses. The situation is not like that in People ex rel. Department of Public Works v. McCullough (1950) 100 Cal.App.2d 101, 105, 223 P.2d 37, relied upon by the People, where the jury rejected the evidence of all the experts, both those who testified for plaintiff and those who testified for defendant, and awarded an amount higher than the valuation to which any witness had testified.

[11] The People object to a portion of the instruction concerning the allowance of special benefits. (As previously stated, the

jury found that there were no such benefits.) At the People's request the jury were correctly instructed as to the allowance of such benefits, if any, resulting from the new means of access provided by the frontage road. This requested instruction was followed by the instruction to which the People object. It is substantially in language used in Beveridge v. Lewis (1902) 137 Cal. 619, 625–626, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581. In that case the langauge was used to state "the reasons usually given for the disallowance of credit for [general] * * * benefits." The instruction complained of reads as follows:

"You are instructed that the chance that land will increase in value as population increases and new facilities for transportation and new markets are created is an element of value quite generally taken into consideration in the purchase of land in estimating its present market value. If a part of one's property is taken for the construction of a highway, he stands in reference to the other property not taken like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement in value in order to secure the increased facilities which the highway will afford. If he is compelled to contribute all that he could possibly gain by the improvement while others in all respects similarly affected by it are not required to do so he does not receive the equal protection of the law. The work is not being done for his benefit. The law will not imply a promise on his part to pay anything toward it.

"To compel him to give up or pay full value for his share of the common or general benefit while others are allowed to retain it is to deny him equal protection of the law.

"Unless there is a special benefit to the remaining land of this nature you cannot consider the general benefit, if any, accruing to the public generally by reason of the construction of the proposed improvement."

This instruction, the People say, is argumentative, and the jury should have been instructed as to the law only, and not as to the reasons for not allowing general benefits as a deduction from severance damages. It does not appear that the instruction stated the law erroneously or that the jury could have been misled by the instruction. Perhaps it was unnecessary to explain to them the theory that the deduction of general benefits from severance damages would be a denial of equal protection because other land in the neighborhood might equally benefit without being chargeable for such general benefit, but there is no showing that the People were prejudiced because the jury were informed of this theory. We find no miscarriage of justice.

For the reasons above stated the judgment is affirmed.

SHENK, Acting C. J., and CARTER, and SPENCE, JJ., concur.

EDMONDS, Presiding Justice (dissenting).

I find no justification in the record nor in the applicable principles of law for holding that the two parcels of land owned by the defendants constitute but one for the purposes of condemnation. Also, in my opinion, there is no basis for the conclusion that the defendants are entitled to severance damages as to the beach property because it, and the landward property, have not been put to diversified uses.

In holding that Section 2631 of the Political Code, which was in effect at the time the defendants' predecessors in interest conveyed a part of their land for highway purposes, a majority of the court disapproves the construction of the statute placed upon it many years ago and not since challenged. In Las Posas Water Co. v. County of Ventura, 97 Cal.App. 296, 275 P. 817, the court said: "It should be borne in mind that this section has no reference to the fee title to the land, which is servient to the easement. The fee title may belong to the owner of the adjacent property, or it may belong to one who owns only the property which is subject to the easement itself. It may be owned by a private individual or corporation, or by the county, or by the state." 97 Cal.App. at page 300, 275 P. at page 818. It is now said that the decision is out of line with cases which "have recognized that while that section was in effect the public by acquiring land for a highway acquired only the rights described in such section."

Briefly, those cases, held as follows: In Wright v. Austin, 143 Cal. 236, 76 P. 1023, 1024, 65 L.R.A. 949, the acquisition of only an easement was not disputed; the question was whether digging a well on bordering land for the purpose of sprinkling down the road was what "may reasonably be said to be 'incident to'" the easement. Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 907, 36 L.R.A.,N.S., 185, concerned land "across which for over forty years a public wagon road or highway * * * [had] existed." The simple issue was whether the erection of poles by the power company pursuant to a purported right granted the company by the board of supervisors, was reasonably incident to the maintenance of the road where lighting the highway was not contemplated.

In Olaine v. McGraw, 164 Cal. 424, 129 P. 460, the board of supervisors had declared 12 feet of the bed of a creek to be a public highway. By that action, it was held, only an easement had been acquired. Porter v. City of Los Angeles, 182 Cal. 515, 189 P. 105 was an action for trespass for damages incurred to plaintiff's house by reason of the city's building a tunnel under the fronting street. The court presumed that plaintiff owned the fee to the center of the street because there was nothing in the record to the contrary. City of Oakland v. Schenck, 197 Cal. 456, 241 P. 545, 546, was an eminent domain proceeding where the city sought only an easement for street purposes. It was held that, despite the fact the resulting judgment did not state the purpose for which the land was acquired, the judgment "carries no greater estate than a mere easement in the property for the uses stated."

In City of Burlingame v. Norberg, 210 Cal. 105, 290 P. 587, the city asserted ownership in fee to land over which it maintained a storm sewer system. The sewer system had been installed in the first instance as the consequence of the conveyance of an easement for that purpose. The city's claim of complete ownership was based on express dedication, prescription and adverse user. Said the court: "Clearly it is not necessary in the dedication of an area to a public use to convey the title in property. * * * If the city were condemning a right of way for a storm sewer, it could get no more than" an easement. 210 Cal. at pages 107–108, 290 P. at page 588. It was held that the city had not acquired the fee by any method shown by the record.

People v. Olsen, 109 Cal.App. 523, 293 P. 645, was an eminent domain proceeding for highway purposes, and the court said: "Title to land acquired by condemnation for highway purposes vests in the public only an easement * * *." 109 Cal.App. at page 532, 293 P. at page 649. In People v. Church, 57 Cal.App.2d Supp. 1032, 136 P.2d 139, the question was whether in a prior condemnation suit concerning a highway, the State necessarily had taken certain service station equipment affixed to the land. It was held that the answer depended upon whether the improvements had to be removed for use of the land as a right of way, and whether that removal caused them to lose a substantial part of their value.

Neither the language of the opinions in those cases nor the factual bases upon which they were decided justifies the conclusion that the State could not by purchase acquire the fee with respect to land to be used as a highway. Just 50 years ago, this court considered the statute here in controversy and characterized it as "the formulation of the general rule laid down in the books and decided cases when treating of highways as easements, which they are." Wright v. Austin, supra, 143 Cal. at page 239, 76 P. at page 1024. By the express terms of the enactment, the legislature declared that the State could acquire a right of way only where the interest was acquired by "taking" (condemnation or prescription), or by "accepting" (dedication). This is the plain meaning of the statute and I find no basis for holding that it prohibited the State from acquiring a fee by the deed which it obtained from Thompson's predecessors in interest.

That deed, I would hold, may not reasonably be construed as conveying less than the entire fee. The majority conclude that the terms of the deed read as a whole and the *habendum* clause considered, show an intention to convey only an easement. But it is only if the operative words of a grant are doubtful, that recourse may be had to its recitals to assist the construction. Civ. Code, sec. 1068. The operative language in the deed is: "* * * do hereby grant to The State of California the real property * * * described as follows: * * * To have and to hold to said grantee, its successors and assigns." There is no ambiguity, that language conveyed the entire fee. See, Civ.Code, sec. 1092. The *habendum* clause commences with "To have," and does not purport to limit or cut down the estate conveyed in the granting clause.

The language relied upon by the majority to cut down the estate granted in the premises is as follows: "It is hereby agreed that as a further consideration for the granting of said right of way * * *." Those are not "operative words" of the grant. They constitute mere recitals and should not be held to limit the estate granted.

Furthermore, although technically a "right of way" is an easement, "As generally used * * * when applied to railroads, canals, and similar instrumentalities, [it] has no exact, well-defined meaning, but often is susceptible of a twofold signification. It is used indiscriminately to describe, not only the easement, or special and limited right to use another person's land, but as well the strip of land itself that is occupied for such use." Anderson v. Willson, 48 Cal.App. 289, 295, 191 P. 1016, 1019. Certainly, a highway is a sound analogy. In view of the clear language of the granting clause, there must be something more than a recital of the language "right of way" to cut down a clear grant of the fee.

The majority declare that where "the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actively devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract." As thus stated, that rule requires a preliminary determination before the severance damages of the interference with the highest and best use of the two parcels as a unit, may be considered.

If a preliminary determination is necessary, then it is not whether there is diversity of use, but whether there is an existing unity or continuity of use. [U]nity of use is the principal test. * * *" (18 Am. Jur., p. 910.) "'To constitute a *unity* of property between two or more contiguous but *prima facie* distinct parcels of land, there must be such a connection or relation of adaptation, convenience, and *actual* and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they *are* used.'" City of Stockton v. Marengo, 137 Cal.App. 760, 766, 31 P.2d 467, 470, quoting with approval from 20 C.J., Eminent Domain, sec. 190, p. 737; emphasis added; see, also, annotation, 6 A.L.R.2d 1197, 1212. These authorities indicate that there must be a present use of both parcels, which use is a common one with unity of purpose, so that an interference with the use of one parcel affects directly the present use of the other. In this case the beach property was not in use at the time of the trial and accordingly, the award of severance damages cannot rest upon unity of use.

For these reasons I would reverse the judgment.

TRAYNOR, J., concurs.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

CUMBERPATCH et al. v. NOLAN et al.

No. 15909.

District Court of Appeal, First District.
Division 1, California.
June 16, 1954.

Action by purchasers for breach of agreement to convey real property wherein default was taken and judgment entered against one vendor. The Superior Court, Marin County, Thomas A. Keating, J., signed an order setting aside default judgment, and permitted vendors to answer. On subsequent trial Norman A. Gregg, J., ordered judgment against vendors, husband and wife, for interest only. The purchasers appealed. The District Court of Appeal, Bray, J., 270 P.2d 540, held that where default was not set aside, purchasers were entitled to immediate entry of another default judgment. On petition for rehearing the same court held that where notice of motion and motion itself were to set aside default judgment, not the default, and formal order showed that motion and order were restricted to setting aside the judgment, minute order, erroneously reciting that matter came upon motion to set aside default, did not constitute a setting aside of the default as distinguished from the default judgment.

Petition denied.

Judgment 🔑173

When notice of motion and motion itself were to set aside default judgment, not the default, and formal order showed that motion and order were restricted to setting aside judgment, minute order, erroneously reciting that matter came upon motion to set aside default, did not constitute a setting aside of the default as distinguished from the judgment.

Lorne M. Stanley, San Francisco, for plaintiffs.

Leonard A. Thomas, San Rafael, for respondents.

PER CURIAM.

In respondents' petition for rehearing, respondents claim that the minute order of July 11, 1952, constitutes a setting aside of the default as distinguished from the default judgment. The minute order erroneouly recites "This matter coming on upon a motion to set aside default * * * It was by the Court ordered that the motion to set aside default be granted * * *." Both the notice of motion and the motion itself were to set aside the default judgment, not the default. Moreover, the formal order on the motion signed by the judge properly shows that the motion and the order were restricted to setting aside the judgment. The statement in the opinion that the default at no time was set aside is correct.

The opinion is modified by adding thereto, at the end thereof, the following: "Plaintiffs and appellants will recover costs."

The petition for rehearing is denied.

126 Cal.App.2d 128

PEOPLE v. CARRIGAN et al.

Cr. 5114.

District Court of Appeal, Second District,
Division 3, California.
June 21, 1954.

Defendant was convicted of armed robbery and kidnapping for the purpose of robbery. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment, and defendant appealed therefrom, and from an order denying his motion for new trial. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Kidnapping 🔑5

Robbery 🔑24(1)

Evidence sustained conviction for armed robbery and kidnapping for purpose of robbery.

2. Criminal Law ⚷824(1)

Where, in the court room and during the trial, but after court had adjourned and jury had been excused, prosecuting witness and his father assaulted defendant, struck him and knocked him down, court did not err in failing to instruct jury, on its own motion, to disregard any account of the incident which they might have read in the newspapers.

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R. E. Montague, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Leonard Daniel Mahan, James Bartley Carrigan and Don Eugene Hall were charged by information with the offenses of kidnaping for the purpose of robbery, and with armed robbery. They were found guilty by a jury. Mahan's motion for a new trial was denied and he appeals from the judgment and the order denying him a new trial.

Appellant says "The record in the instant case may be likened to a strange and fascinating tapestry of intrigue and violence which upon cursory viewing appears to have some quality of overall accuracy, but which, upon closer scrutiny is shown to contain threads which distort the scene to the extent that the work is valueless." This is appellant's euphemistic approach to the argument that the testimony of the prosecuting witness was fantastic to the point of incredibility; hence the evidence was insufficient to justify the verdict. Because the argument, although misguided, is made with apparent sincerity, we shall accord it more attention than it would otherwise merit.

[1] There was evidence of the following facts: Eugene Courtier was 27 years of age, married and living with his wife and three children at Edwards Air Force Base in Los Angeles County where he had been employed for 7 years by North American Aviation Company as a technician; at about 2 p. m. Courtier was driving a Mercury Coupe northward toward Lancaster; defendant Carrigan signaled for a ride and was picked up; after traveling 15 or 20 miles Carrigan drew a gun and upon his orders Courtier turned up his rear view mirror, slackened his speed and eventually turned off the main highway to a point on a dirt road not in view from the highway; Carrigan took Courtier's wallet containing $5; appellant Mahan approached on foot; upon orders Courtier lay face down on the ground; there was talk of killing him; a shot was fired into the ground close to his head; he agreed to sell his captors his automobile; they started toward Lancaster in the car; defendant Hall had entered the car; Courtier lay on the floor; near Lancaster he was allowed to drive; they drove to Stranske Motors where Courtier agreed to sell the car for $2,000; he received $500 and a promise of the balance the following day; Carrigan and Hall were present during these negotiations; the three left Stranske Motors in a cab driven by a woman; upon Carrigan's demand Courtier gave him the $500; they went to a bar where Courtier and Hall each had a drink; Carrigan was absent for a short time; when he returned the three walked down the highway; a shirt was picked up and tied over Courtier's eyes; a car pulled up driven by Mahan and the men entered it; Courtier, blindfolded, lay on the floor; they drove to Courtier's home; the blindfold was removed; Carrigan and Mahan drove away; Courtier rang the doorbell, his wife appeared and the men entered, Hall holding a gun at Courtier's back; Courtier said he had been held up; Hall ordered Mrs. Courtier and the children into a bedroom; shortly thereafter Mrs. Courtier came out and prepared coffee; Hall came into the kitchen and fried eggs; Carrigan and Mahan returned and joined the others in coffee, eggs and toast. A Captain Carnely came by to tell the Courtiers he was leaving on assignment; Courtier, with a gun on him, held by Carrigan, but out of sight of Carnely, told the latter his wife and children were ill; Carnely left. Courtier's father phoned and with a gun held on him Courtier talked with his father; Mahan brought in a suitcase, took a shower and went to bed; the Courtiers endeavored to

get some sleep but returned to the living room where music was played. Mrs. Courtier and the three defendants had a card game and Mrs. Courtier danced with Carrigan. The following morning Carrigan, Mahan and Courtier returned to Stranske Motors; Hall stayed at the Courtier home. The three men stopped for breakfast; Mahan remained to finish his breakfast; Carrigan and Courtier went to Stranske Motors when Courtier received a check for $1,251.02 payable to him; the two went to the bank where the check was cashed by Courtier and the money given to Carrigan outside the bank. They joined Mahan at the drugstore, got into his car and drove a short distance when the money was divided between Mahan and Carrigan. They returned to Lancaster, gave Courtier $70 with which he bought groceries; after stopping at a service station where Mahan had left a tire to be fixed they returned to the Courtier house; Mahan and Carrigan returned to the service station, got the tire, had the car lubricated and again came to the Courtier house. In the latter part of the afternoon the three defendants left, and Courtier reported the matter to the Provost Marshal's office at Edwards Air Force Base.

Mrs. Doris Courtier corroborated her husband's testimony with respect to all of the occurrences at their home. Neither she nor her husband had known any of the defendants. Both testified in intimate detail and at great length. We have given only a synopsis of their testimony. It was replete with assertions that one or more of the defendants at all times was in possession of a gun which was exhibited throughout, accompanied by threats of violence if the Courtiers offered resistance. Courtier testified that he was in constant fear of the defendants and that he did not dare to make an outcry or endeavor to escape. Courtier's car was insured. The three defendants testified at the trial. They did not deny getting the car as related by Courtier but accused him of joining with them in a conspiracy to swindle the insurance company. Although they did not deny possession of a gun, and Mahan admitted having fired it while the four men had stopped, as Courtier testified, they denied having threatened Mr. and Mrs. Courtier with the gun or otherwise. The elaborate scheme, they testified, was planned beforehand, at the suggestion of Courtier, who was to get half the proceeds from the sale of the car and give half to the defendants. Mahan testified that he and Courtier had planned the details of the alleged holdup. Carrigan and Hall each made statements to the police after their arrest to the effect that they had joined Mahan in a plan to hold up a motorist on the highway, and they did not implicate Courtier in the scheme.

Appellant contends that the testimony of Mr. and Mrs. Courtier was so improbable and absurd as to be wholly unworthy of belief. He does not in his brief make any reference to his own testimony concerning the claimed conspiracy to defraud the insurance company. There was good reason for ignoring it. In comparing the account of Mr. and Mrs. Courtier of their encounter with defendants with that of appellant, it will be found that the latter contains considerably more than the former that challenges one's credulity. It was more reasonable for the jury to believe that Courtier was actually robbed of his money and his car than that he agreed to pay the defendants a large sum for engaging in a simulated robbery. The fact that defendants, by their own admissions, engaged in criminal activities, would indicate that they were in great need of money and indifferent as to the means by which they might acquire it. Courtier had no such need or motive. There was ample evidence to support the verdict.

[2] In the court room, during the trial, Courtier and his father assaulted appellant; struck him and knocked him down. Court had adjourned and the jury had been excused. Defendants offered to prove the circumstances of the affair to the jury and requested that the jurors be questioned whether they were present or had read a newspaper account of the incident. They also moved for a mistrial. Their offer was refused by the court and their motions were denied. It is contended that the assault tended to intimidate appellant. His

subsequent testimony refutes this contention. It is claimed the attack was evidence of Courtier's animosity toward appellant and thus tended to weaken his credibility. The prosecution itself proved his animosity and he had not denied it. It was not error for the court to fail to instruct the jury, on its own motion, to disregard any account of the court room incident which they may have read in the newspapers. The case was tried without error and the verdict was justified by the evidence.

The judgment and the order denying appellant's motion for a new trial are affirmed.

PARKER WOOD, J., concurs.

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125 Cal.App.2d 819

MERRILL ELEMENTARY SCHOOL DIST. OF TEHAMA COUNTY

v.

RAPOSE.

Civ. 8621.

District Court of Appeal, Third District, California.

June 10, 1954.

Hearing Denied Aug. 4, 1954.

Suit to have declared invalid certain proceedings taken to annex school district with a union school district. The Superior Court, Tehama County, Curtiss E. Wetter, J., denied the petition, and an appeal was taken. The District Court of Appeal, Van Dyke, P. J., held that failure of board of trustees of district seeking admission to union to take any action required of them would not invalidate annexation proceedings.

Affirmed.

1. Schools and School Districts ⊂⇒32, 34, 44

School districts of California, being public quasi municipal corporations, subject to constitutional limitations, power of legislature over them is plenary, and it may divide, change or abolish them at pleasure. Const. art. 9, § 14.

2. Constitutional Law ⊂⇒278(2)

Public school property is held in trust for school purposes by persons or corporations authorized for time being to control such property, and it is within power of legislature to provide for change in trusteeship of such property in certain contingencies presumably requiring such change, or, indeed, to change trustees of that class of property whenever it may choose to do so. Const. art. 9, § 14.

3. Schools and School Districts ⊂⇒33

No consent to annexation of school district to union school district is required of board of trustees of district to be annexed, the only thing committed to board of trustees of district seeking admission to union being execution of an agreement setting forth such terms as may be agreed upon in matter of annexation. Education Code, §§ 2891 to 2895, 2893.

4. Schools and School Districts ⊂⇒33

Failure of board of trustees of district seeking admission to union to take any action required of them would not invalidate annexation proceedings. Education Code, §§ 2891 to 2895, 2893.

Rawlins Coffman, Red Bluff, for appellants.

C. A. Stromsness, Dist. Atty., Red Bluff, for respondent.

VAN DYKE, Presiding Justice.

The Merrill Elementary School District of Tehama County has appealed from an order denying its petition in the Superior Court to have declared invalid certain proceedings taken to annex that district with Corning Union Elementary School District. It is the claim of appellant that the proceedings were fatally defective in that the governing provisions of the Education Code were not followed.

The facts are not in dispute. On the 24th of August, 1953, there was received by the respondent Superintendent of Schools of Tehama County a petition for annexation signed by the required number of qualified registered electors residing in the Merrill Elementary School District, hereinafter called "Merrill". Attached to this petition was a document signed by the required number of members of the Board of Trustees of Corning Union Elementary School District, hereinafter called "Corning", expressing the agreement or consent of the signers to the annexation of Merrill. Acting upon these two documents, respondent called an election in Merrill, which was held September 8, 1953. A majority of votes was cast against annexation. On October 26th following, a second petition for annexation, signed by the requisite number of qualified electors of Merrill, was presented to respondent. It was not accompanied by any new consent or agreement to annexation by any members of the Corning board. Nevertheless, respondent treated the former consent as sufficient to qualify the second petition and proceeded to call a second election, which was held November 10, 1953. A majority of votes was cast for annexation. During all of this time no action had been taken by the Board of Trustees of Merrill, but on November 20th that board by a majority vote adopted a resolution declaring itself as opposed to the annexation. It was resolved that the board take immediate steps to establish the invalidity of the annexation proceedings.

[1, 2] Following this a petition was presented to the Superior Court of Tehama County, in which county both districts are situated. Responsive to original writs issued by that court, the Superintendent of Schools, respondent here, answered, asserting the validity of the annexation. After a hearing the Superior Court declared the proceedings to have been regular, annexation to have been effected, and entered its order denying any relief to the petitioner therein. From that order this appeal was taken.

> "School districts of this state are public quasi municipal corporations. * * * Subject to such constitutional limitations as may exist, the power of the Legislature over these public municipal corporations is plenary. It may divide, change, or abolish them at pleasure. * * *
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> "* * * public school property is held in trust for school purposes by the persons or corporations authorized for the time being to control such property, and * * * it is in the power of the Legislature to provide for a change in the trusteeship of such property in certain contingencies presumably requiring such a change, or, indeed, to change the trustees of that class of property whenever it may choose to do so." Pass School Dist. v. Hollywood Dist., 156 Cal. 416, 418, 420, 105 P. 122, 123, 26 L.R.A., N.S., 485.

Our Constitution declares:

> "The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and junior college districts, of every kind and class, and may classify such districts." Art. IX, § 14, Calif.Const.

In view of the plenary legislative power we need look only, and we must look only, to the statutory scheme to test the validity of the proceedings here in question. The subject of annexation of a district to a union district is covered by Article 4, Chapter 9, Division 2 of the Education Code, Sections 2891 to 2895 of that Article. These sections declare that any school district may be admitted to a union school district pursuant to said article "and upon such terms as may be agreed upon between its board of trustees and the board of trustees of the union * * * school district." Section 2891. It is required that a majority of the registered electors residing in the district to be annexed and who have children enrolled in any elementary school shall present to the county superintendent of schools a petition for annexation. This petition "shall be accompanied by an agreement to the annexation, signed by a majority of the members composing the board of trustees of the union * * * district to which admission is desired." Section 2893. "If a majority of the votes cast is in favor of the annexation, the annexation is complete." Section 2895.

[3, 4] The only contention of Merrill is that an agreement between its board of trustees and the board of trustees of Corning is necessary to annexation. Admittedly, no such agreement was executed. We think the code sections will not bear this interpretation. It is quite clear that no consent to annexation is required of the board of trustees of the district to be annexed. The question of whether or not annexation shall take place, along with the resolution of the advantages or the disadvantages of annexation as affecting both districts is expressly committed to the trustees of the Union district upon the one hand and to the electors of the district which it is proposed to annex on the other. This is clear from a reading of the sections. One thing and one thing only is committed to the board of trustees of the district seeking admission to the union and that is the matter of executing with the board of trustees of the union district an agreement setting forth "such terms as may be agreed upon in the matter of the annexation." But this requirement does not mean that Merrill's board of trustees had any part to play in deciding whether or not annexation should take place. Their function was this only: If a majority of the trustees of Corning consented to annexation and if a majority of the electors at the election voted for annexation a duty was immediately cast upon Merrill's board to accept the decision made by those required to make it that annexation should occur and to proceed to agree with Corning's board of trustees upon such terms of annexation as those two bodies under the law might have authority to agree upon. It is true that a more than casual search of the Education Code reveals that the statutory scheme for the combining and division of school districts fixes the terms under which such combinations and separations shall take place and it is difficult to conceive of any matters that might be considered terms of annexation which are committed to the boards of trustees. Assuming that there may be such matters, yet there is no reason for holding that those boards, by failing or refusing to agree upon terms, may defeat annexation. We hold, therefore, that, so far as any required action of the board of trustees of Merrill be concerned, their failure to act did not invalidate the annexation proceedings.

There being no other contention for invalidity, the order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

In the Matter of the ESTATE of Dagmar A. HOPPERSTAD, Deceased.

Stanford Jay HOWARD, a minor, by John D. Miller, his Guardian ad Litem, Objector and Respondent, v. David K. ARNOLD, as Administrator with the Will Annexed of the Estate, Petitioner and Appellant.

Civ. 20260.

District Court of Appeal, Second District, Division 2, California.

June 16, 1954.

J. F. Marshall, Long Beach, for petitioner.

John D. Miller, Long Beach, for objector.

PER CURIAM.

Pursuant to the order of this court of March 31, 1954, the Honorable Beach Vasey, Judge of the Superior Court, Los Angeles County, made findings in LB P-24074. He determined after hearing that the compromise and settlement of the controversy between David Keith Arnold as administrator with the will annexed of the above entitled estate, and Stanford Jay Howard, a minor through his guardian John D. Miller, should be approved. It appearing to this court that such compromise is fair and reasonable, and that the conclusion reached by said judge is for the best interest of the minor and of the said estate of Dagmar A. Hopperstad, It is ordered and adjudged that the proposed compromise entitled "Stipulation and Agreement of Settlement and Compromise, and for Distribution in the Above Entitled Estate" be and the same is hereby approved.

126 Cal.App.2d 87

M. G. N. OIL CO., Inc.

v.

GUIBERSON et al.

Civ. 20082.

District Court of Appeal, Second District, Division 2, California.

June 17, 1954.

Action for declaratory relief, accounting and damages, against defendants who had executed, for consideration, a written promise to assign interest in oil and gas leases. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that where agreement stated that formal assignments of the interest would be made upon the obtaining of a permit from the Commissioner of Corporations authorizing such assignment, complaint which failed to state that permit had been obtained did not state a cause of action.

Judgment affirmed.

1. Licenses ⇨18½(17)

Transfer of landowner's oil and gas interest is a transfer of a "security" within the Corporate Securities Act requiring permit from Commissioner of Corporations for sale of securities. Corporations Code, § 25000 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

2. Mines and Minerals ⇨74

Where agreement whereunder defendant promised to assign an interest in oil and gas leases provided that formal assignment would be made upon the obtaining of a permit from the Commissioner of Corporations, promisee could not recover under agreement without showing that permit had been obtained.

3. Trial ⇨18

Trial court in action on agreement to transfer interests in oil leases did not violate his duty to act with courtesy and patience and to extend to plaintiff every opportunity to present his case.

David G. Licht, Beverly Hills, for appellant.

Charles A. Prince, Beverly Hills, for respondents S. A. Guiberson, Jr., Southland Life Ins. Co., Title Insurance and Trust Co.

C. E. Spencer, Los Angeles, for respondent Virginia Velkov.

McCOMB, Justice.

From a judgment in favor of defendants, after trial before the court without a jury, in an action for declaratory relief, accounting and damages, plaintiff appeals.

Facts: Magnor Petroleum Company, hereinafter referred to as Magnor, was the holder of certain gas and oil leases located in Los Angeles County. On May 4, 1949, Magnor assigned the oil and gas leases to defendants. At the same time the following letter was signed by Allen Guiberson:

"May * * *, 1949

"Mr. J. A. Novelli and Mr. C. M. Morse
* * *

"This will confirm our understanding that, as consideration for your negotiating and arranging the transaction between Magnor Pet. Co. and the undersigned, whereby the undersigned acquired a one-half interest in the Oil and Gas Lease dated January 13, 1949 * * * the undersigned hereby assigns to you the following interests in the following Oil and Gas Leases: (Description) It is understood that formal assignments of the foregoing interests will be executed, acknowledged and delivered to you * * * upon the obtaining of a permit from the Commissioner of Corporations of the State of California authorizing such assignments.

"Very truly yours,
"S. A. Guiberson, Jr.
"By Allen Guiberson
"Allen Guiberson"

These are the questions necessary for us to determine:

First: *Did the complaint state a cause of action in view of the fact that there was no allegation that a permit had been obtained from the Commissioner of Corporations of the State of California authorizing the assignments mentioned in the letter set forth above?*

[1] This question must be answered in the negative. An instrument which evidences a fractional or percentage interest in oil and gas production is a "certificate of interest in an oil, gas or mining title or lease," and is a security within the meaning of the Corporate Securities Act, Corporations Code, § 25000 et seq. A permit is required for the assignment of such an interest. (People v. Sidwell, 27 Cal.2d 121, 126 [3], 162 P.2d 913; Blackburn v. Union Oil Co., 90 Cal.App.2d 775, 777 [1], 204 P.2d 69.)

[2] In view of this rule of law one of the essential allegations for a cause of action was absent from the complaint and it failed to state a cause of action in favor of plaintiff.

It should be noted that no evidence was introduced at the time of trial showing that such a permit had been obtained from the Corporation Commissioner of the State of California. Hence the alleged defect in the complaint was not supplied by evidence introduced at the trial.

Plaintiff having failed to allege or prove a cause of action the trial judge properly gave judgment in favor of defendants.

Second: *Did the trial court act arbitrarily to plaintiff's prejudice, necessitating a reversal upon the authority of* Hays v. Viscome, 122 Cal.App.2d 135, 264 P.2d 173?

[3] *No.* The record discloses that the trial judge acted with courtesy and patience throughout the trial and extended to plaintiff every opportunity to present his case. So far as the trial judge was concerned, plaintiff had a full, fair and complete trial. There is no analogy between the facts in Hays v. Viscome, supra, and the instant case.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel.

Affirmed.

MOORE, P. J., and FOX, J., concur.

125 Cal.App.2d 747

SIGLE
v.
SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

BARRISH
v.
SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 16231, 16232.

District Court of Appeal, First District, Division 2, California.

June 4, 1954.

Proceeding for writ of mandate to Superior Court requiring dismissal of criminal action because trial was not had within statutory period after finding of indictment. The District Court of Appeals, Nourse, P. J. held that asserted fact that large number of civil cases were pending did not excuse failure to proceed to trial within 60 days after finding of indictment, in view of statute giving criminal matters precedence over civil matters.

Writ issued.

1. Criminal Law ⚿575

Trial need not be had within statutorily prescribed time after finding of indictment if there is reasonable excuse for delay. Pen.Code, § 1382.

2. Criminal Law ⟹576(2)

Asserted fact that large number of civil cases were pending did not excuse failure to proceed to trial within 60 days after finding of indictment, in view of statute giving criminal matters precedence over civil matters. Pen.Code, § 1050.

◆

Nathan Cohn, San Francisco, for petitioners.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William K. Coblentz, Dep. Atty. Gen., Thomas C. Lynch, Dist. Atty., of City & County of San Francisco, Cecil Poole, Asst. Dist. Atty., San Francisco, for respondents.

NOURSE, Presiding Justice.

These companion cases present a demand for a writ of mandate to the superior court requiring the dismissal of a criminal action because trial was not had within sixty days after the finding of an indictment as required by section 1382 of the Penal Code. The defendant Barrish in case number 16232 has filed an identical petition with that in 16231 and has asked for the same relief. The two cases will be treated in one opinion and separate judgments will be entered.

[1] The State concedes that the parties were not brought to trial within the statutory time and rests on the defense that the circumstances show a sound and reasonable excuse for the delay. If this is so the writs must be denied.

The two petitioners were co-defendants in the criminal indictments with one Tarantino, both charging conspiracy. The same Tarantino was joined with another defendant in another indictment. All actions were assigned to the same department of the superior court. The last mentioned case went to trial on September 22, 1953, and continued for ninety trial days. Following a verdict of guilty, various motions were made on behalf of Tarantino ending in a sentence to the state penitentiary on February 26, 1954.

The record shows that on May 11, 1953 Barrish and Sigle demanded an immediate trial and on May 18, 1953 they made their first motion to dismiss because they had not been brought to trial in 60 days. They have persistently on almost innumerable occasions made similar demands and motions since, both before and after the trial of Tarantino on the other charge. At the time when they filed their petitions with this court, on April 9, 1954, they still had not gone to trial and no trial date has been set.

We are fully aware of the rule of In re Lopez, 39 Cal. 2d 118, 245 P.2d 1 and Ferenz v. Superior Court, 53 Cal.App. 2d 639, 128 P.2d 48. There it was held that the determining factor in cases of this kind is whether a good cause is shown—such as the crowded condition of the court's business. But we can not conclude that good cause has been shown here within the rule of the cited cases. (Dearth v. Superior Court, 40 Cal.App. 2d 56, 104 P.2d 376, 378.)

[2] To comply with the provision contained in section 1050 of the Penal Code that criminal matters should be given precedence over civil matters and to enable defendants in criminal actions to have the speedy trials which are guaranteed by the Constitution a greater number of judges should have been assigned to departments handling criminal matters. There are twenty-two judges in the Superior Court of the City and County of San Francisco, and the showing that a large number of civil cases were pending does not excuse the failure to assign a sufficient number of judges to handle criminal matters. Nor was there any showing made that the chairman of the judicial council was notified that a sufficient number of judges was not available to try criminal cases. In rule 35, adopted by the judicial council for the guidance of the superior court, it is provided that the departments handling criminal cases shall be sufficient in number to hear all criminal cases within the time required by law. Dearth v. Superior Court, supra.

Let a peremptory writ issue as prayed in both causes.

DOOLING and KAUFMAN, JJ., concur.

125 Cal.App.2d 795

PERSKE v. PERSKE et al.

Civ. 15847.

District Court of Appeal, First District,
Division 1, California.
June 9, 1954.

Action against plaintiff's husband and his divorced wife to quiet plaintiff's title to a lot. The divorced wife filed a cross-complaint to set aside as in fraud of the husband's creditors, his deed conveying his interest in the lot as a joint tenant with plaintiff to her, and to subject the lot to cross-complainant's execution lien for alimony and child support. From portions of a judgment of the Superior Court in and for the County of Monterey, Anthony J. Brazil, J., setting aside the deed, declaring plaintiff and defendant husband owners of half interests in the lot, and subjecting the husband's interest to cross-complainant's lien, plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the court could not disturb the trial court's findings contrary to plaintiff's and defendant husband's testimony, which the court determined to be fabricated and unbelievable in view of inconsistencies such testimony and witnesses' self-interest.

Portions of judgment appealed from affirmed.

1. Husband and Wife 🔑49¾(5)

The inference, created by joint tenancy deed to husband and wife of realty purchased with wife's separate funds that she intended a gift to husband of interest in realty may be rebutted by evidence of her intent not to make a gift.

2. Appeal and Error 🔑1010(1)
Evidence 🔑594

A trial court cannot arbitrarily disregard uncontradicted testimony, but appellate court will not interfere with trial court's finding that such testimony was false if there is any basis for such finding.

3. Appeal and Error 🔑994(3)

An appellate court cannot control trial court's finding or conclusion denying credence to certain testimony unless there are no matters or circumstances impairing accuracy of such testimony.

4. Evidence 🔑588

A trial judge has inherent right to disregard any witness' testimony or effect of any prima facie showing based thereon when he is satisfied that witness is not telling truth or testimony is inherently improbable due to its inaccuracy, uncertainty, lapse of time, or witness' interest or bias, all of which matters may be properly considered in determining weight of testimony, though no adverse testimony is adduced.

5. Trial 🔑382

A trial judge in nonjury case is arbiter of witnesses' credibility.

6. Evidence 🔑588

A witness may be contradicted by facts which he states as completely as by direct adverse testimony, there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story, and his manner of testifying may give rise to doubts of his sincerity and create impression that he is giving wrong coloring to material facts.

7. Appeal and Error 🔑1010(1)

In action to quiet title to lot as against plaintiff's husband and his divorced wife, who filed cross-complaint to set aside, as in fraud of husband's creditors, his deed conveying his interest in lot as joint tenant with plaintiff to her, and to subject lot to cross-complainant's execution lien for alimony and child support, trial court's findings contrary to plaintiff's and husband's testimony, which court determined to be fabricated and unbelievable in view of inconsistencies therein and witnesses' self-interest, cannot be disturbed on appeal. Civ.Code, §§ 3439–3439.12.

8. Quieting Title 🔑44(4)

In action to quiet title to lot as against plaintiff's husband and his divorced wife, who filed cross-complaint to set aside, as in fraud of husband's creditors, his deed conveying his interest in lot as joint tenant with plaintiff to her, and to subject lot to cross-complainant's execution lien for alimony and child support, trial court was entitled to consider, in weighing plaintiff's testimony, inconsistencies of two theories, both of which she attempted to establish, that she intended at all times to keep ownership of lot and that she and defendant husband mutually agreed that he was plaintiff's debtor to extent of half interest in lot. Civ. Code, §§ 3439–3439.12.

Thompson & Thompson, Monterey, for appellant.

Gustave L. Goldstein, Los Angeles, for respondent.

PETERS, Presiding Justice.

Elizabeth Perske, the plaintiff, is the second and present wife of defendant Dr. Frederich Perske, an osteopath. Pearl Perske, a defendant and the cross-complainant, is the first wife of the doctor. Elizabeth brought an action against her husband and Pearl to quiet her title to a lot in Pebble Beach. Pearl responded with a cross-complaint, charging that the property in question was the property of the doctor, and asked to have a conveyance from the doctor to Elizabeth set aside as in fraud of creditors, and the property made subject to a lien held by Pearl for alimony and child support. The trial court set aside the conveyance as fraudulent, found that Elizabeth and the doctor each owned a one-half interest in the lot, and subjected the one-half interest of the doctor to the lien of Pearl. Elizabeth appeals from those portions of the judgment. Her main contention is that the basic findings are not only unsupported, but contrary to the uncontradicted evidence.

Pearl secured a divorce from the doctor in July, 1945, in Los Angeles. The divorce decree ordered the doctor to pay $100 a month as alimony and $100 a month for six months for the support of the couple's two minor children, and thereafter to pay to Pearl an additional $50 a month for the support of the children. The doctor married Elizabeth Fenton, his present wife, and the plaintiff, in 1946. By a deed dated August 15, 1948, and recorded August 18, 1948, the doctor and Elizabeth became the record owners, as joint tenants, of a lot in Pebble Beach. The purchase price was $3,100. On August 22, 1949, the doctor, by grant deed recorded August 23, 1949, conveyed to Elizabeth his record interest in this lot. At this time the doctor was delinquent in his payments to Pearl in the amount of at least $625, and at the time of trial, in September, 1952, he owed Pearl $4,500.

In November of 1950 the doctor owed Pearl $1,950. She caused a writ of execution to be levied upon the Pebble Beach lot which could not be satisfied because the record title to the lot was then in Elizabeth. The writ, however, caused a cloud on the title. Elizabeth, in February, 1951, brought this action against her husband and Pearl to quiet her title to the lot, claiming sole ownership. Pearl filed a cross-complaint against the doctor and Elizabeth in support of her execution, alleging that because the property was in the name of Elizabeth her writ of execution could not be satisfied against the property, and averring that the deed from the doctor to Elizabeth was a fraudulent conveyance which should be set aside as void. Elizabeth answered the cross-complaint, alleging that the lot was purchased entirely from her separate funds; that at all times she intended the lot to be her separate property; that when the deed was put in joint tenancy she did not know the legal effect of such a deed and intended the lot to be her separate property; that in August of 1949 when she discovered that title to the lot was in the doctor's and her names as joint tenants, she requested the doctor to convey his interest to her in accordance with her original intention; that the doctor had no interest in the lot; and that in accordance with her request the doctor deeded the property to her.

The cause proceeded to trial on these issues. The trial court determined that the conveyance by the doctor to Elizabeth was fraudulent and should be set aside, that the doctor's interest in the property was subject to the lien of the levy of execution for $1,950 and was further subject to a total lien of $4,500 (which includes the $1,950) due to Pearl at the time of trial. Elizabeth's title was quieted only as to a one-half undivided interest in the Pebble Beach lot. Elizabeth appeals from those portions of the judgment adverse to her.

The trial court found that the allegations of Elizabeth's answer to the cross-complaint that she had paid the entire purchase price of the lot with her separate funds, that nothing was paid by the doctor, and that it was always her intention to own the lot as her separate property, were untrue. The court also found that since August of 1948 the doctor has been the owner of an undivided one-half interest in the lot; that since the conveyance by the doctor to Elizabeth in August of 1949 Elizabeth has held and now holds the record title of the doctor's one-half interest in trust for him and subject to the lien of the execution; that Elizabeth paid no consideration for the deed from her husband; that the doctor was insolvent on August 22, 1949, when he conveyed his interest in the lot to Elizabeth and is now unable to satisfy the writ of execution; that the conveyance to Elizabeth was made with her knowledge and consent and with the intent to cheat, hinder, delay or defraud Pearl in the collection of support moneys.

The point need not be labored that, if the findings that Elizabeth did not pay for the property from her separate funds, and that the doctor had a one-half undivided interest in the property which he conveyed to Elizabeth at a time he was indebted to Pearl, are supported by the evidence, the conveyance of such interest was fraudulent and was properly set aside. §§ 3439–3439.12, Civ.Code. Elizabeth attacks the judgment on several grounds, but her basic contention is that the evidence shows, without conflict, that she purchased the lot with her separate funds, and that the doctor had no interest in the lot. She contends that the findings to the contrary are unsupported.

It is conceded that the findings that the doctor received no consideration for the conveyance of his interest to Elizabeth, and that at that time he was in default in his payments to Pearl, are supported. Of course, the introduction of the deed by which title to the lot was taken in the doctor's and Elizabeth's names as joint tenants established a prima facie case that the doctor then became a joint owner of the property. But Elizabeth urges that the uncontradicted testimony of herself and the doctor establishes that she paid for the property with her separate funds, and that she never intended to make a gift of any interest to the doctor. At any rate, she contends, he never acquired an interest in the lot. She therefore contends that the prima facie case established by respondent was rebutted as a matter of law.

But three witnesses testified at the trial—Elizabeth, the doctor, and the sister of Elizabeth. The latter's testimony is only incidentally involved. There is no doubt that Elizabeth and the doctor testified that the property was purchased with Elizabeth's funds, that there was no intent to make a gift to the doctor, and that he never acquired an interest therein. If this testimony had been believed by the trial court it would have amply supported a judgment in favor of appellant. The question is, did it have to be believed? If so, the findings are unsupported. If not, the prima facie case established by respondent was not rebutted and supports the judgment.

Appellant produced a canceled cashier's check for $3,100 purchased by her, and which was used to pay for the lot. She produced a bank record indicating that a few days before the date of the deed she withdrew $3,100 from her account. She testified that this sum, so withdrawn, was used to purchase the cashier's check. She also testified that every cent of the money in this account was her separate property. Many of the substantial deposits in that account were made after appellant's marriage to the doctor. Thus, she testified that $2,000 in four $500 payments was derived from the repayment of a loan made by her to her brother-in-law, $1,127.50 was received from cashed-in defense bonds, $667 and $400 were received upon the sale of her privately-owned Chevrolet automobile, $131.75 and $600 were received upon the sale of antiques, and $300 upon the sale of her fur coat. Both Elizabeth and the doctor testified that not one cent of the doctor's money went into the purchase price of the lot. The sister of appellant testified that her husband had borrowed $2,000 from appellant, and repaid it in four $500 payments.

[1] To rebut the inference created by the joint tenancy deed that she intended a gift to her husband, appellant testified that when the property was purchased she had an understanding with her husband that since she had paid for the property it was "always to be my property," and that she did not understand the legal significance of a joint tenancy deed, but took title in that fashion because that was the way her parents held their property. Of course, in a proper case, the inference of a gift created by the joint tenancy deed may be rebutted by evidence of an intent not to make a gift. Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656. If the inference was here rebutted the doctor had merely a record title. His conveyance of such title to the true owner would not be a fraudulent conveyance. Kinnison v. Guaranty Liquidating Corp., 18 Cal.2d 256, 115 P.2d 450. At most, under such a state of facts, the doctor would be a constructive trustee for his wife of his joint tenancy interest, and the conveyance of such interest to her would not be fraudulent. Estate of Harris, 9 Cal.2d 649, 72 P.2d 873. It is further asserted that this conclusion is supported by the presumption that in making the conveyance to his wife the doctor was acting honestly, which presumption respondent, it is claimed, did not rebut by evidence of convincing force as required by the law.

Appellant next makes an argument directly inconsistent with the one first made. She urges that if the doctor did acquire a joint tenancy interest by the August, 1948, deed, the evidence shows that his 1949 conveyance to her was in discharge of an obligation owed to her. Such a conveyance would not be fraudulent. Greenwalt v. Mueller, 126 Cal. 636, 59 P. 137; Dandini v. Dandini, 82 Cal.App.2d 263, 186 P.2d 41; § 3439.03, Civ.Code. This contention is based on appellant's evidence that originally the property was to be taken in her name alone, but at the last minute she changed it to joint tenancy with the understanding that the doctor, when able, would repay to her his half of the purchase price, or $1,550. When the doctor was unable to repay this sum he deeded the property to her. The doctor corroborated this testimony.

It will be noted that appellant told two inconsistent stories. Her answer to the cross-complaint pleaded, and she offered testmony in support of the pleading, that she paid for the lot with her own money, took the deed in joint tenancy in ignorance of its legal effect, that she intended always that the lot should be her property, and that when she discovered title was in their joint names she requested the conveyance of the doctor's interest to her in accordance with her intention at the time of purchase. But at the trial, for the first time, appellant and the doctor testified that the deed was intentionally taken in joint tenancy subject to an agreement on the part of the doctor to pay her $1,550 when able, that, when the doctor became convinced he could not pay this sum to her, he conveyed his interest to her in satisfaction of this obligation. Respondent urges that these inconsistencies were properly considered by the trial court in passing on the credibility of appellant and her husband, obviously interested witnesses.

There was other evidence that undoubtedly was considered in passing on the credibility of these two witnesses. Appellant, in accounting for the purchase of a Cadillac automobile, registered in appellant's name and purchased after her marriage to the doctor, testified that the doctor partly paid for the car by turning in his privately-owned automobile, and that she paid in cash the balance of $900. The doctor corroborated this story. There was no evidence of a withdrawal of $900 from appellant's bank account at or about the time of this transaction. Appellant testified, however, that she got the money from a safe in her parent's home where she kept large sums, up to $3,000, in currency, in an envelope. These sums were so kept although appellant possessed several bank accounts in and from which she made frequent deposits and withdrawals. She kept this money in this fashion, she testified, for the purposes of paying for future travel, education, and the buying of antiques. Although the doctor corroborated this story at this trial, he had testified in Los Angeles in a contempt proceeding about the purchase of this Cadillac, and had not then disclosed that the $900 had come from his wife's funds.

There were other factors that the trial court could consider in weighing the testimony produced by appellant. She testified about the purchase of the cashier's check and was clear and positive in her testimony about the withdrawal of $3,100 from her account to make this purchase. But when cross-examined about other large deposits or withdrawals made in the same year she was quite vague and uncertain.

[2–6] Appellant urges that, under this evidence, the trial court was bound by the doctor's and her testimony, inasmuch as such testimony was uncontradicted, and was without power to disregard it. Of course, a trial court cannot arbitrarily disregard uncontradicted testimony. But where, as here, the trial court (by its finding that the property was not purchased entirely with appellant's funds) has necessarily found that the so-called uncontradicted evidence was false, an appellate court will not interfere if there is any basis at all to support the trial court. As was said in La Jolla Casa De Manana v. Hopkins, 98 Cal.App.2d 339 at page 345, 219 P.2d 871 at page 876: "An appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. (Citing cases.)" This rule is well settled, is supported by many authorities, and is applicable to this case.

[7] In the instant case the trial judge saw and heard appellant and the doctor testify. He knew of the inconsistencies in their testimony, and of their self-interest. He determined that their testimony was fabricated and not to be believed. He found contrary to their testimony. We cannot disturb his findings.

[8] Appellant, to succeed on this appeal, had to establish either that she intended at all times to keep ownership of the lot, or that there was a mutual agreement between the doctor and herself that the doctor was her debtor to the extent of a half interest. The two theories are inconsistent. But appellant attempted to establish both theories. This, standing alone, casts doubt upon her testimony. This inconsistency the trial court was entitled to consider in weighing her testimony.

The portion of the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

126 Cal.App.2d 116

TERLAU
v.
BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15880.

District Court of Appeal, First District,
Division 2, California.

June 21, 1954.

Rehearing Denied July 21, 1954.

Proceeding on petition of police captain for review of proceedings before city police commission, as result of which petitioner was fined for dereliction of duty. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment denying writ of mandate, and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that petitioner failed in his duty.

Judgment affirmed.

1. Municipal Corporations ⟹189(1)

A police captain who, after being informed that crimes are being committed within his district, makes no effort to alert any of his command, and makes no effort to conduct an investigation of the charges, is guilty of dereliction of duty.

2. Municipal Corporations ⟹189(2)

Evidence sustained finding that police captain was derelict in his duty, warranting imposition of fine by city police commission.

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George V. Curtis, San Francisco, for appellant.

Dion R. Holm, City Atty. of the City and County of San Francisco, Bernard J. Ward, Deputy City Atty., San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal from an adverse judgment denying a writ of mandate following a review of the proceedings before the San Francisco Police Commission in which petitioner and appellant was fined for dereliction of duty.

The appellant, a captain in the San Francisco Police Department, was charged with the violation of section 141 of the rules of the department which read: "Section 141 of Rules and Regulations: Shall be responsible, so far as in his power, for the preservation of the peace in his district, the prevention of and detection of crime and the enforcement of all criminal laws and penal ordinances."

The evidence heard before the police commission, and found to be true, and then heard before the superior court, and found to be true, is that appellant was captain of the Richmond police station with some two hundred officers and patrolmen under his command, that he was informed by a "special duty" man that there were rumors of gambling and indecent shows in his district which were attended by juveniles; that he merely instructed his informant to keep his eyes open. (It appears that this officer did as he was instructed, but that, since he worked only in the day time he saw nothing of the evils occurring at night.)

Because of numerous complaints from residents of the district, an investigator was assigned by the Attorney General of the State; raids were made on two places within the district and arrests were made for gambling, indecent shows, and the sale of liquor to minors. This was all done without the cooperation of the captain of the district and without the assistance of the police under his command.

[1] In his own defense the appellant testified that he did not alert any of his command concerning the report that gambling and other illegal acts were occurring in his district; that he always waited until someone notified him that illegal acts were being committed, and that, unless he personally knew that such acts were being committed, he took no affirmative action. The rule which he was charged with having violated made him responsible for "the prevention of and detection of crime" within his district. Manifestly when the captain is informed that crimes are being committed within his district and makes no effort to alert any of his command, and

makes no effort to conduct an investigation of the charges he has failed to perform his duty as captain within the purview of rule 141.

[2] It would serve no purpose to review or analyze the cases cited by appellant relating to similar proceedings. Each case rests on its own facts. The only issue here is the sufficiency of the evidence to support the finding that appellant failed in his duty. He is not entitled to a new trial of the facts in this court. Our review of the record satisfies us that appellant was fairly tried and that the evidence fully supports the judgment.

A motion to dismiss the appeal was made by the City Attorney on the ground that since the appellant had paid the fine levied by the Police Commission his appeal is now moot.

We prefer to treat the matters on the merits and the motion is therefore denied.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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126 Cal.App.2d 132

TONNESEN v. TONNESEN et al.

Civ. 19969.

District Court of Appeal, Second District, Division 1, California.

June 22, 1954.

In wife's divorce action, wherein husband's parents were named as parties defendant on theory that conspiracy existed in reference to holding of certain property, the Superior Court, Los Angeles County, H. S. Farrell, J., entered the judgment challenged by the wife's appeal. The District Court of Appeal, Doran, J., held that evidence sustained trial court's finding that plaintiff's allegations concerning conspiracy were not true, and that wife had not, as she alleged, been defrauded of her share in community property by virtue of such conspiracy.

Affirmed.

1. Judgment 🔑524, 527

An interpretation upholding validity of judgment is favored, and to clarify any uncertainty, resort may be had to findings of fact.

2. Divorce 🔑162

Where resort to findings of fact made it clear that plaintiff-wife's allegations concerning conspiracy involving defendant-husband's father and mother were not true and that only judgment intended was that which was rendered, namely an interlocutory judgment of divorce, judgment could be upheld notwithstanding plaintiff's complaint that no judgment had been rendered for or against her husband's father and mother, who had been made parties defendant.

3. Divorce 🔑253

In wife's divorce action, wherein husband's parents were named as parties defendant on theory that conspiracy existed in reference to holding of certain property, evidence sustained trial court's finding that plaintiff's allegations concerning conspiracy were not true, and that wife had not, as she alleged, been defrauded of her share in community property by virtue of such conspiracy.

Hahn, Ross & Saunders, Los Angeles, for appellant.

Jerry Giesler and Robert A. Neeb, Jr., Beverly Hills, for respondents.

DORAN, Justice.

The appellant instituted the present action for divorce against the respondent husband, and also against the husband's parents on the theory that a conspiracy existed in reference to the holding of certain property and alleged concealment and disposal of community property. The trial court found in favor of the appellant wife in reference to the divorce issue, and found "That none of the allegations in paragraph IV of the complaint is true except that the

1950 Buick automobile and certain furniture and furnishings in possession of the defendants as hereinafter set forth are community property". Paragraph IV of the complaint continued the conspiracy allegations hereinbefore referred to in reference to the ownership of an apartment house claimed to be community property.

An interlocutory divorce, granted to the wife, gave to the respondent husband the Buick automobile, and to the wife certain designated items of household furnishings. Custody of the two minor children was awarded to the parties jointly, physical possession of the children being given to the wife subject to the husband's right to have said children on alternate weekends and during one-half of vacation periods. The husband was ordered to pay $120 per month for support of the children, $1 per month alimony, and attorney fees.

Appellant complains "That the plaintiff did not receive a fair and impartial trial, and justice did not prevail". Among other points appellant contends that "There is an incomplete judgment", in that although the action was brought against the husband's father and mother, Victor E. and Ruth K. Tonnesen, no judgment was rendered for or against these parties.

Answering this contention respondents' brief points out that, as hereinbefore mentioned, the trial court found that paragraph IV of the complaint related to these defendants was not true. Moreover, as appears from the Clerk's Transcript, the interlocutory judgment of divorce from which plaintiff now appeals, was prepared by appellant's attorneys. As respondents state, "It would therefore be a very odd rule that would permit counsel for an appealing party to prepare a judgment and leave out some phase, submit the same to the Court without an approval as to form, and then base an appeal upon the fact that counsel left out a portion thereof".

[1, 2] It is a well established rule that an interpretation upholding the validity of a judgment is favored, and that to clarify any uncertainty, "resort may be had to the findings of fact". Goldsworthy v. Dobbins, 110 Cal.App.2d 802, 810, 243 P.2d 883, 888. In the present case, the findings of fact make it clear that plaintiff's allegations concerning a conspiracy involving the husband's father and mother, were not true, and that the only judgment intended was that which was rendered, namely an interlocutory judgment of divorce. Appellant has suffered no prejudice in the instant situation.

[3] The appellant further contends that "The husband disposed of community property in fraud of the wife's rights, and the greater part of said property ended up in the possession of his mother and father". Appellant's brief culls from the record certain items of testimony by the wife and by the husband's mother alleged to support this contention. A review of the entire record, however, discloses substantial evidence in support of the trial court's finding that plaintiff's allegations concerning these matters were not true. The only community property found to exist was a Buick automobile awarded to the husband, and certain household furnishings given to the wife. Such being the case, the well established rule prevents a further review of the evidence or a retrial of these issues.

Certain pieces of real estate had been purchased with money supplied by the husband and wife, which properties were later sold, the parties receiving back the amount of equities therein. What is referred to as the Berwick property was sold to the husband's parents for $12,000, a part of the consideration being the cancellation of two notes in the amount of $7,500 which had been given to the parents, and a cash payment by the parents of $4,500. Another complaint relates to certain money received as damages in a personal injury action and paid over to the husband's parents. There is substantial evidence, however, indicating that in this transaction, the parents were only being reimbursed for doctor bills and expenses for which money had been furnished. Appellant's contentions that in these and other transactions the trial court should have found that the wife was being defrauded, present no matter requiring or justifying a reversal.

Other contentions made by appellant are likewise without merit. The record does not support the assertion that "The husband obtained the signature of the wife to community real property while she was incompetent". In refusing to allow plaintiff to file an amended complaint, the trial court exercised its discretion, and there is no showing that in so doing, there was any abuse of discretion.

The same may be said in reference to appellant's contention that "The trial court abused its discretion in awarding the plaintiff wife only a dollar per month alimony". Considering the fact that there was no property other than the husband's earnings, from which the husband was ordered to pay $120 per month for support of the children, plus a fee for the wife's attorney, the trial court by making an alimony award of $1 per month, left the matter of alimony open for modification should conditions change. This is not an uncommon practice, and no reversible error is apparent.

Appellant further complains that the wife was not awarded half or more of the community property. It appears that the trial court gave a Buick automobile to the husband, purchased in 1950 for $3,000 but value at time of trial not shown. The wife was awarded the household furnishings, valued at $640. The husband was further ordered to pay a community medical bill of $1,500. These matters were doubtless taken into consideration by the trial court in dividing the property, and the record presents no reversible error in reference thereto.

There is no merit in appellant's contention that "The Court committed reversible error when it erroneously excluded certain evidence, and * * * refused to allow the plaintiff to make an offer of proof". These alleged errors relate to a refusal to admit evidence concerning injuries received by plaintiff in an automobile accident, total sales price of the Berwick property, cross-examination of the husband in regard to a doctor bill; and as to when the wife had been permitted to see the children, in regard to which latter item an offer of proof was refused.

It appears that the excluded evidence related largely to irrelevant and immaterial matters, and that both parties were accorded a fair and impartial trial with adequate latitude in respect to all relevant evidentiary matters. After hearing the evidence, the trial court found on all material issues, granted an interlocutory divorce to appellant wife, divided the existing community property, made an award for child support, and left the matter of alimony open by granting nominal alimony to the wife. The evidence supports the findings and judgment, and no reversible error was committed.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

125 Cal.App.2d 840

WARD v. OAKLEY CO. et al.

Civ. 19850.

District Court of Appeal, Second District, Division 2, California.

June 14, 1954.

Wrongful death action arising out of drowning of plaintiffs' children in slough located on defendants' land. The Superior Court, Los Angeles County, Ellsworth Meyer, J., sustained demurrers and entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the complaint failed to state a cause of action.

Affirmed.

1. Negligence 🔑**32(1)**

Where person goes on premises of another without invitation and as a bare licensee, he takes all risks arising from condition of premises, and owner, though he acquiesces in licensee's presence, is not liable for injuries sustained because of mere defect in premises. Code Civ. Proc. § 377.

2. Negligence 🔑**111(1)**

Complaint, alleging that defendants had permitted children to come upon their land with result that children were drowned in slough, did not state cause of action for wrongful death, since children were mere licensees, in absence of allegation of overt act on part of defendants which resulted in the accident. Code Civ. Proc. § 377.

3. Negligence ⟹39

A body of water, natural or artificial, does not consitute an attractive nuisance which will subject owner to liability for trespassing children who are attracted thereto and drowned, unless death is caused by artificial, uncommon, dangerous and concealed contrivance, constituting a trap, which can be readily safeguarded without destroying its usefulness or imposing upon owner an undue burden.

4. Negligence ⟹39

The essential elements of cause of action for death of child caused by attractive nuisance, which included an artificial, uncommon, dangerous and concealed contrivance constituting a trap, are that the dangerous hazard causing death be artificially created by landowner, that it be so concealed as to constitute a trap, and that it could have been readily guarded without destroying its usefulness or placing upon the owner an undue burden.

5. Negligence ⟹111(3)

Complaint, alleging that children entered upon defendants' land and were drowned while wading in slough to or around barge did not state cause of action under attractive nuisance doctrine, in absence of allegation of causal connection between maintenance of barge and death. Code Civ. Proc. § 377.

6. Nuisance ⟹72

A private party does not have a cause of action on account of public nuisance unless he alleges facts showing special injury to himself in person or property, and of a character different in kind from that suffered by the general public. Civ. Code, §§ 3479–3480.

7. Nuisance ⟹76

Complaint, alleging that plaintiff's children had gone upon defendants' land and had been drowned in slough, failed to state cause of action predicated upon theory that defendants maintained public nuisance, in absence of allegations showing that alleged nuisance invaded some right belonging to people in the neighborhood generally or that alleged nuisance infringed personal right of plaintiff, resulting in special injuries different from those suffered by public generally. Civ. Code, §§ 3479–3480.

8. Nuisance ⟹76
Pleading ⟹8(3)

Allegation, in wrongful death action, that maintenance of portion of slough in which plaintiff's children drowned constituted public nuisance was a mere conclusion of law and was insufficient to state cause of action on theory that defendants maintained a public nuisance. Civ. Code, §§ 3479–3480.

9. Death ⟹37

Any purported cause of action for violation of statute making it a misdemeanor for a person to knowingly permit existence on his premises of any pit dangerous to persons legally on the premises or to minors under age of twelve years, was barred by statute of limitations one year after date of drownings of such children in slough located on defendants' land. Health and Safety Code, § 24400; Code Civ.Proc. § 340, subd. 3.

10. Limitation of Actions ⟹127(11)

If new cause of action is introduced into complaint by way of amendment, action is deemed to have been commenced, so far as such cause of action is concerned, at time of amendment to the complaint, for purpose of ascertaining whether statute of limitations has barred prosecution of new cause of action.

11. Limitation of Actions ⟹127(15)

Although action for drowning of children in slough on defendants' land was timely instituted, on separate grounds that defendants had permitted the children to enter upon their land, that defendants had maintained attractive nuisance, and that defendants had maintained public nuisance, amended complaint seeking to state cause of action on theory that defendants had violated statute making it a misdemeanor to permit dangerous pit to exist on one's property purported to state new cause of action, and, not having been filed within one year of unfortunate drowning, was barred by statute of limitations. Health and Safety Code, § 24400; Code Civ.Proc. § 340, subd. 3.

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Jerome Weber, Los Angeles, for appellant.

James G. Scarborough, Leonard Comegys and J. Gregg Evans, Los Angeles, for respondents Oakley.

Chase, Rotchford, Downen & Drukker, and Otto M. Kaus, Los Angeles, for respondents Crail.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining without leave to amend of their demurrer to plaintiff's second amended complaint in an action to recover damages under section 377 of the Code of Civil Procedure for the wrongful death of plaintiff's two children, plaintiff appeals.

Facts: The second amended complaint purports to allege 8 causes of action. The first 4 apply to the wrongful death of plaintiff's decedent James Elwood Ward, Jr., and the last 4 are identical except in that they apply to the wrongful death of plaintiff's decedent William Gerard Ward. Therefore we shall refer hereafter to the first and fifth causes of action as the first cause of action, to the second and sixth as the second, etc.

Defendants Oakley Company, J. W. Oakley and Bella W. Oakley will be referred to as defendants Oakley; defendants Crail Brothers, Rotary Materials Company and Ed Crail will be referred to as defendants Crail; and plaintiff's decedents as plaintiffs.

The second amended complaint alleged the following facts in the respective causes of action:

First Cause of Action.

Defendants Oakley were the owners of a portion of Bixby Slough and on September 8, 1951, defendants Crail were lessees of the land owned by defendants Oakley; on that day plaintiffs lost their lives; the land owned by the Oakleys and leased by the Crails was almost covered by a large body of water, namely Bixby Slough; the shoreline of the water varies with the seasons; the slough receives water from a large watershed; the water flowing into the slough carries with it silt, colloids and a relatively small quantity of fine sand; the colloidal materials thus carried into the slough are so fine in texture as to remain suspended in solution and in the course of geological time great quantities of these colloids have become deposited to great depths on the bed of the slough and these materials are commercially adaptable.

Defendants Crail, under agreement with defendants Oakley engaged in a mining operation in the course of which they removed from the slough hundreds and thousands of tons of these colloids by means of a bucket and drag line for commercial use; great quantities of these colloids were deposited on the upland and "elsewhere in the submerged areas."

The colloidal material deposited on the upland, when dehydrated, is firm, but when submerged becomes viscuous plastic solid which reverts to a semi-plastic state when agitated by running, walking or wading.

A deposit of such colloids was on the shore near a rock and oil driveway on Vermont Avenue and this deposit had no vegetable growth on it, forming convenient access to the water; this deposit was covered with sand in certain places. The lands involved are near major highways, near a housing development which accommodates two thousand children, and are an attractive play area for children. There have been six previous drownings in the water in previous years, involving children under the age of twelve and parts of the land not affected by the mining operation were not unsafe for walking, wading or swimming; the mining operation has been abandoned without precaution to safeguard children, the area remains accessible, but was unposted and unguarded; the dangerous condition of the area is not apparent or obvious to children and it is practical to fence it or to take other precautions; defendants knew, or should have known, that children were accustomed to play on the land and that children would not discover the danger because of their youth. The condition of the soil is also said to be the artificial result of the mining operation. Defendants permitted the children to come onto the area by their failure to take any measures to warn them against entering the area or by their failure to take any precautions to prevent harm to the children.

It is also alleged that plaintiffs entered with the "consent, express or implied, of defendants and each of them" and were dragged and sucked under by the mud while wading.

Second Cause of Action.

The second cause of action repeats in substance all the allegations of the first, except the conclusion that the children entered with the consent, express or implied of defendants and adds the allegation that there was a dredging barge on the water which was used by defendants in connection with the mining operation; that the youngsters were drowned while wading to or around the barge and that defendants permitted children to play around the barge.

Third Cause of Action.

The third cause of action incorporates all the allegations of the first cause of action and adds allegations to the effect that the condition created and maintained by defendants was a public nuisance.

Fourth Cause of Action.

The fourth cause of action includes the allegations of the first concerning the ownership of the land, the lease to defendants Crail for the purpose of engaging in a mining operation which resulted in excavations being made below the water level. It further alleges the abandonment of the mining operation without fencing the so-called excavations.

[1,2] *Questions:* First: *Did the first count allege a cause of action under the provisions of section 342,*[1] *Volume 2, Restatement of the Law of Torts, 1934, p. 932 and the decision in Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 194 P. 2d 706?*

No. Where a person goes on premises of another without invitation and as a bare licensee, and the owner of the property acquiesces in his presence, if injury is sustained by reason of a mere defect in the premises the owner is not liable since the licensee takes all the risks arising from the condition of the premises. (Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 267 P.2d 841.)

In Fisher v. General Petroleum Corp., supra, it was expressly held that the rule announced in section 342 of the Restatement of the Law of Torts, supra, so far as it pertained to licensees was not the law in California. (See Fisher v. General Petroleum Corp., supra, 123 Cal.App.2d 770, 267 P.2d 841.)

With reference to Newman v. Fox West Coast Theatres, supra, the case merely held that where as in such case defendants' failure to comply with its duty constituted active negligence, under the law in California defendant was liable. In the present case there is no allegation of active negligence on the part of defendants, nor may any inference thereof be drawn from the facts which are alleged. Likewise in the Newman case plaintiff was an invitee, while in the case at bar the injured parties were merely licensees. Therefore Newman v. Fox West Coast Theatres, supra, is not here applicable.

Since in the instant case count I alleged that plaintiffs were merely licensees on defendants' property, and there is a total absence of any allegation of an overt act on the part of defendants or either of them which resulted in the unfortunate accident, the above stated rule is here applicable and the trial court properly sustained the demurrer to the first count.

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[1] Section 342 reads: "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon, if, but only if, he (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warn them of the condition and the risk involved therein."

[3-5] Second: *Did the second count state a cause of action on the theory that defendants maintained an attractive nuisance?*

No. It is settled that a body of water, natural or artificial, does not constitute an attractive nuisance which will subject the owner to liability for trespassing children who are attracted thereto and are drowned. (Peters v. Bowman, 115 Cal. 345, 347 et seq., 47 P. 113, 598; Demmer v. City of Eureka, 78 Cal.App.2d 708, 710 [1], 178 P.2d 472.)

There is an exception to this rule where the death of a child is caused by an artificial, uncommon, dangerous and concealed contrivance constituting a trap, which can be readily safeguarded without destroying its usefulness or imposing upon the owner an undue burden. (Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 518 [2], 271 P. 1060; Faylor v. Great Eastern, etc., Co., 45 Cal.App. 194, 199, 187 P. 101.)

The essential elements of a cause of action under the "hidden or concealed trap" exception are (a) that the dangerous hazard causing death be artificially created by the owner, (b) it be so concealed as to constitute a trap, and (c) that it can be readily guarded without destroying its usefulness or placing upon the owner an undue burden.

Count II alleges that the attractive nuisance consisted of a barge maintained on the premises by defendants. However, there is no allegation that the barge caused or contributed to the death of either minor. Under these circumstances the maintenance of the barge does not bring the case under the attractive nuisance doctrine, despite the conclusion stated in the pleading that its maintenance in connection with the mining operations constituted such a nuisance. There is a total absence of any allegation of a causal connection between the maintenance of the barge or the beach surrounding the waterway, or the beach surrounding the slough, and the unfortunate drownings. In fact from the pleading the contrary appears, the allegation being that the deaths were caused by the dangerous mud beneath the waters.

The discussion in the following cases shows that plaintiffs have failed to allege a cause of action under the attractive nuisance doctrine as applied in California:

Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993, was a suit by a parent to recover damages for the death of her ten-year old son who fell into a water hole in a storm drain maintained by the defendant and was drowned. Judgment in favor of the defendant after the sustaining of a demurrer to plaintiff's amended complaint was affirmed on appeal and petition for a hearing in the Supreme Court was denied. Appellant argued that under her complaint the hole constituted a concealed trap under the attractive nuisance doctrine as applied in the Sanchez case. (205 Cal. 515, 271 P. 1060.) The court, upon the authority of Morse v. Douglas, 107 Cal.App. 196, 198, 290 P. 465, and other cases cited, stated the rule as follows (115 Cal.App. at pages 126, 127, 300 P. at page 995):

"In order to constitute an attractive nuisance there must be an appliance or contrivance that is artificial, uncommon, dangerous, and constituting a trap for a young child, which can be made safe easily and without destroying its usefulness."

The court distinguished the facts of the Sanchez case as follows (115 Cal.App. at pages 127, 128, 300 P. at page 996):

"In the Sanchez Case the defendant maintained an open irrigation ditch about three feet deep through which it conveyed irrigating water to its consumers. In the bottom of this ditch there was constructed an unprotected and unguarded siphon down which the water rushed. While the plaintiff's minor son was playing in the water of the ditch he fell into, or was sucked into, this siphon and was drowned. This state of facts brings this case within the attractive nuisance doctrine as announced and established in California. The siphon was a contrivance or appliance constructed by the owner of the ditch and was a hidden danger and a trap for a young and inexperienced child. It was artificial and not natural. Its dangers could have been guarded against easily without destroying or even affecting its usefulness.

"In the instant case the pool was not a contrivance or an appliance created by an act of the owner of the property. It was caused either by the water falling into the drainage ditch from the cement drain or by the banks of the ditch caving in and forming a dam, probably by both.

"It has been repeatedly held in California that a pond, excavation, or pool of water is not an attractive nuisance under the definition of the term adopted here. Loftus v. Dehail, 133 Cal. 214, 65 P. 379; Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, 56 Am.St.Rep. 106, and Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414, 418."

In Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971, similar facts were alleged in the amended complaint to which a demurrer was sustained without leave to amend. Appellant contended that his case fell under the "hidden trap" exception as applied in the Sanchez case. The Supreme Court granted a hearing after decision of the Appellate Court for the purpose of determining whether the rule announced in the Beeson case or the doctrine of the Sanchez case should govern. In accepting the former and rejecting the latter, the court said in part, (8 Cal.2d at page 745, 68 P.2d at page 973):

"It is clear from the recited allegations that the complaint is framed to state a cause of action under the attractive nuisance doctrine as recognized in this jurisdiction if it may, under the facts, be so alleged. This exception to the general rule that the owner of land is under no obligation to keep it in a safe condition for trespassers is based upon the principle that one who maintains upon his land something in the nature of a trap or concealed danger is under a duty to use ordinary prudence and foresight to prevent an injury to children which might be expected where it can be guarded against without placing an undue burden upon the owner of the land and his right to make a beneficial use of it."

The court discussed the Beeson and Sanchez cases as follows (8 Cal.2d at pages 746, 747, 68 P.2d at page 974):

"There, also [Beeson v. City of Los Angeles], the pool of water was formed by a storm drain in which muddy water stood at an average depth of approximately one foot, except at one end where there was a pit or hole about seven or eight feet in depth concealed by the muddiness of the water and the debris, and caused by the emptying of the water into the open drainage ditch from a cement conduit with such force as to dig out the floor of the open drainage ditch. There also notice of the dangerous condition of the ditch and of the fact that children played there and failure to remedy the situation were alleged in the complaint. It was held that the doctrine of attractive nuisance did not apply on the ground that the concealed hole was not an artificial contrivance or appliance maintained by the owner of the ditch and, on this ground, the case was distinguished from Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060. In that case a child fell into an open irrigation ditch of the average depth of three feet and slipped into a tunnel which carried the water under a creek. The water in the canal was muddy and the opening of the tunnel could not be seen. It was held that the shallow muddy water in the canal, the concealed opening of the tunnel of a much greater depth which was wholly unguarded constituted a trap; that, while the children assumed the risk of the open, obvious, notorious danger incident to the canal, they did not assume the risk of an unknown, concealed, and unguarded danger, and therefore the case came within the doctrine of attractive nuisance.

"These two cases are not at variance when weighed in the light of all the circumstances. In the former case the court took into consideration the common knowledge that the perils of water are instinctively known even by a boy of ten years of age and the further fact that water running over soil operates against the probability of a continuous even bed. * * *

These matters of common knowledge should be applied in the instant case and differentiate it from the Sanchez Case. In the latter case there was a concealed contrivance which no one would suspect. And common knowledge again tells us that the remark of the learned justice in the Beeson Case that the boy in the Sanchez Case either slipped or was 'sucked' into the syphon was justified."

In support of its decision in the foregoing case, the court quoted at length from Peters v. Bowman, supra, 115 Cal. at page 356, 47 P. at page 599, wherein the court, in denying a rehearing, speaking through Chief Justice Beatty, said in part:

"The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character."

In King v. Simons Brick Co., 52 Cal.App. 2d 586, 126 P.2d 627, the complaint sought damages for the death of a twelve-year old boy who, while wading in the shallow perimeter of an abandoned clay pit filled with opaque water, fell into a deep hole and was drowned. The court pointed out the distinguishing features of the Sanchez and Faylor cases to be the concealed unguarded syphon in the open irrigation ditch in the first, and the hidden stope in the floor of the mining tunnel in the second, and affirmed the judgment for defendant following the sustaining of a demurrer to the complaint upon the authority of the Beeson and Melendez cases.

In Betts v. City and County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456, plaintiff recovered damages for the drowning of his seven-year old boy in a public park reservoir when he slipped down a steep, mossy and wet spillway into the water. On appeal plaintiff sought to support the judgment under the hidden or concealed danger theory. The appellate court reversed the judgment on the ground that the hazard causing death was an open source of danger and the perils thereof should have been obvious to the boy. A hearing was denied by the Supreme Court.

Reardon v. Spring Valley Water Co., 68 Cal.App. 13, 228 P. 406, was an appeal from a judgment in defendant's favor after demurrer sustained. The complaint alleged that defendant owned a reservoir in a populous neighborhood, which was unguarded and easily accessible from public streets; that children were accustomed to play therein, which fact was known to defendant; that defendant maintained in the reservoir an unsecured rowboat; that plaintiff's minor son, attracted to the boat, boarded it, floated out into the reservoir, fell into the water and was drowned. Plaintiff contended that the maintenance of the unguarded boat which attracted the child to the reservoir removed the case from the application of the established general rule announced in the Peters and Polk cases, supra. To this contention the court said (68 Cal.App. at page 18, 228 p. at page 408):

"Can it be that if he falls from a rowboat left upon the water by the owner of the property and is drowned a different legal principle is involved? We think there is no reason for a different rule in the instance last mentioned, and an examination of the following authorities will indicate that there is no change in the principle to be applied, because a child was drowned after falling from a floating object placed in the water by the owner of the property. (Cases cited.)

"The cases last cited involved situations where young children fell from rafts or logs into an unfenced body of water upon private property. We think that upon neither reason nor authority can the instant case be differentiated in principle from the cases of Peters v. Bowman, supra, and Polk v. Laurel Hill Cemetery Ass'n, supra."

The demurrer was properly sustained to this count.

[6–8] Third: *Did the third count allege a cause of action predicated upon the theory that defendants maintained a public nuisance?*

No. A private party does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property, and of a character different in kind from that suffered by the general public. (Frost v. City of Los Angeles, 181 Cal. 22, 24 [1] et seq., 183 p. 342, 6 A.L.R. 468)

In this count there is a total absence of an allegation of any facts showing (a) that the alleged nuisance invaded some right belonging to the people in the neighborhood generally, or (b) that the alleged nuisance infringed any personal right of plaintiffs, resulting in special injuries to them different from that suffered by the public generally.

A public nuisance is defined by the statute (Civil Code, sections 3479–3480) to be something which is injurious to health, is offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use of any public street or highway, affecting at the same time an entire community or neighborhood.

Clearly in the instant case there is an entire absence of allegations in count III of the complaint to meet the foregoing requirements.[2] Mr. Chief Justice Gibson in Kreling v. Superior Court, 18 Cal.2d 884, 886[2], 118 P.2d 470, 471, thus accurately states the rule here applicable:

"But the complaint does not set forth facts from which it can be concluded that the activities of these petitioners constituted a public nuisance within the terms of our statute. Allegations of fact are required from which it can be determined that the furnishing of such services and supplies is within the statutory definition of 'public nuisance' as activity 'which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property.' "

The trial judge properly sustained the demurrer to the third count.

[9–11] Fourth: *Did the fourth count state a cause of action for violating the provisions of section 24400 of the Health and Safety Code, which reads in part as follows: "Every person * * * who knowingly permits the existence on the premises of any * * * pit * * * dangerous to persons legally on the premises, or to minors under the age of twelve years, who fails to cover or fence securely * * * is guilty of a misdemeanor"?*

No. Any purported cause of action for violation of the quoted statute was barred by the statute of limitations (Code of Civ. Proc. sec. 340, subd. 3) because it was not filed within one year after the date of the unfortunate drownings.

The cause alleged that the drownings occurred on September 8, 1951. The second amended complaint by which count IV was introduced into the complaint was filed on October 23, 1952.

It is settled that if a new cause of action is introduced into a complaint by way of an amendment, the action is deemed to have been commenced so far as such cause of action is concerned at the time of the amendment to the complaint for the purpose of ascertaining whether or not the statute of limitations has barred the prosecution of the new cause of action. (Rideaux v.

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[2] The mere allegation in the count that the maintenance of the portion of the slough involved constituted a public nuisance is a mere conclusion of law and is insufficient.

Torgrimson, 39 Cal.App.2d 273, 275, 102 P.2d 1104; Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 478, 137 P. 25.)

Applying this rule to the facts of the present case it is apparent that any cause of action alleged in the fourth count was barred by the statute of limitations since it was not filed until more than one year after the injury is alleged to have occurred, with the result the trial court properly sustained a demurrer to this count.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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GREEN
v.
MENVEG PROPERTIES, Inc. et al.

Civ. 19887.

District Court of Appeal, Second District,
Division 3, California.

June 15, 1954.

Rehearing Denied July 6, 1954.

Hearing Denied Aug. 10, 1954.

Action for personal injuries sustained when plaintiff, who was working on a lighting pole on defendant's property, fell when pole collapsed. The Superior Court, Los Angeles County, Ralph K. Pierson, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to support finding that prior lessees had surrendered their lease and that defendant had assumed possession and control of the premises.

Judgment affirmed.

1. Electricity 🔑19(5)

In action for injuries sustained when lighting pole on defendant's premises fell while plaintiff was replacing thereon lighting fixtures which his employer had removed and which defendant requested be replaced, evidence was sufficient to support finding that prior lessees had surrendered, and that defendant had assumed, possession and control of the premises.

2. Electricity 🔑19(5)

In action for injuries sustained when lighting pole on defendant's premises fell while the plaintiff was replacing thereon lighting fixtures which his employer had removed and which defendant requested be replaced, evidence on issue of whether there had been an honest difference of belief as to whether the fixtures belonged to employer supported finding that plaintiff was an invitee at time of accident.

3. Electricity 🔑15(2)

Where plaintiff was injured when pole on defendant's premises fell while plaintiff was replacing thereon lighting fixtures which plaintiff's employer had removed and which defendant requested be replaced, whether plaintiff was an invitee depended upon whether he had been sent upon property for purposes exclusively his employer's, or at defendant's request for mutual advantage of defendant and employer.

4. Trial 🔑260(1)

Refusal to give requested instruction, which was covered by instructions given, was not error.

5. Trial 🔑261

Instruction which was requested to be given in action for injuries sustained when lighting pole on defendant's premises fell while plaintiff was replacing thereon lighting fixtures which plaintiff's employer had removed and which misstated the law with respect to defendant's duty of inspection was properly refused.

6. Electricity 🔑19(13)

Instruction which was requested by defendant in action for injuries sustained when lighting pole on defendant's premises fell while plaintiff was working thereon, that unless defendant was in possession and occupation of premises a reasonable time before accident he had no duty to make an inspection of the condition of the pole, was properly refused, the term "a reasonable time before accident", as used, conveying no relevant meaning.

7. Electricity ⟹16(5)

Where defendant assumed possession of property the latter part of November and plaintiff was injured when pole on premises fell while plaintiff was working thereon on the 30th of the following January, defendant had reasonable time within which to exercise his duty to inspect the condition of the pole.

8. Negligence ⟹54

"Possession", such as is necessary to impose liability to persons injured on property, may or may not mean the same as "occupancy", and means the fact or state of being under one's control, and relates to a condition in which not only one's own dealing with the property is physically possible, but every other person's dealing with it is capable of being excluded.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

9. Negligence ⟹32(1)

If an owner invites someone to go upon his land, the fact that he may not then be in actual occupancy of the land would not absolve him of the duties of an invitor.

10. Landlord and Tenant ⟹167(1)

Where prior lessees surrendered their rights under lease and owner assumed exclusive control of property, and asserted control of property in dealing with employer of person who was injured on property, owner had possession of the property, necessary to his being found liable to injured person, irrespective of whether he might still have had some claim against lessees for rent.

11. Electricity ⟹17

Owner of land upon which electrical work was done could not shift the duty of compliance with municipal electric code provisions relating to licenses and permits required for electrical work, either to plaintiff or to plaintiff's employer.

12. Electricity ⟹18(4)

Where employer did not comply with municipal electrical code provision requiring that licenses and permits be obtained before performance of electrical work, he could not contend that workman's failure to obtain license was proximate cause of injuries sustained when workman fell from lighting pole on the premises.

13. Negligence ⟹56(3)

Proof of violation of a law does not establish actionable negligence unless there exists a causal connection between the violation and the act which causes injury.

14. Electricity ⟹1

Purpose of the Los Angeles City Electrical Code is to insure proper performance of electrical work in order that property owners be not defrauded, and that the public safety be preserved.

15. Electricity ⟹18(4)

Absent a showing that there would have been less likelihood of an accident if workman had been a registered electrician and a permit had been issued, workman's violation of municipal electric code provision requiring that electrical work be done by registered electricians and that permits be obtained therefor did not constitute contributory negligence proximately causing injury sustained when lighting pole on defendant's premises fell while workman was working thereon.

16. Electricity ⟹19(2)

Claim for injuries sustained when lighting pole on defendant's premises fell while workman was installing fixtures thereon stated a good cause of action.

17. Trial ⟹109

Plaintiff's opening statement in action for injuries sustained when lighting pole on defendant's premises fell while plaintiff was working thereon was sufficient as a statement of fact proposed to be proved which would entitle plaintiff to a verdict.

◆

Halverson & Halverson, Los Angeles, for appellant.

Ball, Hunt & Hart, Long Beach, for respondent.

SHINN, Presiding Justice.

Action to recover damages from personal injuries sustained by plaintiff when a defective lighting pole collapsed while he was working at the top of it. In a jury trial plaintiff had judgment for $40,000. Defendant Charles Menveg appeals.

The implied findings were that at the time of the accident defendant was the party in possession and control of the premises, plaintiff was on the premises and working on the pole as an invitee of the defendant, the pole was in a defective and dangerous condition and defendant was negligent in failing to correct, or warn plaintiff of, the condition. The factual background is involved, and must be set forth at some length.

Prior to 1946 and continuously thereafter, defendant was three-fourths owner of a small parcel of land located in Wilmington. The other one-fourth was owned by a corporation, Menveg Properties, Inc. At the time of the accident the improvements consisted of a blacktop surface, a wire fence, several poles equipped with power wires and floodlights, a small shed, and a small movable building intended to serve as an office. The lot was bordered on the west by a parcel known as the Patton property. In 1946 the land was leased to Cornelius A. Heintz for a term of years, for use as a lumber yard. At the same time Heintz leased the Patton property for the same purpose. During the latter part of 1946 Heintz installed on the Menveg property certain poles, wires and floodlights, including the pole in question. In December, 1947, Heintz, failing in business, surrendered his lease. At the same time Charles Menveg and Menveg Properties granted a lease until December 31, 1950 to the Hardwood Mills and Lumber Company, owned by a Mr. Keslar and a Mr. Smith, and Heintz sold all his assets to Keslar and Smith, who also leased the Patton property. Thereafter Keslar and Smith erected on the Menveg property the small movable building. At a later date Keslar and Smith sublet the Menveg property to another lumber company, which failed in July or August of 1948. Keslar and Smith re-entered at that time, but conducted no operations on the land. In the latter part of 1949 Keslar and Smith, having discontinued their lumber business, sold some of their equipment for a consideration of $1,600 to plaintiff's employer, Dubin, and his partner Wahnish, who planned to set up a lumber operation on the Patton property. Shortly thereafter, in November, 1949, Keslar and Smith sought to terminate their lease with the Menvegs, and entered into negotiations for that purpose. There was evidence of an agreement under which the lease was surrendered. Toward the end of December, 1949, Dubin, having entered into possession of the Patton land, came upon the Menveg land, removed the wires and floodlights from the poles which stood there, and stored them on the Patton land. Charles Menveg learned that Dubin had removed the wires and lights. During the next few days Menveg and Dubin argued over ownership of the wires and lights. Finally Dubin agreed to replace them on the poles, and on January 30, 1950 Dubin and the plaintiff commenced to do so. After attaching lights and wires to other poles Dubin and plaintiff commenced work on the pole which fell. A flatbed truck was backed up to the pole and plaintiff ascended the pole with the aid of a ladder footed on the bed of the truck. He drew himself to the top of the pole and seated himself on the crossarm. The wires were drawn to the top of the pole and plaintiff, after securing one wire to an insulator on the crossarm, was in the act of putting tension on a second wire when the pole snapped at the base. Plaintiff was approximately 30 feet from the ground, and his fall resulted in severe injuries. Subsequent examination of the pole revealed that a few inches below the surface of the ground it had become heavily infested with termites and fungus. It would have been a simple matter to discover this condition.

In his original complaint plaintiff joined Menveg Properties, Charles Menveg and Hardwood Mills as defendants. Before commencement of the trial he voluntarily dismissed as to Hardwood Mills, and amended his complaint by deleting an allegation that Hardwood Mills was a tenant in possession and inserting an allegation that Menveg Properties and Charles Menveg were in possession at the time of the accident. The verdict was against these defendants and the court granted Menveg Properties a judgment notwithstanding the verdict.

Defendant urges that the evidence proved, as a matter of law, that the lease to Keslar and Smith was still in force at the time of the accident, that he was not in possession or control of the premises when the accident occurred, and that he therefore did not owe to plaintiff a duty to invitees to discover and repair or warn of defects.

[1] The evidence relating to the question of possession and control of the premises was as follows: Keslar testified that before November, 1949, he and Smith wanted to terminate their lease. They were not using the property after September, 1949. In the latter part of November, 1949, they negotiated orally with Charles Menveg; Keslar offered to pay up to the first of the year and to walk out and allow the Menvegs to take over the premises, and have the small office building. Charles agreed for his own part to take two months' rent and the office building and let Smith and Keslar out of the lease, and said that he would talk it over with Emil Menveg and let Keslar know of their decision. Keslar testified that a few days later his offer to surrender the lease was accepted over the telphone by either Charles or Emil Menveg—he believed it was Charles who telephoned him. Smith's testimony as to negotiations had with Charles Menveg was to the same effect. The two months' rent was paid. Keslar also testified that sometime in January or February he received a telephone call from the Menvegs' attorney requesting that Keslar send him a letter stating that he and Smith had disclaimed any interest in the lease, and had abandoned the premises. On April 3rd the request was repeated, and on April 6th Keslar wrote such a letter to Menvegs' attorney. In this letter he promised to remove a saw which remained on the premises. Charles Menveg testified to the negotiations with respect to termination of the lease but denied that he had agreed to it and Emil also denied having given his consent. The jury resolved the conflict in favor of Keslar's version of the transaction, which was sufficient to prove an offer to surrender the lease and an acceptance by the owners. It will be developed in our discussion that it is unimportant whether there was a formal surrender of the lease, accomplished by means of the oral agreement. There was sufficient evidence that Keslar and Smith surrendered, and that Charles Menveg assumed possession and control of the premises.

[2] The next question is whether the implied finding that plaintiff was Menveg's invitee was justified. If Menveg invited Dubin to go upon the land, to replace the wires, both Dubin and the workman were invitees. The wires from the Menveg poles originated in and current was controlled from a shed on the Patton property, in which the meters and switches were located. Dubin testified that one or two days before the accident, Menveg called on him, claimed the wires were his, and demanded that they be restored within three days. Dubin claimed ownership. The next day Dubin called on Menveg at his office, said in effect that if the wires were Menveg's he, Dubin, had been duped in his purchase of the mill and equipment, and asked to see some evidence of Menveg's ownership. He said that if it appeared that the wires belonged to Menveg he would replace them. Menveg produced a bill of sale which listed two floodlights and some wiring. Dubin had removed three or four floodlights. Dubin thought that two of the floodlights might be Menveg's and two might be his own. Menveg reiterated his demand and Dubin said that he would put them back. The next morning Menveg called on Dubin again, and again the matter was discussed. Thereafter Dubin and plaintiff set about replacing the wires and lights on the poles. Dubin further testified that he contended that he took the wires in the belief that they were his. The fact that the circuit originated in and ran from the shed on the Patton property tended to support his claim. The bills of sale issued by Keslar and Smith to Dubin enumerated various items plus "miscellaneous personal property on the Patton property; all fencing and motors in storage which belong to the said above mentioned equipment; and one white office

building." There was room for an honest difference of opinion whether the wiring and lighting which extended onto the Menveg property was intended to be included. There was sufficient evidence that plaintiff was an invitee.

[3, 4] The next claim of error relates to the instructions. The jury was instructed as set out below.[1] The record does not disclose at whose request this instruction was given. Defendant requested an instruction as set out below which instruction was refused.[2] Error is assigned in giving the first instruction and refusing the one that was requested. There was no error. The instruction that was given imposed upon plaintiff the burden of proving that the parties had settled and compromised their respective claims and that it would be necessary for the jury to so find in order to find that Menveg was an invitor. The instruction that was given was favorable to defendant. It was not error to refuse the one that was requested. The question was whether Dubin's entry through sending plaintiff upon the property was voluntary and for purposes exclusively his own, or was at the request of Menveg for purposes of their mutual advantage. In order to constitute Menveg an invitor it was not necessary that Mr. Dubin should have "made it clear to Mr. Menveg that acceptance of the return of the wires and lights were subject to the condition that it would be in satisfaction of claims by Mr. Menveg and Menveg Properties, Inc., against Mr. Dubin." Another instruction which the court declined to give at defendant's request related to the good faith of Dubin in removing the wires and lights. It was covered by the instructions that were given.

[5] The jury was instructed "One who goes upon the premises of another as a business visitor, at the express or implied invitation of the *owner* or *occupant,* and in connection with some mutual business interest with the *occupant* or with the latter's own business, is called in law an invitee." (Emphasis added.) Also that one who goes upon the premises of another for purposes of his own is at most a licensee, but if the visit is related to the *occupant's* business or some matter of mutual interest an invitation to use the premises may be inferred. The duties of an invitor were stated and it was said that the *owner* or *occupant* or *one having control of the premises* is not bound to discover defects in the premises which reasonable

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[1] "Where one goes upon the premises of another and removes therefrom certain property such as wiring and lights and the person removing the same has no title thereto, then such person in law has a duty to restore the property to the owner thereof, and neither the person who wrongfully converted the property or his agent, servant or employee, when in the act of returning such property to the premises of the owner thereof, and while on such premises, has any greater rights than those of a licensee.

"Where, however, one has removed certain property from the premises of another, upon honest claim of title, whether valid or not, and thereafter his right to said property is disputed by the owner or possessor of said premises and each in good faith claims ownership of the questioned property and if thereafter the parties to the dispute settle and compromise their claims and in connection therewith the person who had removed the questioned property agrees to return and replace the same and said agreement is accepted and approved by the owner or possessor of the premises, and thereafter if the one having removed the questioned property goes upon the premises of the owner or possessor thereof for the purpose of restoring and replacing the questioned property or sends his agent, servant or employee upon said premises for said purpose so as to confer a benefit upon the owner or possessor of said premises, such person or his agent, servant or employee while on the premises to accomplish such purpose would be an invitee."

[2] "In determining whether there was a compromise of a dispute in good faith by Mr. Dubin, you are instructed that before a compromise, as the term is used in these instructions, can exist the party asserting the compromise agreement must prove that the debtor, in this case Mr. Dubin, made it clear to Mr. Menveg that acceptance of the return of the wires and lights were subject to the condition that it would be in satisfaction of claims by Mr. Menveg and Menveg Properties, Inc. against Mr. Dubin."

inspection would not disclose. There was a further instruction that the *owner* having invited a workman to enter the premises is required to use reasonable care to provide a reasonably safe place in which to work; also that one invited by the *owner* or *possessor* may be an invitee. The words "owner", "occupant", "possessor" and the phrase "one having control of the premises" were used interchangeably. The general tenor of the instructions was that an owner or occupant who extended an invitation to enter the premises would have the duty of an invitor. Defendant does not complain of any of these instructions. He requested an instruction, which the court refused, to the effect that unless he was "in possession or occupation of said premises, to the knowledge of the plaintiff or his employer, he would have no right or authority to extend such invitation, and neither plaintiff's employer nor the plaintiff would be an invitee under the law." The principle attempted to be stated in this portion of the instruction was fully and more correctly explained in other instructions. Moreover, other portions of the requested instruction misstated the law with respect to defendant's duty of inspection. It was properly refused.

[6, 7] Defendant requested and the court declined to give an instruction reading "Unless you find that the defendants were in possession *and* occupation of the premises, a reasonable time before the accident, I charge you that there was no duty upon the part of the defendants, or either of them to have made an inspection of the condition of the pole in question." (Emphasis added.) It was not a proper instruction. The term "a reasonable time before the accident" as used in the requested instruction conveyed no relevant meaning. Moreover, if the lessees surrendered and defendant assumed possession the latter part of November and the accident occurred the 30th of the following January the jury would have had no reason for finding that defendant did not have a reasonable time in which to discover the defect in the pole. He admitted that he made no inspection of it prior to the accident.

[8, 9] Although defendant insists he was not in possession, no instruction was requested as to what would constitute possession and none was given. "Possession" has many meanings. It may or may not be used to mean the same as "occupancy". Since the meaning of "possession" is not discussed by defendant we may assume the jury understood it to mean as the dictionaries state "Fact or state of being under one's own control", which fits in with the definition given in Bouvier's Law Dictionary, Rawle's Third Revision, p. 2636, Baldwin's Century Edition, p. 955, "By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." See, also, Tiffany Real Property, 3d ed., Vol. 1, p. 27. Furthermore, if an owner invites someone to go upon his land the fact that he may not then be in actual occupancy of the land would not absolve him of the duties of an invitor. If he extends the invitation he asserts his right to extend it, and, especially if it is known to the invitee that no one else is in possession or claiming the right to possession, the invitation may be relied upon by the invitee.

[10] The case was tried upon the theory that if Keslar and Smith surrendered their leasehold interest and the surrender was accepted by defendant, possession and control passed to the defendant without regard to the physical occupancy of the premises. We have seen that the implied finding that Keslar and Smith surrendered all their rights under the lease pursuant to an agreement with Menveg, and that the latter assumed exclusive control of the property, had support in the evidence. Moreover, in dealing with Dubin, Menveg, as the principal owner, was asserting control of the premises and could not be heard to say that he was doing so wrongfully and that possession or control still remained in his lessees. There was no question of the sufficiency of the oral agreement of surrender as between Menveg and his lessees. It was sufficient to allow Menveg to take possession and it is immaterial whether he

might still have had some claim against his lessees for rent until the lease was surrendered in writing. It was not error to refuse the instruction.

Defendant offered in evidence certain sections of the Los Angeles City Electrical Code.[3] In his brief, without quoting from the code, he says: "The Municipal Electrical Code prohibits every person from installing, altering, reconstructing or repairing any wiring without a license and permit and makes any violation thereof a misdemeanor."

The "owner" provision has no application. Division 70 regulates the registration of electrical contractors, prescribes qualifications and imposes certain conditions for the issuance of a certificate of registration and it provides that no person shall carry on the business of electrical contracting or install, alter or repair any electrical wiring unless he holds a certificate of registration.

[11, 12] Defendant says "violation of this ordinance was the proximate cause of the injury", and certain cases are cited in support of the statement. Defendant does not mention subdivision (b) of section 93.35 which provides that no person shall cause or permit to be done any work for which a permit is required unless a permit has been issued. Defendant ignores this provision, and does not discuss the question whether it was the duty of himself and Dubin, as well as the duty of Green, to obtain a permit for the work. Menveg, as one of the owners of the property, had a duty to comply with the requirements of the code. Both he and Dubin caused and permitted work to be done which under the Municipal Code could only be done by a registered electrical contractor. Defendant could not shift the duty of compliance with the code to either Dubin or Green. Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17; Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 263 P.2d 32. Since defendant does not discuss the question of his duty under the code we shall say only that if both he and Green failed to comply with the code he is not in a position to say that it was Green's violation and not his own that was a proximate cause of the accident. This would seem to furnish an answer to the contention that it was error to exclude the offered sections of the code, but since this point has not been considered by defendant we shall discuss another reason for rejection of the evidence.

[13] Proof of violation of a law does not establish actionable negligence unless there exists a causal connection between the violation and the act which causes injury, or, as some courts express it, unless there exists reasonable grounds for a belief that the violation was a proximate cause of the accident or injury. Page v. Mayors, 191 Cal. 263, 216 P. 31; Shimoda v. Bundy, 24 Cal.App. 675, 142 P. 109; Roos v. Loeser, 41 Cal.App. 782, 183 P. 204; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801; Moon v. Payne, 97 Cal.App.2d 717, 218 P.2d 550; Knowles v. Roberts-at-the-Beach Co., 115 Cal.App.2d 196, 251 P.2d 389.

[14, 15] Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063 and Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17, supra, which defendant says are directly in point, were cases in which there was a clear connection between the violation of the ordinance and the injury. In the Cragg case the negligence consisted of the employment of an inexperienced and unlicensed elevator operator without investigation as to his competency. In the Finnegan case there was reason to believe that a door which opened inward instead of outward, as required by the ordinance, was a proximate cause of plaintiff's in-

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[3] "Sec. 93.35. (a) No person shall do, install, alter, reconstruct or repair any electric wiring without a permit therefor from the Board.

"(b) No person shall cause or permit any electric wiring to be done, installed, altered, reconstructed or repaired unless a permit therefor has first been obtained from the Board. * * *

"Sec. 93.36.1. (c) No permit shall be issued to any person except one who holds a valid, unsuspended, unrevoked and unexpired certificate of registration to do electric wiring when required by Division 70, or to an owner as provided in Section 93.39."

ability to escape more quickly from a fire. Defendant has not pointed out any connection between the failure to have a permit for the work, or the failure of Green to be registered, and plaintiff's accident. The sections of the code were not admissible unless there was reason to believe that compliance with the requirements would have prevented the accident or rendered it less likely to occur. If no such reason existed there was no causal connection between the failure to comply and the falling of the pole. A rotten pole is as apt to fall with a registered electrician working under a permit as with one who is unregistered and holds no permit. The purpose of the code is to insure proper performance of electrical work in order that property owners be not defrauded, and that the public safety be preserved. It was the duty of defendant to make reasonable inspection of the pole; it was not the duty of Green to inspect it for latent defects. The provisions of the code sought to be introduced did not relieve Menveg of that duty nor impose it upon Green. There was no reason to believe that there would have been less likelihood of an accident if Green had been a registered electrician and a permit had been issued. A finding of contributory negligence on the part of Green, or of negligence on the part of Menveg, based upon nonobservance of the code, would have been unwarranted. It was not error to exclude the offered evidence.

[16] Defendant contends that the complaint failed to state a cause of action. The argument is based on alleged defects in the complaint as first amended, which omitted a direct allegation that defendant was in possession of the premises at the time of the accident, and included an allegation that a lessee was in possession. Defendant overlooks the amendment made before trial which supplied the missing allegation of his possession and deleted an allegation that a lessee was in possession. The complaint stated a good cause of action.

[17] Defendant also contends that the court erred in refusing to grant a nonsuit on his motion made at the close of plaintiff's opening statement. Defendant refers to only a part of the opening statement and has reproduced this material in his brief. We have read the remainder. The complete opening statement was clearly sufficient as a statement of facts proposed to be proved which would entitle plaintiff to a verdict.

The judgment is affirmed.

PARKER WOOD, J., concurs.

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126 Cal.App.2d 118

PEOPLE v. FONG.

Cr. 2992.

District Court of Appeal, First District,
Division 2, California.

June 21, 1954.

Rehearing Denied July 6, 1954.

Hearing Denied July 21, 1954.

Defendant was found guilty in Superior Court, City and County of San Francisco, Herman A. VanderZee, J., of possession of narcotics, and from the judgment and from order denying him a new trial, defendant appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained the conviction and that the trial court did not err in refusing to give an instruction to the effect that defendant's possession of a key to an apartment was but a mere suspicion that he possessed the narcotics found in that apartment.

Affirmed.

1. Poisons 🔑9

Evidence sustained conviction for possession of narcotics. Health and Safety Code, § 11500.

2. Witnesses 🔑286(4)

In prosecution for possession of narcotics, where defendant's testimony put in doubt whether he resided, at time of raid, at place where found by officers, testimony of a witness on redirect examination, as to defendant's statement as to his residence, was properly admitted. Health and Safety Code, § 11500.

3. Criminal Law ⚷1122(5)

Defendant who failed to include in appeal transcript the instructions actually given, was not entitled to review of trial refusal to give requested instruction. Rules on Appeal, rule 33.

4. Poisons ⚷9

In prosecution for possession of narcotics, court properly refused instruction to effect that defendant's possession of key to apartment was but mere suspicion that he possessed narcotics found in the premises. Health and Safety Code, § 11500.

5. Criminal Law ⚷1037(1)

Where district attorney, in prosecution for possession of drugs, questioned with respect to drugs found in search which occurred almost a year after alleged offense, and court ruled results of search inadmissible and instructed jury to disregard the testimony, and defendant failed to object to district attorney's reference to the matter in closing argument, defendant could not assign misconduct on appeal. Health and Safety Code, § 11500.

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Walter H. Duane, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant was tried before a jury on 6 counts—counts 1 to 4, possession of narcotics in violation of section 11500 of the Health and Safety Code; count 5, maintaining an establishment where narcotics unlawfully sold, given away or smoked in violation of section 11557, Health and Safety Code, count 6, possession of a firearm capable of being concealed on the person by a non-citizen. Appellant was found guilty on counts 1, 2, 3, 4 and 5, and not guilty on count 6. Motion for new trial was denied as to counts 1 to 4 and granted as to count 5. Judgment was entered sentencing appellant to imprisonment on the first four counts, violation of section 11500 of the Health and Safety Code. He appeals from the judgment and from the order denying a new trial.

On March 24, 1952, at about 9:30 p. m., two officers of the Narcotic Detail of the San Francisco Police Department went to an apartment house at 1540 Hyde Street, San Francisco and sought admittance to apartment 7. They rang the doorbell and as there was no response forced their way into the apartment where they found a complete set of opium-smoking equipment, consisting of mats, headrests, pipe, lamps and all paraphernalia used for smoking opium. They also found quantities of opium, yen shee, dolophine and heroin, estimated to be worth somewhere between $5,000 and $20,000. The officers then phoned headquarters requesting additional officers, who were sent out to meet them, whereupon the first two officers left 1540 Hyde Street and went to 1919 Larkin Street, where, after searching a rear apartment and finding no narcotics, they proceeded to the front apartment where they found Thomas Fong with a woman companion. Fong was searched and several keys were taken from him. Fong was placed under arrest and he and his companion taken to the Hyde Street apartment. Of the three keys found in Fong's watch pocket, one was discovered to fit the front door of the apartment house at 1540 Hyde Street, another the door of apartment 7 in that building, while another key Fong was carrying unlocked a tin box containing narcotics which was found in apartment 7 at 1540 Hyde Street. Fong denied that the apartment was his but the manager of the apartment house, who was questioned by the police when they returned with Fong, identified Fong as the man who rented the apartment and paid the rent.

Appellant bases his appeal on the following grounds:

(1) The evidence was insufficient to sustain the judgment.

(2) The court erred in admitting incompetent and inadmissible evidence over the objection of appellant in rebuttal.

(3) The court erred in refusing to give to the jury an instruction proposed by appellant.

(4) Misconduct of the district attorney.

We shall answer these questions in the order raised.

[1] (1) The charge in the first four counts was "possession." The arresting officers found in the defendant's apartment a large quantity of opium, heroin and other drugs, with pipes and other paraphernalia for smoking opium. The defendant was searched in another apartment and had on his person three keys—one to the apartment house first visited by the police; one to the separate apartment where the narcotics were found, and one to a tin box found in that apartment and which contained a supply of narcotics. No further evidence of possession was necessary.

[2] (2) The gist of the objection is that it was not proper re-direct examination to question a witness regarding defendant's statement as to his residence at 1919 Larkin Street at the time of the raid. This had been put in doubt by defendant's testimony. The questions objected to showed an admission of such residence by the defendant to the witness called in rebuttal. There was no error, and the testimony could not have possibly prejudiced the appellant.

[3, 4] (3) That the court erred in refusing to give appellant's proposed instruction reading: "If you find from the evidence that the defendant possessed a key to the Hyde Street apartment, the possession of such key is but a mere suspicion that he possessed the narcotics found in the premises." But appellant has failed to comply with Rule 33, Rules on Appeal, requiring that when an appellant relies on the refusal to give a requested instruction, he must include in the transcript the instructions actually given. Moreover the proposed instruction was not sound law. The possession of the key to the apartment was more than a suspicion of the possession of the narcotics found therein. It was one of the several facts in evidence which would support an inference, not a mere suspicion, that defendant had possession of the contents of the apartment.

[5] (4) The claim of misconduct on the part of the district attorney is frivolous. The charge is based on the district attorney's persistence in questioning and arguing with respect to drugs found in a search of other premises at a date almost a year after the alleged offense, although the results of the search had been ruled inadmissible by the court. The questioning on this point was assigned as misconduct in the court below and the court instructed the jury to disregard the testimony. When the matter was referred to in his closing argument no objection was made and no misconduct assigned. This precludes an assignment of misconduct on this appeal.

Judgment and order affirmed.

DOOLING and KAUFMAN, JJ., concur.

126 Cal.App.2d 79

KURLAND et al. v. SIMMONS.

Civ. 19976.

District Court of Appeal, Second District, Division 2, California.

June 17, 1954.

Hearing Denied Aug. 10, 1954.

Action to recover for attorney's fees. The Superior Court, Los Angeles County, Arnold Praeger, J., rendered judgment for plaintiffs and defendant appealed. The District Court of Appeal, McComb, J., held that testimony by a highly respected member of bar that the complexity of the cases, the excellent results obtained, and the skill and tenacity exhibited warranted awards of $25,000 and $3,900, based on allowance of $30.00 an hour and $20.00 an hour in the cases respectively, supported findings that value of plaintiffs' services was $23,500.

Affirmed.

1. Attorney and Client ⇨141

In action for attorney's fees in two cases, expert testimony that in view of complexity of cases, excellent results obtained, and skill and tenacity exhibited warranted awards of $24,000 and $3900, based on allowance of $30 and $20 an hour in the cases respectively, supported finding that value of services was $23,500.

2. Attorney and Client ⚿140

Where the trial judge has fixed the compensation of an attorney upon consideration of the evidence and his own judgment, a reviewing court will not interfere unless a plain and palpable abuse of discretion has occurred.

3. Attorney and Client ⚿166(3)

In action for attorney's fees, evidence sustained finding that attorneys had not made an agreement limiting their fee for work done in a particular case.

4. Contracts ⚿324(1)

If a contract is fully executed upon the part of plaintiff and payment in money is to be made, plaintiff may either elect to sue upon the contract or upon the common count for the reasonable value of services rendered.

5. Attorney and Client ⚿166(2)

In action for attorney's fees, evidence supported finding that second attorney had been employed with defendant's consent, making him a proper party plaintiff to the action for fees.

6. Trial ⚿18, 29(4)

Record on appeal from judgment for plaintiffs in action for attorney's fees disclosed nothing to indicate that trial judge had been prejudiced against defendant, or to indicate that defendant had not had a full, fair, complete and impartial trial.

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Samuel L. Kurland and A. Arnold Klein, Los Angeles, in pro. per.

Edward E. Simmons, Jr., in pro. per.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover for attorney's fees, defendant appeals.

Facts: It was alleged in the complaint:

Count I, that defendant became indebted to plaintiffs in the aggregate sum of $20,000, on which the balance of $16,200 remained unpaid, for the reasonable value of legal services rendered by plaintiffs on defendant's behalf and at his request in connection with proceedings had in and before the District Court of Appeal, Second Appellate District, State of California, in an action entitled Simmons v. California Institute of Technology,[1] 34 Cal.2d 264, 209 P.2d 581, and in addition for the reasonable value of services rendered on defendant's behalf and at his request in connection with proceedings had before the Supreme Court of the State of California in said action.

Count II, that defendant became indebted to plaintiffs in the sum of $3,500, no part of which had been paid, for legal services rendered by them on his behalf and at his request in connection with an action entitled "Baldwin Locomotive Works, Plaintiff, v. Edward E. Simmons, Jr., et al., Defendants.[2]

Prior to pleading to the complaint defendant paid the sum of $3,200 to plaintiffs for which they filed an acknowledgment of credit on account of their total claim.

Subsequently the parties entered into a written stipulation by which defendant paid to plaintiff Kurland the entire balance of plaintiffs' claim in the sum of $16,500.

Defendant in his answer, counterclaim and cross-complaint alleged that plaintiffs agreed to render all services necessary in connection with the District Court of Appeal and the Supreme Court appeals for a total fee of $7,000; that plaintiff Kurland agreed to charge a fee for the Baldwin matter on the same basis as the fee in the superior court trial of the Cal Tech case; that defendant had never been billed for these services; that he was not indebted to plaintiff Klein; and that he demanded the return of the $16,500 which he had paid. He also alleged that plaintiffs' second cause of action was barred by the statute of limitations.

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[1] Hereinafter this action is referred to as the "Cal Tech case."

[2] This action will hereinafter be referred to as the "Baldwin matter."

The trial court found that the total value of services rendered by plaintiffs to defendant on the Cal Tech case was of the reasonable value of $20,000, on account of which defendant had paid plaintiffs $7,000, leaving an unpaid balance due plaintiffs in the amount of $13,000; that the reasonable value of services rendered by plaintiffs in the Baldwin matter was $3,500, no part of which had been paid, giving judgment in favor of plaintiffs for $16,500, which was to be satisfied from the funds previously paid by defendant to plaintiff Kurland and for costs.

[1] *Questions:* First: *Was there substantial evidence to sustain the trial court's findings as to the reasonable value of the services rendered by plaintiffs to defendant?*

Yes. (a) *Fee in the Cal Tech case.* Mr. Pierce Works, a highly respected member of the State Bar of California, with vast experience in the trial of cases, when asked the hypothetical question as to the value of services rendered by plaintiffs to defendant in the Cal Tech case, testified as follows:

"In my opinion, the services rendered in the appeal phase of the (Cal Tech) matter, because of the complexity, the excellent results obtained for Mr. Simmons, the skill and tenacity with which Mr. Kurland and Mr. Klein protected Mr. Simmons' interests warrant an allowance of at least $30.00 an hour. And at 806 hours, according to my arithmetic, that would be rounded off at $24,000.00 or might be rounded off at $25,000.00 * * * I should perhaps make it clear I regard that as more or less of a minimum."

In concluding his testimony Mr. Works stated: "According to my arithmetic, $17,115.00 for the Supreme Court work. And as your Honor indicated, $7,925.00 for the District Court of Appeal."

This testimony clearly sustains the finding of the trial court that the reasonable value of services in this matter was $20,000.

(b) *Fee in the Baldwin matter.* Mr. Pierce Works testified as to the reasonable value of services rendered by plaintiffs to defendant in the Baldwin matter: "In my opinion, the services rendered as to the Baldwin phase of the matter would be reasonably worth $20.00 an hour, or $3,900.00."

[2] In view of the foregoing testimony and the established rule that where the trial judge has fixed the compensation of an attorney upon a consideration of the evidence and his own judgment, an appellate court will not interfere unless a plain and palpable abuse of discretion has occurred, Estate of Schnell, 82 Cal.App.2d 170, 175 [3], 185 P.2d 854, no useful purpose would be served by considering other evidence in support of the trial court's findings since it is clear that the trial court did not abuse its discretion. (Cf. Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

[3] Second: *Was there an agreement between plaintiffs and defendant which was ambiguous but could be construed to mean that plaintiffs agreed to do all the work in the Cal Tech case on appeal for the sum of $7,500, and that since the agreement between the attorney and client was ambiguous it should be construed in favor of defendant in accordance with the rule announced in the following cases:* Preston v. Herminghaus, 211 Cal. 1, 292 P. 953; McClintock v. Bathurst, 23 Cal.App.2d 647, 73 P.2d 1237; Miller v. Wing, 9 Cal.App.2d 483, 50 P.2d 470; Pinto v. Seely, 22 Cal. App. 318, 135 P. 43; and Bennett v. Potter, 180 Cal. 736, 183 P. 156?

No. There was a direct conflict between plaintiffs' and defendant's testimony. Plaintiffs testified that they did not make an agreement with defendant limiting their fee to $7,500 for all the work done in the Cal Tech case while it was on appeal. This testimony was denied by defendant leaving a question of fact for the determination of the trial judge, who by his finding, supported by substantial evidence, believed the testimony of plaintiffs and disbelieved the testimony of defendant.

This is clearly indicated by a portion of the trial court's memorandum ruling, reading as follows: "Despite defendant's contention that attorneys are not trustworthy, the Court is inclined to believe Kurland's testimony that the fee (whether $7000 or $7500) was only for proceedings in the District Court of Appeal; that he did tell Simmons that there would be an additional fee if there were further proceedings in the Supreme Court."

The letter of August 5, 1946, relied on by defendant is not ambiguous but supports plaintiffs' testimony. It reads in part as follows: "Upon our last meeting you stated that you did not want any contingency to exist on the matter of the fee on the Appeal, Simmons v. California Institute of Technology, District Court of Appeal, 2nd Civil No. 15109, and a fee of $7500.00 plus costs and expenses upon the appeal was agreed upon for said proceeding. Since more than a year has elapsed since completion of the transcript on appeal and Mr. Klein and I have worked on the matter since that time, I would appreciate payment of some portion of the fee on account."

Third: *Is defendant's contention correct that plaintiffs could not sue in quantum meruit for the services rendered since defendant "contracted for the whole of the appeal in the Cal Tech case for the fixed fee of $7500?"*

No. Defendant's contention is without merit. Relative to the first count, pertaining to the Cal Tech case, defendant assumes facts not found by the court, to wit, that plaintiffs agreed to handle the Cal Tech case on appeal for the total sum of $7500. The trial court found just to the contrary, supported by substantial evidence. The finding was that defendant agreed to pay the reasonable value of the services in connection with the appeal.

[4] In addition the rule is established in California that if a contract is fully executed upon the part of plaintiff and payment in money is to be made, plaintiff may either elect to sue upon the contract or upon the common count for the reasonable value of services rendered. (Castagnino v. Balletta, 82 Cal. 250, 257, 23 P. 127; Lucy v. Lucy, 22 Cal.App.2d 629, 631 [1], 71 P.2d 949.)

Relative to the second count for the Baldwin fee, defendant erroneously contends that there was a different contract between plaintiffs and defendant in that he was to be charged only $200 per day for court appearances. The trial court did not so find, but found that the parties orally agreed that plaintiffs would be paid a reasonable fee for their services in connection with the Baldwin matter. This was to be computed at the rate of $200 per day for time expended on and in connection with the matter. The evidence disclosed that 195 hours were expended by plaintiffs on the Baldwin matter, which, predicated upon an 8 hour day basis, would equal $4,875. Clearly the trial court's finding was supported by the evidence in the instant case.

[5] Fourth: *Was plaintiff Klein a proper party plaintiff to the action?*

Yes. The record discloses that shortly after the appeal in the Cal Tech case was instituted, plaintiff Kurland requested and received permission from defendant to associate plaintiff Klein as co-counsel. Plaintiff Kurland testified in part as follows:

"I told Mr. Simmons that I thought the appeal would be a difficult matter; that the findings that we had would make a difficult matter even more difficult because Judge Beardsley would not accede to the request of Mr. Klein and myself, as he, Mr. Simmons, knows, to word the findings as we wanted them, completely in our favor. But he had ordered certain matter in the findings which raised an ambiguity. That the appeal would be difficult, and that I would not go into the appeal without getting some physical help on the matter, and that I wanted to associate Mr. Klein.

"He said in his kind of brief style that I could associate whoever I wanted, to use my judgment. I told him I would use Mr. Klein. And Mr. Klein participated in all the work on the appeal except one portion at the time of the first re-hearing."

Relative to the Baldwin matter plaintiff Klein participated in the conferences with defendant and with Baldwin's counsel prior to the institution of the action, and participated in all phases of the action itself as co-counsel of record with defendant's knowledge and without objection upon his part. Clearly under the evidence he had been employed with defendant's consent and was a proper party plaintiff.

[6] Fifth: *Was the trial judge prejudiced against defendant?*

No. An examination of the record discloses that defendant had a full, fair, complete and impartial trial. There is absolutely nothing in the record to indicate the slightest bias or prejudice upon the part of the trial judge.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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126 Cal.App.2d 35

HEIDLEBAUGH v. MILLER et al.

Civ. 20132.

District Court of Appeal, Second District, Division 1, California.

June 16, 1954.

Action by seller to recover unpaid balance on conditional sales contract. The Superior Court, Los Angeles County, Dudley G. McGregor, J., granted defendants' motion for nonsuit on ground that no notice of sale of the property by plaintiff, after plaintiff had repossessed it, had been given defendants as required by the contract, and plaintiff appealed. The District Court of Appeal, Mosk, J. pro tem., held that where the contract provided that plaintiff might, after repossessing the property, sell it at public or private sale "with or with notice", and it was apparent from the remainder of the contract that the letters "out" were inadvertently omitted from the end of third word of quoted phrase, court would read the phrase as "with or without notice."

Judgment reversed.

1. Contracts 🔑175(1)

Ordinarily, it is presumed that parties read and understood the import of their contract, and that they had the intention which its terms manifest.

2. Contracts 🔑147(2), 152

Generally, office of interpretation or construction of a contract is to ascertain intention of parties exclusively from words which they have used, and not to insert what has been omitted, or to omit what has been inserted. Code Civ.Proc. § 1858.

3. Contracts 🔑143

The words employed in the contract, and the purpose of the writing, must be ascertained solely from their common-sense meaning as a whole.

4. Contracts 🔑154

A contract, and its component parts, must be given a reasonable rather than an unreasonable construction, and in so doing, the court must bear in mind that words should be employed merely as a means and not as an end.

5. Contracts 🔑152

Generally, where it is clear that a word or term has been used inadvertently, and it is clearly inconsistent with, and repugnant to, the meaning of the parties, it will be rejected altogether, and conversely, where, by inadvertence, words are plainly omitted from a contract, they may be supplied by construction if the context indicates what they are.

6. Contracts 🔑143, 154

In construing contract, court will, if possible, give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable, and if this is impossible, an interpretation which gives effect to the main apparent purpose of the contract will be favored.

7. Contracts 🔑152

If necessary to carry out the intention of a contract, words may be transposed, rejected, or supplied, to make its meaning more clear.

8. Contracts 🔑143

The interpretation of terms in any particular case is controlled by the context of the writing, and the whole instrument must be examined, and in so doing, court employs an objective, not a subjective, test.

9. Sales ⚷479(14)

Where conditional sales contract provided that seller might, after repossessing the property, sell it at public or private sale "with or with notice", and it was apparent from the remainder of the contract that the letters "out" were inadvertently omitted from end of third word of quoted phrase, court would read the phrase as "with or without notice."

10. Trial ⚷165

On motion for nonsuit, court is bound, for purpose of motion, to accept and treat as true every piece of evidence which tends to establish plaintiff's case, and to reject all which tends to disprove it.

Getz, Aikens & Manning and DeWitt Morgan Manning, Los Angeles, for appellant.

Sidney Fischgrund, Los Angeles, and Alvin R. Isenberg, Redwood City, for respondent.

MOSK, Justice pro tem.

Respondents purchased certain tractors and trailer from appellant on a conditional sales contract for a total price of $26,527, of which $1,027 was paid at the time of execution of the contract on September 29, 1951, leaving a balance of $25,500 to be paid in fifty-one consecutive weekly installments of $500 each

One of the trailers subsequently was destroyed and appellant, through an assignee, received $2,100 from an insurance company, this sum being applied on the contract. No other sums were paid by the respondents or credited to their account. In February, 1952, the remaining equipment was repossessed by appellant, removed to the business premises of one V. P. Hunt at Redlands, and sold to Hunt for $12,000.

This law suit was then commenced to recover the unpaid balance on the contract, less credits for the aforementioned $2,100 and $12,000.

Paragraph 2 of the conditional sales contract executed by the parties provided as follows:

"Should Purchaser fail or neglect to comply with any term or condition of this contract, or to make any payment provided for herein, when due or payable, or violate any of the provisions hereof, or should Purchaser become financially involved, or if Seller should feel insecure or deem the property in danger of misuse or confiscation, or in case of any unusual or unreasonable depreciation in the value thereof, or in case Purchaser has made any misrepresentation as to his name, address or occupation, Seller at his option, and without notice to Purchaser, may declare the whole amount unpaid here under immediately due and payable, or Seller may, without notice to Purchaser, declare all of Purchaser's rights under this contract terminated, and without demand first made, and with or without legal process, immediately take possession of said property, together with all additions, equipment and accessories thereto, wherever the same may be found, using all necessary force so to do, and hold the same, together with title thereto, and Purchaser waives all claims for damages due to or arising from, or connected with any such taking. Should Seller take possession of such property, all the rights of Purchaser under this contract shall immediately terminate, and all payments theretofore made hereunder shall belong absolutely to Seller, and Purchaser shall pay to Seller all instalments then delinquent upon this contract; upon any such termination, Seller may, if he so desires, but shall not be obliged so to do, sell said property at public or private sale, *with or with notice* to Purchaser (if given, notice by mail to Purchaser's address as given on this contract being sufficient), with or without having such property at the place of sale, and upon the terms and in such manner as Seller, or his assigns, may determine, and Seller or his assigns, may bid at any such sale. The net proceeds of any such sale shall be the remainder after deducting from the Selling price all expenses for re-taking and conditioning, keeping and selling such property, including the attorney's fees aforesaid. In case the net proceeds from such sale, added to the payments theretofore made hereunder, do not cover the total payments required to be made by Purchaser hereunder, then Purchaser agrees to pay to Seller, on demand, such difference, with interest thereon from the date of sale at highest rate for which parties may lawfully contract in the State in which this contract is executed. Purchaser hereby waives all statutes of limitation in any way affecting the time within which Seller may enforce its rights hereunder and the defense thereof." (Italics ours.)

The contract in its entirety, except for typed insertions, was a printed form. At the bottom thereof was a notation, "No 152 —Law Ptg. Co., 4505 W. 1st, L. A. * * *", indicating it to be a form commonly available in stationery stores.

At the conclusion of appellant's case respondents moved for a nonsuit on the ground that no notice of sale to the purchasers had been given as required by the language of the conditional sales contract: "Seller may, if he so desires, but shall not be obliged so to do, sell said property at public or private sale, *with or with notice* to Purchaser * * *" (Italics ours.) The trial court sustained the position of respondents and granted the motion for nonsuit.

Appellant urges that the letters "out" were inadvertently omitted from the printed form of contract, that they should be read into the instrument by the court so that the crucial phrase would become "with or without notice", that pursuant thereto no notice of sale was required, but that in any event there was sufficient testimony indicating oral notice to respondents to require denial of the motion for nonsuit. He has therefore appealed.

[1, 2] Ordinarily it is presumed that the parties read and understood the import of their contract and that they had the intention which its terms manifest. As a general rule, the office of interpretation or construction is to ascertain the intention of the parties exclusively from the words which they have used, and not to insert what has been omitted, or to omit what has been inserted. Code Civ.Proc. § 1858.

[3, 4] But the words employed and the purpose of a writing must be ascertained solely from a common-sense meaning of them as a whole. A contract, and its component parts, must be given a reasonable rather than an unreasonable construction. Broome v. Broome, 104 Cal.App.2d 148, 157, 231 P.2d 171. In so doing we must bear in mind that words should be employed merely as a means and not as an end. Language, it has been said, is but the dress of thought.

[5, 6] Therefore, as stated by the court in McNeil v. Graner, 91 Cal.App.2d 858, 863–864, 206 P.2d 38, 42: "The general rule which should be applied is stated in 17 Corpus Juris Secundum, Contracts, § 308 page 725, as follows: 'Where it is clear that a word or term has been used inadvertently, and it is clearly inconsistent with, and repugnant to, the meaning of the parties, it will be rejected altogether. Conversely, where, by inadvertence, words are plainly omitted from a contract, they may be supplied by construction if the context indicates what they are'. Mr. Williston says, Volume 3, Revised Edition, page 1781: 'The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if this is impossible an interpretation which gives effect to the main apparent purpose of the contract will be favored. Indeed, in giving effect to the general meaning of a writing, particular words are sometimes wholly disregarded, or supplied, or transposed. * * *'"

[7] This rule appears to be universally accepted. If necessary to carry out the intention of a contract, words may be transposed, rejected, or supplied, to make its meaning more clear. Potthoff v. Safety Armorite Conduit Co., 143 App.Div. 161, 127 N.Y.S. 994, 995.

In this field, the use of the words "or" and "and" interchangeably in legislation and contracts has been the subject of frequent animadversion on the part of courts.

In fact, so often has this particular problem arisen, it was said in Arnold v. Hopkins, 203 Cal. 553, 563, 265 P. 223, 227, that the solution "has come to depend almost wholly upon the context in which one or the other of these words appears * * ". To the same effect are Washburn v. Lyons, 97 Cal. 314, 32 P. 310, and Abbey v. Board of Directors, etc., 58 Cal.App. 757, 209 P. 709. Also see Kasun v. Todevich, 71 Mont. 315, 229 P. 714, 715, in which "or" was substituted for "in" because a phrase with the latter was "meaningless in the connection in which it is employed".

There are numerous examples of substitution of words in order to arrive at an intelligible text. In Schroeder v. Griggs, 80 Kan. 357, 102 P. 469, a negative was read as an affirmative. In Butler v. Bohn, 31 Minn. 325, 17 N.W. 862, "eleven hundred" became "eleven hundred dollars". In Cornell v. Green, 7 Cir., 95 F. 334, "north" was read to be "south". In Marion v. Faxon, 20 Conn. 486, "me" was construed to mean "him". In Nusbaum v. Hartford Fire Ins. Co., 276 Pa. 526, 120 A. 481, "of" became "thereof".

There are also a great many illustrations of additional words being inserted to complete a phrase. In Gran v. Spangenberg, 53 Minn. 42, 54 N.W. 933, "one" was placed before "hundred and fifty dollars". In Wallis Iron Works v. Monmouth Park Ass'n, 55 N.J.L. 132, 26 A. 140, the crucial word "fail" was added. In Pacific Surety Co. of California v. Toye, 224 Mass. 98, 112 N.E. 653, the amount of yearly premium was judicially written into a blank space. In Hamilton v. Wead, 122 Neb. 854, 241 N.W. 556, 559, the words "then" or "thereafter" were said to be implied. In Mondou v. Lincoln Mut. Casualty Co., 283 Mich. 353, 278 N.W. 94, 96, the word "by" was included to complete an important sentence. In Kaifer v. Georgia Casualty Co., 9 Cir., 67 F.2d 309, "additional" was inserted in front of "assured".

Factually comparable to the instant case is Irwin v. Nichols, Dean & Gregg, 87 Ark. 97, 112 S.W. 209, particularly in that an omitted word completely altered the contractual obligation. There a letter relied on as a contract of employment read, 112 S.W. at page 209: "We are willing to allow you 10 hours for each day that we work a full day both winter and summer but we can promise to give you work at $2.50 per day when the mill is not running * *'". The court held omission of the word "not" before the word "promise" was a plain inadvertence correction of which the contract itself readily and naturally accomplished.

Missing words supplied in the cases generally fall into two categories. The first are those words the omission of which through ellipsis is sanctioned by usage for the sake of brevity, and which are necessarily understood to complete grammatical construction. An apt illustration is this quotation from Hamilton, 241 N.W. at page 559: "Two things cannot be first. In the sentence 'We will first go to the opera and to supper' the word 'then' is understood."

The second category are those in which the omission is patently an inadvertence or clerical misprision. A splendid example of this is Lincoln Joint Stock Land Bank v. Bexten, 129 Neb. 422, 261 N.W. 845, 847, in which to the phrase "'part * * * of the second part'" the letters "ies" were supplied to make it read "'parties of the second part.'"

The instant case falls into the latter class. It should be obvious to all reasonable men that the letters "out" were inadvertently omitted from the end of the third word in the printed expression "with or with notice".

[8] The interpretation of terms in any particular case is controlled by the context of the writing, and the whole instrument must be examined. Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 768, 128 P.2d 665. As respondent insists, in so doing we employ an objective, not a subjective test. King v. Stanley, 32 Cal.2d 584, 591, 197 P.2d 321.

[9] Paragraph 2 of the conditional sales contract involved herein uses the expressions "with or without legal process" and "with or without having such property at the place of sale". The same paragraph

twice uses the word "without" immediately preceding the word "notice" and once additionally preceding the word "demand".

The foregoing suggests a pattern of phraseology with which "with or without notice" would have been consistent, "with or with notice" an inexplicable redundancy.

It might be contended, though respondent has not done so, that it is just as conceivable the words "with or" were erroneously included as it is the letters "out" were erroneously excluded. If that were the situation, however, and notice was thus necessary, the clause in parenthesis following the one in question would indeed be strange: "(*if given*, notice by mail to Purchaser's address as given on this contract being sufficient)". That language appears to be more consistent with optional rather than required notice.

Were we to adopt respondent's strict interpretation of words we would be subverting the only reasonable interpretation of the instrument as a whole. No court should slavishly bow before meaningless words. The terms employed in a writing must be made the servants and not the masters of a perspicuous intent.

[10] Having read into the contract the phrase "with or without notice", we find it unnecessary to discuss at length whether there was prima facie evidence of actual notice given by appellant. Bearing in mind that on motion for nonsuit, however, "the rule is almost axiomatic that the court is bound for the purpose of the motion to accept and treat as true every piece of evidence which tends to establish the plaintiff's case and to reject all which tends to disprove it" (Williamson v. Pacific Greyhound Lines, 78 Cal.App.2d 482, 485, 177 P.2d 977, 979), there was sufficient indication of notice to have required a denial of the motion for nonsuit.

Respondents have raised several affirmative defenses, which merit consideration on the retrial of this cause.

The judgment of nonsuit is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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126 Cal.App.2d 217

PEOPLE v. SALDANA.

Cr. 958.

District Court of Appeal, Fourth District, California.

June 23, 1954.

Defendant was convicted of a second offense of illegally possessing marijuana. The Superior Court, Orange County, Robert Gardner, J., rendered judgment and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence on issue of whether defendant had possession and knowledge of narcotics found on premises on which he lived was sufficient to support conviction.

Judgment affirmed.

1. Criminal Law 🔑1169(1)
Poisons 🔑9

In prosecution for illegal possession of marijuana, whether defendant had knowledge of various articles containing marijuana found in and about his residence and in an automobile used by him was for the jury, and admission of this evidence was not prejudicial error, even though owner of premises subsequently testified that he, the owner, owned the articles. Health and Safety Code, § 11500.

2. Poisons 🔑9

In prosecution for illegal possession of marijuana, evidence on issue of whether defendant had possession and knowledge of articles containing marijuana found in and about his residence was sufficient to support conviction. Health and Safety Code, § 11500.

James Penney, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Dep. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with possession of marijuana in violation of section 11500 of the Health and Safety Code. He was further charged with a prior conviction of the crime of smuggling and concealing marijuana, on which he served a term in a federal prison. The public defender was appointed to represent him. He pleaded not guilty, and admitted the prior felony conviction. The jury found him guilty and he personally filed notice of appeal from the judgment. He has been ably represented on this appeal by counsel appointed by this court.

The appellant occupied a 2-room house in the rear of a house occupied by his sister and her husband, Louis Rocha. Officers searched this 2-room house and found two Prince Albert tobacco cans and a brown paper sack, all of which contained seeds or leafy fragments of marijuana. They also found a whiskey bottle and an envelope containing marijuana in a small shed outside this rear house. They also found a paper sack containing marijuana hidden behind the wallpaper in a lean-to garage at the rear of these premises. Particles of marijuana were also found in several places in an automobile found in this garage. This automobile was owned by Rocha but there was evidence that the appellant had recently used it.

[1] Appellant's first contention is that the court committed prejudicial error in admitting into evidence the articles above mentioned with their contents. It is argued that a proper foundation for their admission was not established since they were not shown to have been in the appellant's possession, and that Rocha testified that he had placed these various items throughout his premises. The finding of these various articles containing marijuana in and about the residence of the appellant, and in an automobile used by him, was material to the issues being tried. People v. Rumley, 100 Cal.App.2d 6, 222 P.2d 913. The question of whether the appellant had knowledge of them was one of fact for the the jury to determine from all the evidence in the case. At the time these articles were admitted in evidence Rocha had not testified, and no prejudicial error appears in the admission of this evidence.

[2] It is further contended that the evidence was insufficient to support the verdict in that it was not sufficient to show that the appellant had possession and knowledge of these narcotics. People v. Gory, 28 Cal.2d 450, 170 P.2d 433; People v. Sinclair, 129 Cal.App. 320, 19 P.2d 23; and People v. Barnett, 118 Cal.App.2d 336, 257 P.2d 1041, are cited in support of this contention. In the first of these cases, the judgment was reversed because of the lack of proper instructions although it was held that the evidence was sufficient. The other two cases involve very different facts from those here appearing.

There was considerable other evidence here, in addition to that above referred to. The officers also found a number of articles of clothing in the bedroom of this rear house. The appellant stated to the officers that part of these belonged to him and part were borrowed. When questioned about these clothes the appellant said: "If there is anything found in those pockets, it belongs to me" and "If there is any grass found in those pockets, it belongs to me." It was found, on examination, that seven of these articles of clothing contained leafy material of the marijuana plant.

A conversation was had that same day between two officers, the appellant, and his sister Mrs. Rocha. The appellant said to Mrs. Rocha "You know that I am doing a year now on this other deal * * * you know if I take the rap on this stuff found here, that I will go to the joint for a long time * * * Louis has no record, and he could probably get a county jail sentence if he took the rap." Mrs. Rocha then asked one of the officers to tell her husband to plead guilty, and was told to tell him herself. When the appellant was informed that Rocha had told one of the officers that the stuff belonged to appellant he did not directly deny this but said that Rocha knew who it belonged to, and that if the officer checked into it far enough he would find out who it belonged to. The appellant admitted that he had recently used Rocha's car on a couple of days. While two officers were taking the appellant and Rocha to the arraignment the appellant said to Rocha "Man, you know that I have just got out of McNeill, and if I take the rap on this stuff that I will go back to the joint for a long time * * * You know whose stuff it is * * * why don't you take the rap on it all and you will get a county jail sentence?" Rocha replied, "I am not going to take the rap for anybody else. That's not my stuff and you know it."

The appellant did not take the stand. The only defense witness was Rocha, who testified that he had pleaded guilty to the possession of this marijuana; that his wife had talked to him about pleading guilty; that the marijuana seeds were his; that an Indian doctor at Ensenada "recommended me the seeds for my kidney trouble"; that he got this marijuana for that purpose; that a boy he met gave him a paper bag with some seeds and two Prince Albert cans full of seeds also in the bag; that when he first got this paper bag he threw it in the rear of his car and it spilled all over the back seat; that he did not know how marijuana got in the front seat; that he knew that the appellant used his car sometime while he was in the hospital; that when he got home he put the seeds in the whiskey bottle and put the bottle in the pocket of the leather jacket, where it was found; that he put the tobacco cans in the rear house, one in the sewing machine but could not remember where he put the other; and that when the officers first showed him these various articles he told them that he knew nothing about them, and did not tell them that he was using the marijuana for medical purposes.

For obvious reasons the jury did not believe all of Rocha's testimony. While it might be that there was some joint possession of this marijuana, the evidence as a whole, with the reasonable inferences therefrom, is sufficient to support the verdict. People v. Bigelow, 104 Cal.App.2d 380, 231 P.2d 881; People v. Batwin, 120 Cal.App.2d 825, 262 P.2d 88.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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126 Cal.App.2d 71

In re HANSON'S ESTATE.

HANSON et al. v. QUINCE et al.

Civ. 16080.

District Court of Appeal, First District, Division 1, California.

June 17, 1954.

Rehearing Denied July 16, 1954.

Hearing Denied Aug. 10, 1954.

Proceedings in the matter of a deceased husband's estate, wherein the deceased husband's relatives sought a determination of heirship. The Superior Court of Alameda County, Cecil Mosbacher, J., found that certain improved real property and furnishings therein had been community property of the deceased husband and his predeceased spouse, and ordered one-half of such property distributed to wife's relatives and one half to the husband's. On appeal by the husband's relatives, the District Court of Appeal, Peters, P. J., held that even though wife's administrator had not contested husband's quiet title action, decree therein was binding against wife's heirs and husband's heirs as well; and held that therefore surviving relatives of wife, in their capacity as statutory heirs of husband, could not, in subsequent suit brought by husband's relatives to determine heirship, assert, contrary to such decree, that property involved was community property rather than the separate property of the husband.

Reversed.

1. Judgment 🔑688

Even though wife's administrator did not contest husband's quiet title action, decree therein was binding against wife's heirs and husband's heirs as well, and therefore surviving relatives of wife, in their capacity as statutory heirs of husband, could not, in subsequent suit brought by husband's relatives to determine heirship, assert, contrary to such decree, that property involved was community property rather than the separate property of the husband. Probate Code, § 228; Civ.Code, § 164.

2. Judgment 🔑678(2)

A "privy" is one who, after rendition of judgment, has acquired an interest in subject matter affected by judgment through or under one of parties, as by inheritance, succession or purchase.

See publication Words and Phrases, for other judicial constructions and definitions of "Privy".

3. Husband and Wife ⟹262(2)

Where right of person as heir depends not merely upon fact of certain relationship, but on fact of such relationship plus fact that property he claims as heir had formerly been either community property of decedent and his or her deceased spouse or else separate property of latter, burden of proof of showing such additional fact rests upon him and it is a fact which must appear in order that he be an heir, and he is an heir only as to property as to which it does appear.

4. Husband and Wife ⟹264

In action by husband's relatives to determine heirship, wherein husband's relatives established prima facie case by proving that furnishings alleged to be separate property of husband were in his estate at time of death, that he was then unmarried, and that he had died intestate without issue or parents surviving, predeceased wife's relatives failed to sustain burden of proving that such property had been community property of husband and his spouse. Civ. Code, § 164.

L. L. Steele, Oakland, for appellants.

H. Raymond Hall, Oakland, for respondents.

PETERS, Presiding Justice.

Richard Hanson died intestate and without children on June 18, 1952. Thereafter, his next of kin, referred to herein as the "husband's relatives," filed a petition in the probate proceedings, claiming to be the heirs of Richard entitled to the distribution of his estate. This petition was opposed by contestants, all of whom are the next of kin of Richard's predeceased wife. The administratrix of Richard's estate is included in this group. They will hereafter be referred to as the "wife's relatives." It was their contention that certain portions of Richard's estate had been acquired with community funds during the marriage of Richard and prior to the death of his wife, Edna. If such were the fact, Richard having died intestate and without issue, one-half of such property must be distributed to the wife's relatives under the provisions of section 228 of the Probate Code. The trial court found that two pieces of improved real property and the furnishings therein were acquired with community funds, and ordered one-half of such property distributed to the wife's relatives and one-half to the husband's. This appeal is taken on a settled statement by the husband's relatives from those portions of the judgment awarding one-half of the property in question to the wife's relatives, it being their contention that this property was at all times the separate property of Richard, and that such fact had been so determined in a prior action.

The evidence as to the financial arrangements of the Hansons in general, and in particular as to the source of the funds used to purchase the two pieces of real property and the furnishings, is very meager. It is of such a nature that, if this case is decided on its merits, such evidence will not, without the aid of inferences and presumptions, support a finding either way on the issue as to whether such funds were the separate property of Richard or the community property of Richard and his predeceased wife. For that reason the parties rely upon and discuss various inferences and presumptions, which are conflicting, overlapping and elusive, and certainly, in this case, far from satisfactory.

The following appears from the record: Early in this century Richard, then unmarried, emigrated from his native Norway to Canada. He acquired a homestead in Saskatchewan. In 1914 he left Canada and took up a federal homestead in Montana, of which he became the owner in 1924. These two properties were, of course, his separate property. In addition, as a soldier with the United States forces in World War I, he received a disabling wound for which he received disability insurance during the balance of his life. From the time these payments started until Richard's death, the government paid him $20,844.75. This, too, was his separate property.

On May 31, 1921, Richard married Edna Joy Doyle in Montana, and shortly thereafter moved to Alameda County, California, where they continued to live together until the death of Edna on July 11, 1931. They had no children, no surviving parents, and Edna died intestate. As already pointed out, Richard died intestate June 18, 1952. He had not remarried. Both worked during the marriage, but the extent of their earnings is not shown. Richard worked to some unknown extent after the death of his wife.

The record shows the following facts in reference to the properties here involved: On September 7, 1922, the Hansons contracted to purchase a vacant lot on 35th Avenue in Oakland. The purchase price was $1,188.50, and $119 was paid as a down payment. The balance was paid in installments. On April 3, 1924, the indebtedness was paid in full, and the Hansons received a deed naming them as owners as tenants in common. It should be mentioned that the record shows that on November 13, 1923, Richard sold his Canadian homestead for $2,850. Whether any portion of these separate funds was used to pay off the debt on the 35th Avenue property does not appear. In 1924 the Hansons constructed a house on this property, and thereafter lived there. They borrowed various sums secured by deeds of trust for this purpose, totalling at one time $2,600. The first loan was secured on April 14, 1924. At the time of Edna's death on July 11, 1931, this debt had been reduced to $930.05. This loan was paid off by Richard after Edna's death, but the original source of the funds used for such repayments does not appear. Edna had declared a homestead on this property on December 15, 1925. This is one of the pieces of property here involved, found by the trial court to have been acquired with the community funds of Richard and Edna.

The second piece of improved real property here involved is located on Quigley Street, in Oakland. It was purchased by the Hansons on May 7, 1928, for $2,700, $100 being paid down and the balance in small monthly payments. This property was deeded to the Hansons as "joint tenants." From it the Hansons enjoyed some undisclosed income as rent. This property, too, was found by the trial court to have been purchased by the Hansons with community funds.

There are certain other relevant facts that should be mentioned. On June 29, 1929, the Montana homestead was sold for $1,500, the deed being signed by both of the Hansons.

After Edna's death, Richard waived his right to be appointed administrator of her estate, and requested that one Wilmarth by name be appointed, which request was granted. In his petition for letters of administration Wilmarth alleged that the real properties here involved were the community property of Richard and Edna. But in an action brought by Richard against Wilmarth, as administrator, to quiet his title against any claims of Edna's estate, the trial court, in 1934, found that the properties were the separate properties of Richard. This quiet title decree was entered October 22, 1934, the administrator not contesting the action. There is no claim of any fraud practiced by Richard in securing this decree. There is evidence, and the trial court found, that Wilmarth's appointment was secured by Richard, and that Wilmarth was a "friendly Administrator." The application for this appointment was apparently made by Richard's then attorney, who had been Richard's friend and attorney for many years, and who is the attorney for Richard's relatives in this proceeding.

The quiet title decree adjudged that Richard "at all times herein mentioned, was and now is the owner of, in fee simple, and entitled to the immediate possession of" the two pieces of real property, and that Wilmarth, as Edna's administrator "had no estate, right, title, interest, claim, or demand whatsoever in or to the above described real property, or any part or portion thereof." Richard's title was quieted against all claims of Edna's estate, and Wilmarth, as administrator, was enjoined from bringing any action in respect to Richard's title, or from asserting any "right, title, interest, claim, or demand, whatsoever, in or to said real property adverse" to Richard.

Obviously, the two pieces of real property must have been held by Richard and/or Edna as tenants in common, as community property, as homesteaded property, in joint tenancy, or as the separate properties of either. The quiet title decree determined that they were held as the separate property of Richard. Of course, Edna having died intestate, without issue or parents, even if the properties had been held in tenancy in common, community property, as homesteaded property or in joint tenancy, they would have gone to Richard, by operation of law. But the quiet title decree determined that Edna's estate had no interest at all in these properties and that they were and had been the separate property of Richard. Thus, the quiet title decree, and the judgment in this action are not only inconsistent with, but directly contradictory to each other. This presents the question as to whether the quiet title decree is *res judicata* and, as such, a bar to the instant case.

[1, 2] The trial court held that it was not. The issue was properly raised. When Richard died these two pieces of real property and their furnishings, were in his estate. These properties have since been sold and cash substituted for them. When the dispute arose between the husband's and the wife's relatives, the husband's relatives instituted this action to determine heirship. In their petition the husband's relatives not only averred that the properties involved were the sole and separate property of Richard, and thus by necessary implication had not come to him from his predeceased wife under any of the circumstances set forth in section 228 of the Probate Code, but in proper form pleaded the 1934 quiet title decree as a conclusive determination of that fact and as a bar to the claims of the wife's relatives. At the inception of the trial the husband's relatives moved for judgment on the pleadings on the ground that the quiet title decree "was a bar and an estoppel" against the claims of the wife's relatives. This motion was denied by the trial court and, after trial, in its conclusions of law, the court found that "it is not true" that the wife's relatives "are estopped or barred" by the quiet title decree.

In our opinion this determination of the trial court was erroneous.

It is true that if the properties had gone through some special proceedings in the probate of Edna's estate, and had vested in Richard as the surviving spouse in such proceedings, heirs of Edna who were not parties to such proceedings would not have been bound by any determination there made by the probate court as to the nature of the property. See King v. Pauly, 159 Cal. 549, 115 P. 210. That is so because the heirs of Edna would not have been represented in such special proceeding. McPike v. Mehrmann, 18 Cal.App. 501, 123 P. 549. But here Richard tried his claim against his wife's estate in a quiet title action, which is a proper procedure. In re Estate of Kurt, 83 Cal.App.2d 681, 189 P.2d 528. In this quiet title action all of the heirs of Edna were, of course, represented through the administrator of her estate. For that reason, this quiet title decree is necessarily binding not only against the administrator of Edna's estate against whom it was rendered, but also against Edna's heirs or privies. Luckhardt v. Mooradian, 92 Cal.App.2d 501, 207 P.2d 579; Schwarz v. Bohle, 47 Cal. App. 445, 190 P. 819; In re Estate of Clark, 190 Cal. 354, 212 P. 622.

Respondents, the wife's relatives, tacitly concede that the quiet title decree is *res judicata* against those who were heirs of the wife in 1934, that is, that that decree is binding against Edna's estate and heirs and constitutes as against such heirs a conclusive determination that the two pieces of property were the separate property of Richard. But, they urge, under section 228 of the Probate Code, they, as surviving relatives of the wife, take, if they take at all, not as heirs of the predeceased Edna, but as the statutory heirs of Richard. Respondents are correct in this portion of their argument. Under section 228 of the Probate Code the relatives of the predeceased wife are made the statutory heirs of the subsequently deceased husband. The wife's relatives do not claim through the predeceased wife or through her administrator, but rely on Edna only to establish that kinship which can be translated into legal effect by making them statutory heirs of the subsequently dying Richard. In re Estate of Marshall, 42 Cal.App. 683, 184 P. 43; In re Estate of Watts, 179 Cal. 20, 175 P. 415; In re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231.

The wife's relatives next contend that as statutory heirs of Richard they are not bound by the 1934 decree because they had no legal right to appear in that action for the reason that their interest did not arise until the death of Richard in 1952, intestate.

The fallacy of this argument is that the 1934 quiet title decree bound not only the administrator of Edna's estate, but it also bound Richard. It not only bound Richard, but bound all those who were then or should become privy to him. Richard's statutory heirs, not ascertained until 1952, must be considered as being in privy with Richard, and therefore bound by the 1934 decree. "A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. (Citing authorities.)" Bernhard v. Bank of America, etc., 19 Cal.2d 807, 811, 122 P.2d 892, 894; see, also, Dillard v. McKnight, 34 Cal.2d 209, 215, 209 P.2d 387, 11 A.L.R.2d 835. It is also stated in the Bernhard case 19 Cal.2d at page 811, 122 P.2d at page 894: "The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. (Citing authorities.)" Certainly, if the court in the 1934 quiet title action had found the property was the community property of the parties, or the separate property of Edna, Richard would have been bound by such a decree. That being so, the wife's relatives, as his statutory heirs, and therefore his privies, are also bound. It, therefore, follows that whether the wife's relatives be considered heirs of the predeceased wife or of the subsequently deceased husband they are bound by the 1934 decree.

[3, 4] This still leaves undecided the questions in reference to the furnishings, which were not involved in the 1934 decree. As to when these furnishings were acquired, and from what source, the record is silent. There is evidence that the home of the parties during their married life was well furnished. There is evidence that both Edna and Richard had separate property of their own. There is evidence that they accumulated some funds after marriage from their earnings. If these furnishings were acquired during the marriage of the parties, the presumption would be that they were community property. § 164, Civ.Code. If they were acquired by Richard after the death of Edna, the presumption would be that they were his separate property. It is the general rule that "where the right of a person as heir depends not merely upon the fact of a certain relationship, but upon the fact of such relationship plus the fact that the property he claims as heir had formerly been either the community property of the decedent and his or her predeceased spouse or else the separate property of the latter, the burden of proof of showing such additional fact rests upon him. It is a fact which must appear in order that he be an heir and he is an heir only as to property as to which it does appear." In re Estate of Simonton, 183 Cal. 53, 60, 190 P. 442, 445; see also, In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042. Even though the husband's relatives filed this petition to establish heirship, they established a prima facie case when they proved that the furnishings in question were in Richard's estate at the time of death, that Richard was then unmarried, and died intestate without issue or parents surviving. The burden rested on the wife's relatives to prove that this property had been the community property of Richard and his predeceased spouse. This burden they did not sustain.

It follows that the two pieces of real property, as a matter of law, must, by reason of the 1934 decree, be declared to be the separate property of Richard. These properties should be distributed to Richard's relatives. As to the furnishings, found to be community property, the evidence in the present record is insufficient to support the finding. Unless the wife's relatives can produce additional evidence on a retrial of this issue, this property, too, should be distributed to Richard's relatives.

The portions of the judgment appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.

126 Cal.App.2d 208

PEOPLE v. TELL.

Cr. 2994.

District Court of Appeal, First District, Division 2, California.
June 23, 1954.

Proceeding on a defendant's petition for coram nobis which sought vacation of a judgment of conviction. The Superior Court, Alameda County, James R. Agee, J., denied the petition, and the defendant appealed. The District Court of Appeal, Dooling, J., held that defendant whose admitted prior conviction of a felony rendered him ineligible for probation could not complain on petition for coram nobis of trial court's failure to require a report of probation officer before sentencing defendant for subsequent offense.

Affirmed.

1. Criminal Law ⚷997(4)

Defendant whose admitted prior conviction of a felony rendered him ineligible for probation could not complain on petition for coram nobis of trial court's failure to require a report of probation officer before sentencing defendant for subsequent offense. Pen.Code, §§ 288, 1203.

2. Criminal Law ⚷982

It is not necessary that prior convictions be charged in indictment or information in order that court may consider them in applying provisions of statute rendering defendant ineligible for probation if he has been previously convicted of a felony. Pen.Code, §§ 288, 969, 969½, 1025, 1203.

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James M. Dennis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

This appeal is from an order denying a petition for coram nobis which sought the vacation of a judgment of conviction of violating section 288 Penal Code. The appeal has been well briefed and argued by counsel appointed by this court at appellant's request. The sole ground relied upon is that the failure of the trial court to require a report of the probation officer before sentencing appellant was prejudicial error.

Penal Code section 1203 so far as here pertinent provides: "probation shall not be granted * * * to any defendant convicted of the crime of * * * violation of Section * * * 288 * * * of this code * * * unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor previously convicted in any other place of a public offense which would have been a felony if committed in this State * * *."

[1] On cross-examination during the trial of the charge against him appellant admitted that he had previously been convicted of a felony, grand theft. This fact, under the quoted provision of section 1203, rendered appellant ineligible for probation and no prejudice could have been suffered by him through the court's refusal to order a report from the probation officer.

[2] Appellant argues that under sections 969, 969½ and 1025 of the Penal Code the prior convictions must be charged in the indictment or information in order to be considered by the court in applying the provision of section 1203 above quoted. The court ruled otherwise in People v. Leach, 22 Cal.App.2d 525, 71 P.2d 594. We are satisfied of the correctness of the reasoning

and conclusion of the court in that case. The very language of section 1203, "unless the court *shall be satisfied* that he has never been previously convicted of a felony", shows on its face that the court is entitled to go beyond the issues framed by the indictment or information in determining whether the defendant is entitled to probation.

Order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

PEOPLE v. YRIGOYEN.*

Crim. 2500.

District Court of Appeal, Third District, California.

June 22, 1954.

Defendant was convicted of issuing a check without sufficient funds or credit and with intent to defraud. The Superior Court, Lassen County, Ben V. Curler, J., entered judgment, and defendant appealed therefrom, and from order denying his motion for new trial. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained jury's implied finding of fraudulent intent.

Judgment and order affirmed.

1. False Pretenses ⇨39

Where the People introduced evidence that defendant had issued his check without a sufficient balance to cover it, and without having credit with bank, and had obtained cattle of another by delivering the check to such other, and that the check had been dishonored, the People thereby made out a prima facie case against defendant under statute making it unlawful to issue a check without sufficient funds or credit and with intent to defraud, the fraudulent intent being inferrable from such evidence. Pen.Code, § 476a.

2. False Pretenses ⇨49(2)

In prosecution for issuing a check without sufficient funds or credit and with intent to defraud, evidence sustained jury's implied finding of fraudulent intent. Pen. Code, § 476a.

3. Criminal Law ⇨670

In prosecution for issuing a check without sufficient funds or credit and with intent to defraud, even if court could be said to have refused to admit testimony as to status of defendant's business as reflected by his books of accounts, such refusal was not shown to be error, in absence of any showing by offer of proof or otherwise as to what that status was, and as to whether it was such as to materially affect issue of intent. Pen.Code, § 476a.

4. Criminal Law ⇨720(7)

In prosecution for issuing a check without sufficient funds or credit and with intent to defraud, argument of district attorney, in which he referred to checks which he indicated or asserted defendant had drawn in favor of a third party, which checks, arriving in bank prior to the check upon which the prosecution was based, depleted defendant's account, was supported by record and did not constitute misconduct. Pen.Code, § 476a.

5. Criminal Law ⇨800(6)

In prosecution for issuing a check without sufficient funds or credit and with intent to defraud, instruction that in respect to certain crimes, the criminal act must be accompanied by specific or particular intent without which such a crime may not be committed, and that the crime charged was such a crime, so that before jury could find defendant guilty a specific intent to defraud was required to be proved, which instruction followed one in which the crime charged was defined as including the element of intent to defraud, was not subject to criticism that it failed to instruct jury as to meaning of "specific intent." Pen. Code, § 476a.

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J. Everett Barr, Yreka, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Frederick G. Girard, Deputies Attys. Gen., for respondent.

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* Subsequent opinion 276 P.2d 633.

VAN DYKE, Presiding Justice.

Appellant has been convicted of a violation of Penal Code Section 476a issuing a check without sufficient funds or credit and with intent to defraud. From the order denying his motion for a new trial and from the judgment he appeals.

Appellant admits the making and nonpayment of the check, but contends that the evidence was insufficient to sustain the jury's implied finding of fraudulent intent on his part, that the court erred in rejecting certain testimony and that the district attorney was guilty of misconduct in his argument to the jury. We shall treat of these contentions in order.

A summary of the evidence which, in the main, is not in conflict, shows that on September 30, 1950, defendant issued a check to the complaining witness, Pierre Mendiboure, in the sum of $1,000 as part payment on the purchase of certain cattle. The check was drawn on appellant's commercial account in a Healdsburg bank and was paid when presented. On October 5th appellant agreed to resell the cattle to one Lucas, the manager of a ranch near Healdsburg. Both Lucas and defendant testified that on that day they went to the Healdsburg bank and gave to the manager a check drawn by Lucas in favor of defendant in the sum of $8,000 with instructions that it subsequently was to be deposited to appellant's account for the purpose of covering a final payment check to be given to Mendiboure. This check was held in the bank undeposited until October 10th. Appellant's bookkeeper testified that on that date he went to the bank with a second check in the sum of $5,566 given him by Lucas in payment of the balance due appellant for the cattle purchased by Lucas; and that he then deposited both checks to appellant's account. In the interim and on Saturday, October 7th, appellant took delivery of the cattle from Mendiboure and gave him a final payment check for the sum of $11,260 drawn on appellant's account in the Healdsburg bank. It is this check which forms the basis of the present complaint. When it was presented for payment at the bank on October 14th it was dishonored due to insufficient funds. In the main this insufficiency was caused by the prior presentation of two other checks which appellant had drawn and which totaled more than $10,000. Appellant's bank statement was introduced in evidence and it appeared that the only time during the month of October when there were sufficient funds in appellant's account to pay his check to Mendiboure was on the 10th when, after deposit of both the Lucas checks, the balance in the account amounted to $13,572.30. The record shows that the information charging appellant with felonious issuing of the Mendiboure check was not filed until more than two and a half years after the check had been dishonored and that in the meantime appellant had paid Mendiboure $3,000 to apply against the amount appellant owed him and had delivered to him the pink slips from a number of motor vehicles which, however, for some unexplained reason Mendiboure did not attempt to capitalize. The foregoing testimony concerning the arrangements made at the bank when the first Lucas check was given to the bank manager was introduced by appellant after the People had rested.

[1] Section 476a of the Penal Code provides that any person who wilfully with intent to defraud delivers any check for the payment of money, knowing at the time that he has not sufficient funds in or credit with the bank on which the check is drawn for the payment thereof on presentation is punishable by imprisonment in the county jail or in the State prison. The essentials of proof, therefore, are: The issuance of the check with knowledge that it is issued without funds or credit in the bank to meet it and with fraudulent intent. When the People had introduced evidence that appellant had issued his check without a sufficient balance to cover it and without having credit with the bank, that he had obtained the cattle of Mendiboure by delivering that check to him, and that the check had been dishonored, a prima facie case against appellant had been made out, for the element of fraudulent intent could be inferred from that evidence. The discussions at the bank between appellant Lucas

and the bank manager regarding the use of the Lucas check to meet the anticipated draft in favor of Mendiboure did not amount to an arrangement of credit with the bank within the meaning of the statute, for the statute expressly defines credit as therein used as meaning an arrangement or understanding with the bank for the payment of the check. Of course, whether the jury would draw the inference of fraud was for the jury to decide after the case was submitted to them and their conclusion upon the issue of fraudulent intent would be based not only upon the evidence we have related as being introduced by the People, but also upon whatever additional pertinent evidence might be received bearing on the issue.

Appellant sought to meet the State's case not by proof that he had not drawn the check without funds or credit or that it had not been dishonored when presented, but by showing that when he issued the check he had not done so with the requisite fraudulent intent; and he argues here that he conclusively proved the absence of such intent by the testimony he introduced. That testimony was most persuasive. It consists of the testimony of himself, Lucas and his bookkeeper about the conversation with the bank manager concerning the holding of the first Lucas check by the bank manager until the bookkeeper came in with the second Lucas check and deposited both. The action on the part of the bank manager was exactly in accordance with the arrangements which appellant and Lucas testified they made with the bank. The effect of this testimony is not lessened by that of the bank manager that he could not so long after the transactions took place remember that conversation nor how he had handled the checks. He said it could well have been as testified to by appellant's witnesses. Appellant argues that his rebuttal evidence was such as to bar the jury as a matter of law from inferring fraudulent intent. This contention cannot be sustained. On this subject matter the Supreme Court in Blank v. Coffin, 20 Cal.2d 457, 460, 126 P.2d 868, 870, spoke as follows:

> "An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. [The material fact we are here concerned with is fraudulent intent.] * * * If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. * * *
>
> "Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has has been established as a matter of law. * * * The jury, however, is the sole judge of the credibility of the witnesses * * * and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. * * * In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference."

[2] The argument of appellant, therefore, is that the testimony of the witnesses on which he relies was such as to establish the nonexistence of fraudulent intent as a matter of law. But if we apply the usual tests we think it cannot be said that appellant's evidence can be so evaluated. Appellant himself was, of course, a vitally interested witness and his bookkeeper might also fairly have been considered to be interested in his behalf. Even Mr. Lucas could have been thought by the jury to have wanted to establish his good faith as the purchaser of

the Mendiboure cattle. All three men were testifying after the lapse of about three years of time. Finally, if the testimony of all three be accepted, it does no more than furnish in turn the foundation for an inference of good faith on the part of appellant when he issued the Mendiboure check. Opposed to the drawing of this inference are the facts shown by the People's witnesses, plus the depletion of appellant's bank account by two other checks with no explanation by appellant as to when they were drawn, what was the consideration, or why adequate deposits were not made for their payment without depleting the balance built up for the claimed purpose of honoring the Mendiboure check. As to when these checks were drawn appellant himself said he could not remember. The checks were not produced. They would, of course, under the normal course of business, have been returned to appellant and he tendered no explanation as to where they were. On the whole he appears to have been either quite forgetful or deliberately evasive as to the time, circumstances, consideration and the like, attendant upon the issuance of these two checks which depleted his account to the point where the Mendiboure check went unpaid. It was for the jury to determine in this case whether to infer fraudulent intent on the one hand or good faith on the other. They found that fraudulent intent existed and that finding is supported by the record.

[3] While appellant's bookkeeper was on the stand appellant sought to elicit testimony from him as to the status of appellant's business as reflected by his books of account. After showing that the books were kept in the regular course of business by the witness or others acting under him, this question was asked: "Q. Mr. Smith, from an examination of that record are you able to tell us what the accounts receivable were * * * in the month of July [1950]?" Objection was made that the offered testimony was not relevant and appellant's counsel replied that since the issue of intent to defraud was in the case he wished to show the condition of appellant's business prior to the issuance of the check as negativing a wrongful intent. The court said: "I think you are wrong on the nature of the charge 'without having made arrangements or credit for it being paid'. If it is necessary I think we will take a short recess. I, personally, don't see the materiality." Counsel for the appellant replied: "We will not press the issue, if Your Honor please; may I proceed? The Court: Yes." Respondent points out that the court did not rule out the testimony sought to be introduced. On the contrary, says respondent, the appellant voluntarily abandoned his course. These observations are pertinent, but even if it be assumed that the court refused to allow the situation shown by appellant's books to be proven there was no showing by offer of proof or otherwise as to what that situation was. The question objected to was asked as to entries in the books as of July, some three months before the Mendiboure check was issued. We cannot say from the record that even as of that remote date the condition of appellant's business would have been shown to be such as to materially affect the issue of intent. Error in respect to that contention has not been shown.

[4] During the argument the district attorney referred to checks which he indicated or asserted appellant had drawn in favor of the Modoc Auction Yard, which checks, arriving in the bank prior to the Mendiboure check, depleted appellant's account. Appellant urges that there was no evidence to show that appellant had written checks to the Modoc Yard. This contention is not borne out by the record. Appellant, upon cross-examination, said that he had issued a check for $3,701 at the "Modoc Sales Yard" and appellant's bank account showed that a check in that size had been paid and debited to appellant's account. Again, when asked if he recalled issuing a check to the Modoc Yard in the amount of $6,670.25 appellant's reply was that he did not remember that date, but believed the date was sometime in October. He was then asked: "Q. And this was in the amount of $6,670.25, you remember the amount? A. I don't remember the exact amount, but I believe that is pretty close. Q. You state you think you issued that to the Modoc yard a week after you gave the

check to Mr. Mendiboure? A. I believe that's right, I am not sure." There was other testimony by appellant with reference to these two checks and to their being made payable to the Modoc Auction Yard sufficient to rob the charge of misconduct on the part of the district attorney in argument of any validity.

[5] In his closing brief, for the first time appellant advances the contention that the court should have instructed the jury as to the meaning of specific intent. In support of this contention appellant refers to an instruction given by the court as follows:

> "In the case of certain crimes it is necessary that in addition to the intended act which characterized the offense the act must be accompanied by a specific or particular intent without which such a crime may not be committed. The crime charged in this case is such a crime and before you can find the defendant guilty a specific intent to defraud must be proved to have existed in the mind of the defendant at the time the check was made, drawn, uttered, or delivered."

Appellant says that the term "specific intent" has a definite and precise legal meaning and that the court ought, therefore, to have defined the words. We think the court did sufficiently define the words as meaning "a specific intent to defraud", which definition followed the use of the term "specific intent" in the same instruction. The instruction given followed one in which the crime charged was defined as including the element of intent to defraud. Under these circumstances we think the instructions are not subject to the criticism directed at them.

The judgment and the order appealed from are affirmed. This Court, by order heretofore made, granted bail to appellant pending appeal. It is ordered that upon the going down of the remittitur appellant surrender himself to the Sheriff of the County of Lassen to abide the further orders of the trial court.

PEEK and SCHOTTKY, JJ., concur.

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126 Cal.App.2d 99

KALFUS v. FRAZE.

Civ. 19986.

District Court of Appeal, Second District,
Division 3, California.

June 18, 1954.

Action for injuries sustained by pedestrian when she was struck by defendant's vehicle which was at time negotiating left-turn at intersection at which pedestrian was crossing. The Superior Court, Los Angeles County, Daniel N. Stevens, J., entered an order granting plaintiff's motion for new trial on ground of insufficiency of evidence to sustain verdict, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that there was evidence which would sustain findings that defendant had been negligent and that plaintiff had been free of contributory negligence.

Affirmed.

1. Appeal and Error ⚷979(2)

On appeal from order granting plaintiff's motion for new trial on ground of insufficiency of evidence to sustain verdict, issue was whether there was evidence which would have sustained judgment in favor of plaintiff.

2. Automobiles ⚷245(72)

Whether it is negligent of pedestrian not to maintain lookout after having looked once is question for jury to decide, taking all circumstances into consideration.

3. Automobiles ⚷244(6, 50)

In action for injuries sustained by pedestrian when she was struck by defendant's vehicle which was at time negotiating left turn at intersection at which pedestrian was crossing, there was evidence which would sustain findings that defendant had been negligent and that plaintiff had been free of contributory negligence. Vehicle Code, § 560(a).

* * *

Robert A. Cushman, Los Angeles, for appellant.

Joseph W. Fairfield, Ethelyn F. Black, Los Angeles, for respondent.

SHINN, Presiding Justice.

[1] This is an action for damages for personal injuries suffered by a pedestrian when struck by an automobile. The jury returned a verdict for defendant. Defendant appeals from an order granting plaintiff's motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict. On appeal from such order, the issue is whether there was evidence which would have sustained a judgment in favor of the moving party. Gallardo v. Luke, 33 Cal.App.2d 230, 91 P.2d, 211; Nicholas v. Leslie, 7 Cal.App.2d 590, 46 P.2d 761. We have only to determine whether there was evidence which would sustain findings that defendant was negligent and that plaintiff was free of contributory negligence. Defendant's argument is essentially a request that this court reweigh the evidence, and accept as established those facts testified to by his own witnesses which were most favorable to his defense, in disregard of the fact that our jurisdiction on appeal is limited to the review of questions of law.

Plaintiff was struck by the automobile of defendant as she was crossing Glendale Avenue at Doran Street in the City of Glendale, at about 5:15 p.m., December 6, 1951. Doran Street west of Glendale Avenue is 36 feet wide. Glendale Avenue is 58 feet wide. Doran Street east of Glendale Avenue is 30 feet wide and jogs about 35 feet to the south. The northern marked pedestrian crosswalk, which connects the northeast corner of the intersection with the northwest corner, extends northwesterly and southeasterly, with the western end about 25 feet north of the eastern end. On the east side of Glendale Avenue to the north of the intersection there is a food market, one exit of which is some 30 feet north of the above-described crosswalk. At the time of the accident it was dusk, and the streetlights had been turned on. Plaintiff was walking across Glendale Avenue toward the northwest corner of the intersection. It was disputed whether she was within the crosswalk or crossing to the north of it. Defendant was traveling east on Doran Street at a moderate speed, with his headlights turned on. As he reached the intersection the traffic signal governing traffic on Doran Street was green, and he rounded the corner and turned north on Glendale Avenue. He had completed or nearly completed the turn when the right front portion of his automobile struck the plaintiff, knocking her an undetermined distance northward. When defendant brought his car to a halt it was on the east side of the center line of Glendale Avenue, facing north, with the right front portion about 16 to 20 feet north of the crosswalk.

Plaintiff testified that she purchased two large sacks of groceries in the market, left by way of the above-mentioned exit, and walked south to the crosswalk. At that point she slowed her pace momentarily, observed that the signal light was green, and glanced around in all directions before stepping off the sidewalk. She saw no automobile except some coming south a long distance away. She walked across the street looking straight ahead. She did not remember whether she looked in other directions as she walked.

[2, 3] Whether it is negligent not to maintain a lookout after having looked once is a question for the jury to decide, taking all the circumstances into consideration. Taha v. Finegold, 81 Cal.App.2d 536, 184 P.2d 533. Here, the question was not one of law. Although plaintiff's testimony was uncertain in some respects, it was not thereby rendered unworthy of belief. Hendricks v. Pappas, 82 Cal.App.2d 774, 778, 187 P.2d 436. Plaintiff's testimony, if believed, was sufficient to justify findings that she used the pedestrian crosswalk and exercised due care for her safety by looking for approaching vehicles before stepping into the street. Although there was evidence that plaintiff was not within the crosswalk when she was struck, such evidence merely created a conflict to be resolved by the trier of fact.

The testimony of defendant given on the trial and in a deposition was that he did not perceive plaintiff until the right front of his auto was nearly touching her or until the auto actually struck her. Since there was nothing to obstruct his view, this evidence was sufficient to justify a finding that he was negligent in failing to observe the presence of plaintiff in the area through which he intended to drive. Milner v.

Toliver, 87 Cal.App. 38, 41, 261 P.2d 1069. Moreover, if plaintiff was crossing in the crosswalk, the jury could have found that defendant was negligent in failing to yield the right of way as required by section 560 (a) of the Vehicle Code. Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834. In commenting on the evidence after the verdict was returned, the trial court pointed out that even if plaintiff was not exactly in the crosswalk, defendant, in the exercise of ordinary care, could have seen her, and that if she would have been struck had she been in the crosswalk, her being slightly outside it, although prima facie negligent, would not have been a proximate cause of the accident. We agree. Nicholas v. Leslie, 7 Cal.App.2d 590, 594, 46 P.2d 761; Farole v. Eichman, 39 Cal.2d 822, 824, 249 P.2d 261; Woods v. Eitze, 94 Cal.App.2d 910, 917, 212 P.2d 12.

The appeal is without merit and was apparently taken for the purpose of delay.

The order is affirmed with $100 damages for a frivolous appeal.

PARKER WOOD, J., concurs.

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126 Cal.App.2d 41

PEOPLE v. SIU.

Cr. 5154.

District Court of Appeal, Second District, Division 1, California.

June 16, 1954.

Hearing Denied July 14, 1954.

Defendant was convicted of attempting to violate statute proscribing the possession of narcotics. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., rendered judgment and denied motion for new trial and defendant appealed. The District Court of Appeal, Drapeau, J., held that delivery to defendant by a police agent of what defendant thought was heroin, but what was actually talcum powder, was an unequivocal act toward commission of the crime of possession of heroin, sufficient to constitute the crime of attempt.

Judgment and order affirmed.

1. Criminal Law 🔑44

Mere intention to commit a crime does not of itself amount to an "attempt", and some act done toward accomplishment of the intended crime is necessary, but if a person formulates the intent and then does something more which in the usual course of natural events would result in the commission of a crime, the attempt is complete, even though the intended crime could not have been completed, due to some extrinsic fact unknown to person who intended it. Pen. Code, §§ 663, 664.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempt".

2. Criminal Law 🔑44

If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, even though, unknown to the person making the attempt, the crime cannot be committed because the means employed are in fact unsuitable, or because of extrinsic facts.

3. Poisons 🔑4

The delivery to defendant by a police agent of what defendant thought was heroin, but what was in fact talcum powder, was a direct unequivocal act toward commission of the crime of illegal possession of narcotics, constituting the crime of attempting to possess narcotics illegally. Health and Safety Code, § 11500; Pen. Code, §§ 663, 664.

Bertram H. Ross, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Dep. Atty. Gen., for respondent.

DRAPEAU, Justice.

Jacob E. Siu, defendant in this case, was a sheriff's deputy in Los Angeles county assigned as bailiff to one of the criminal courts. He proposed to a fellow deputy, who was in the sheriff's narcotics detail, that

that deputy supply him with narcotics for sale. Defendant said, "Do you have any connections for narcotics? I want something big. I have a connection that could handle any big quantity we could get."

The sheriff's narcotics deputy reported the conversation to his superiors, and was instructed to go along with defendant. So the next time he saw defendant he said to him, "Were you serious about what we were talking about the other day?" Defendant said, "Yes, I would like a large supply of heroin."

After that the two men had several conversations, arranging for a delivery to defendant. Finally the narcotics deputy told defendant that he "had the stuff." They agreed to meet at defendant's home, where he had an office in which he conducted an insurance business on the side. Defendant said he would put the narcotics in his office safe.

The narcotics deputy met defendant outside his home, and delivered to him a package containing white powder. Defendant put the package into his trousers' pocket. Then they went inside to the office. When defendant opened his safe to put the package into it, the narcotics deputy arrested him.

But the package did not contain heroin, nor any other narcotic. It had talcum powder in it.

Mr. Siu was indicted for the crime of attempt to violate Section 11,500 of the Health and Safety Code; (possession, transportation, etc. of narcotics) tried by the court without a jury, the case being submitted on the transcript of proceedings before the Grand Jury. He was convicted; denied probation; and sentenced to state's prison. He appeals from the judgment, and from the court's order denying his motion for a new trial.

The appeal is based entirely upon the fact that the package delivered to defendant when he was arrested contained nothing but talcum powder. Therefore, says the defendant, as no narcotic was involved in the transaction in any way, the corpus delicti of the crime of which he was convicted was not established, the communications between the two officers were in the mere nature of preparation to commit, and the evidence was insufficient to justify the trial court's finding of guilt.

Defendant argues that the facts in his case do not establish that "'fragment of the crime committed'" held essential in the following cases: People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 309, 98 A.L.R. 913; People v. Buffum, 40 Cal.2d 709, 256 P.2d 317; and People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29.

Defendant also argues that his case is similar to the old law-school classics that there can be no corpus delicti when a husband fires a gun at a dummy in a bed, thinking it the paramour of his wife, or when an attempt is made to poison with an innocuous substance, or when a person points an unloaded gun at another.

These illustrations do not reflect the rules that must be followed in defendant's case.

Section 663 of the Penal Code, adopted in 1872, defines the crime of attempt. Section 664 of the same Code provides penalties for the crime. Two elements are essential: a specific intent to commit a crime, and a direct, ineffectual act done towards its commission. People v. Miller, 2 Cal.2d 527, 42 P.2d 308.

[1] Mere intention to commit a crime does not of itself amount to an "attempt" as that word is employed in the criminal law. Some act done toward the ultimate accomplishment of the intended crime is necessary. People v. Stites, 75 Cal. 570, 575, 17 P. 693. But if a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete. And even though the intended crime could not have been completed, due to some extrinsic fact unknown to the person who intended it, still he is guilty of attempt.

[2] "If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are in fact unsuitable, or because

of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim or by a third person." 22 C.J.S., Criminal Law, § 77, p. 142.

This rule has been approved and followed in California. People v. Lanzit, 70 Cal.App. 498, 233 P. 816; People v. Hickman, 31 Cal.App.2d 4, 87 P.2d 80.

The facts in People v. Lanzit, supra, were somewhat the same as in this case. In the Lanzit case the defendant solicited another to held plant a bomb in the home of defendant's wife, to murder her. The plot was brought to the attention of the police by the person solicited. The police permitted the plan to go forward to the placing of the bomb, without a detonator, in the wife's home. Defendant was convicted of attempt to commit murder. The same argument was made on appeal as here. The District Court of Appeal said, 70 Cal.App. at page 505, 233 P. at page 819, "It is sufficient if the overt acts reach far enough toward the accomplishment of the intended offense to amount to the *commencement* of its consummation."

Defendant strongly relies upon People v. Gallardo, supra, 41 Cal.2d 57, 257 P.2d 29. In that case a defendant charged with attempt to commit abortion talked with three women in his office, arranged for operations, filled out hospital cards, and took money from them. No medicine was provided or administered, and no instrument or other means was used to procure a miscarriage. Our Supreme Court held that such conduct was not the direct, unequivocal act toward commission of a crime required by our law to constitute the crime of attempt.

[3] In this case, however, it is conceded that Mr. Siu intended to commit the crime of possession of narcotics. Delivery to him of what he thought was heroin was a direct, unequivocal act toward commission of the crime of possession. There was, therefore, no error in the court's finding that he was guilty of the crime of attempt.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

WHITE, P. J., and DORAN, J., concur.

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126 Cal.App.2d 93

CITY OF PASADENA v. PAINE et al.

Civ. 20050.

District Court of Appeal, Second District, Division 2, California.

June 18, 1954.

Condemnation proceeding by city to acquire a site for a branch library. From adverse judgment of Superior Court of Los Angeles County, Arnold Praeger, J., the defendants appealed. The District Court of Appeal, Fox, J., held that resolution of necessity which had been adopted by city board after resolution had been explained and discussed at an informal meeting of the board, and which had been read by title only at two official board meetings, was valid even though there was not a full reading of the resolution at a regular public session of the city board.

Judgment affirmed.

1. Municipal Corporations ⟹85

Resolution of necessity adopted by city board after resolution had been explained and discussed at an informal meeting of the board was valid even though there was not a full reading of the resolution at a regular public session of the city board and the resolution had been read by title only at two official board meetings.

2. Municipal Corporations ⟹85

Violation by city board of parliamentary rule adopted by city ordinance which provided for full reading of resolutions did not invalidate a resolution which did not receive a full reading but which was otherwise in conformity with charter requirements.

3. Eminent Domain ⟹196

In proceeding by city to condemn land for a library site, evidence of the explanation, discussion and consideration of proposed resolution of necessity at an informal meeting of the city board prior to official session of the board was properly admitted.

4. Municipal Corporations ⟹65

City which had brought itself within the condition of the "municipal affairs" sections of the constitution, had the power of municipal home rule with respect to all matters of local or internal concern and was not subject to general laws concerning such affairs. Const. art. 11, §§ 6, 8; Government Code, § 65360.

5. Municipal Corporations ⚿41

Necessity for and location of a branch library to be used by the city's inhabitants and as a part of its library system is a "municipal affair", and therefore, city which had brought itself within the condition of the "municipal affairs" sections of the constitution was not required to submit the matter to the city planning commission. Const. art. 11, §§ 6, 8; Government Code, § 65360.

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LeSage & Bowman and Thomas W. LeSage, Pasadena, for appellants.

Frank L. Kostlan, City Atty., Vincent W. Heublein, Senior Dep. City Atty. and Wendell R. Thompson, Dep. City Atty., Pasadena, for respondent.

FOX, Justice.

This is an appeal by the defendants from an interlocutory judgment in condemnation.

On February 15, 1952, the City of Pasadena filed condemnation proceedings for the acquisition of certain property in the San Rafael section of the city for a library site. For more than two years prior to filing this action, the Board of Directors of the City considered various sites in this locality for a branch library and discussed their relative merits. Several trips were made by the board in a body to this area for the purpose of evaluating the sites under consideration. As a result, the site here in question was decided upon.

On February 5, 1952, at a regular session of the City Board, the Resolution of Necessity was introduced and received its first reading, which was by title only. Prior to the regular meeting of the board on February 13, 1952, the directors met informally with the City Manager and other department heads to discuss the various matters to come before the board that morning. At that time the resolution was explained to them and discussed by them. Thereupon, when the Board officially convened, the resolution received its second reading—again only by title—and was unanimously adopted.

The vital question is whether the proceedings which led to the adoption of the Resolution of Necessity were valid. Defendants challenge its validity upon two grounds: (1) the failure to have a full reading of the resolution at a regular public session of the board of directors of the City; and (2) the absence of a report on the matter from the City Planning Commission. Neither of these objections is well founded.

The City does not claim that the Resolution of Necessity was read in full at any public session of the board of directors but it insists that such reading is not essential under its charter.

[1] Article 2, section 9, subsection (f) of the City Charter provides that ordinances and resolutions are the formal acts of the legislative body passed under "legal restrictions" governing action thereon. It further provides no ordinance or resolution shall receive final passage upon the same day that it was introduced. Subsection (e) provides that no ordinance or resolution shall be valid unless it receives the affirmative vote of four members of the board of directors, and that every ordinance and resolution so adopted shall be signed by the chairman, or, in his absence, by the vice chairman, or by four members of the board. Thus the charter enumerates three "legal restrictions" governing action on resolutions. All of these were admittedly complied with by the City. Such "restrictions" are undoubtedly mandatory and the omission of any one of them would be fatal. Had a fourth such "restriction" been intended, i.e., the full reading of a resolution, it would have been included in the charter by appropriate language. Its absence indicates that such a requirement does not fall in the same category with the aforementioned "restrictions."

[2] The procedure to be followed in the introduction of resolutions is covered by ordinance. It adopts Roberts' Rules of Or-

der, which provide for the full reading of resolutions. This parliamentary guide is adopted by legislative bodies to expedite the transaction of their affairs in an orderly fashion. Such rules are therefore procedural and their strict observance is not mandatory. Consequently, a failure to observe one of them is not jurisdictional and does not invalidate action which is otherwise in comformity with charter requirements. McGraw v. Whitson, 69 Iowa 348, 28 N.W. 632, 633—failure to observe a rule of Roberts' Rules of Order. Rutherford v. City of Nashville, 168 Tenn. 499, 79 S.W.2d 581, 584; Winninger v. City of Waupun, 183 Wis. 32, 197 N.W. 249, 251; South Georgia Power Co. v. Baumann, 169 Ga. 649, 151 S.E. 513, 515.

In McQuillin on Municipal Corporations, Vol. 4, section 13.42, pp. 523–5, the author, in discussing this problem, points out that the mere failure of a municipal legislative body to conform to parliamentary usage will not invalidate its action when the requisite number of members have agreed to the particular measure. Hence, "where an ordinance is enacted in compliance with the charter it will not be held void because in its passage one of the parliamentary rules of the council was violated. So, the council may abolish, suspend, modify or waive its own rules. But, of course, it cannot disregard mandatory charter provisions." In 62 C.J.S., Municipal Corporations § 416(c), p. 799, the principle is stated as follows: "While municipal governing bodies usually adopt or recognize parliamentary law as their rules of order and proceeding, courts ordinarily will not annul or invalidate an ordinance enacted in disregard of parliamentary rule, provided the enactment is made in the manner required by statute. The rules of parliamentary practice are merely procedural, and not substantive." These principles, of course, apply with equal force to resolutions.

The purpose of a parliamentary procedural rule requiring the reading of a resolution in full before it is voted on is to provide assurance that those whose duty is to vote thereon may have some knowledge of its scope and terms before they cast their votes. In the instant case that purpose was adequately served. Not only had the members of the board of directors visited the site in question as a body several times and come to the conclusion that this particular site should be selected, but the resolution of intention had been explained to them and had been discussed and considered by them informally. To require that the resolution be read in full when the board officially convened would have added nothing to the knowledge of the board members. It would simply have been an idle act. In denying defendants' motion for a nonsuit the court summarized the situation as follows: "The Court: The evidence in this case shows that the Board at an informal meeting prior to the public meeting and previously thereto had considered this matter, for over a year, and that all of the City Directors were familiar with the matter, knew the general purpose and the general context of the resolution, and that the reading of the resolution in full was not demanded by any City Director, and its reading would have served no useful purpose * * *" Finally, in denying defendants' motion to strike the resolution of necessity from the record, the judge appropriately observed that "certainly no property owner was prejudiced by a failure" to read the resolution in full at the official session of the board.

[3] Defendants vainly insist that it was improper to admit evidence of the explanation, discussion and consideration of the proposed resolution at the informal meeting of the board members prior to the official session of the board. This was simply a convenient means of familiarizing the members of the board with "the general purpose and general context of the resolution" so that when it was brought up formally before the board the members knew, as the court pointed out, "its intent and purpose." It was not, therefore, error to admit such evidence.

In arguing that the resolution of necessity is void because the board of directors did not submit the matter to the city planning commission and that such body did not hold a public hearing and make a report thereof, pursuant to the provisions of section 65360, Government Code, defendants overlook the character of the contemplated public improvement and the authority of a chartered city in making such a decision.

[4] Under sections 6 and 8 of Article XI of the California Constitution, cities may be empowered in their charter "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters * * *." By the provisions of its charter the City of Pasadena has brought itself within the condition of the "municipal affairs" sections of Article XI of our Constitution, Charter of the City of Pasadena, art. 1, sec. 1. Pasadena has thereby acquired "the power of 'municipal home rule' with respect to all matters of local or internal concern." Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 310, 144 P.2d 4, 8. With respect, therefore, to matters that are "municipal affairs" the City enjoys autonomous rule and is not subject to general laws concerning such affairs. Brougher v. Board of Public Works, 205 Cal. 426, 437, 271 P. 487; West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 522, 95 P.2d 138; Arnold v. City of San Diego, 120 Cal. App.2d 353, 358, 261 P.2d 33.

[5] There can be no doubt that the necessity for and location of a branch library to be used by the city's inhabitants and as a part of its library system is a "municipal affair." Section 65360 of the Government Code was therefore not applicable to these proceedings and failure to comply with its provisions did not invalidate the resolution of necessity.

Defendants rely on Johnston v. Board of Supervisors, 31 Cal.2d 66, 187 P.2d 686. In that case the action complained of was taken by the board of supervisors. It is wholly inapplicable to the instant proceeding because the exception of "municipal affairs" from the general legislative power does not apply to or include the powers and functions of *county* governmental bodies. Art. XI, sec. 6, Calif.Const.; Nicholl v. Koster, 157 Cal. 416, 420, 108 P. 302.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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126 Cal.App.2d 85

AMBROZ v. IRELAND.

Civ. 20025.

District Court of Appeal, Second District, Division 2, California.

June 17, 1954.

Action to recover unpaid balance of full amount of minimum wage. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that the finding that, between specified dates, defendant became indebted to plaintiff in sum of $1425.09, on account of work, labor and services performed for defendant by plaintiff, was a sufficient finding upon issue as to how many hours per day plaintiff actually worked for defendant during the period in question.

Judgment affirmed.

1. Labor Relations 🔑1561

In action to recover unpaid balance of full amount of minimum wage, finding that, between specified dates, defendant became indebted to plaintiff in sum of $1,425.09 on account of work, labor, and services performed for defendant, was a sufficient finding upon issue as to how many hours per day plaintiff actually worked for defendant during the period in question. Labor Code § 1194.

2. Trial 🔑404(1)

Findings should be reconciled, and every inference drawn therefrom, and uncertainties and ambiguities construed, if possible, so as to support judgment.

◆

George E. Atkinson, Jr., John W. Pares, Long Beach, for appellant.

Malcolm E. Uptegraff, Joseph B. Murphy, Long Beach, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to recover wages under section 1194 of the Labor Code, after trial before the court without a jury, defendant appeals.[1]

Facts: Plaintiff filed an action for wages under section 1194 of the Labor Code alleging nonpayment for straight time work performed for her first cause of action, and requesting double time penalty as provided for in section 28 of the Industrial Welfare Commission Order No. 5R. For her second cause of action defendant alleged that she "worked for defendant ten (10) hours a day, seven (7) days a week."

This allegation defendant denied. The trial court gave judgment in favor of plaintiff for the sum of $1,425.09.

Question: Did the trial court make findings on all the material issues raised by the pleadings?

[1] *Yes.* One of the issues raised by the pleadings was: "How many hours per day did respondent actually work for appellant during the some thirty months in question?"

Defendant contends that there is no finding upon this issue. This contention is not supported by the record. The trial court found: "That it is true that between the 10th day of June, 1949, and the 11th day of November, 1951, the defendant, Pauline Klyng Ireland, became indebted to the plaintiff in the sum of $1,425.09, on account of work, labor, and services performed for the said defendant by virtue of Section 1194 of the California Labor Code and Sections 4 and 9 of Industrial Welfare Commission Order No. 5R."

Section 4 of the Industrial Welfare Commission Order No. 5R reads in part as follows: "Every employer shall pay each woman or minor employee not less than sixty-five cents (65¢) per hour for all hours worked * * *"

Thus it is evident that dividing the sum of $1,425.09, the amount the trial court found defendant was indebted to plaintiff, by 65¢ per hour, the minimum wage to which plaintiff was entitled, the quotient is the total number of hours plaintiff worked for defendant for which she was not compensated.

[2] It is the law that findings should be (a) reconciled, (b) every inference drawn therefrom, and (c) uncertainties and ambiguities construed, if possible, so as to support the judgment. (Chamberlin v. Abeles, 88 Cal.App.2d 291, 299 [8 & 9], 198 P.2d 927; City of Signal Hill v. Wyse, 9 Cal.App. 2d 641, 642 [1], 50 P.2d 1076; Hartford v. Pacific Motor Trucking Co., 16 Cal.App.2d 378, 381[3], 60 P.2d 476.)

It is evident that in construing the trial court's findings pursuant to the foregoing rule the total number of hours paid for and the total amount of hours not compensated for gives the total number of hours work during the 30 months in question. This is predicated upon the reasonably implied finding of the trial court that plaintiff worked 48 hours a week for defendant.

No other questions being presented, the judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

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[1] Section 1194 of the Labor Code reads: "Recovery of unpaid balance of full amount of minimum wage. Any woman or minor receiving less than the legal minimum wage applicable to such woman or minor is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage, together with costs of suit, notwithstanding any agreement to work for a lesser wage."

126 Cal.App.2d 29

PEOPLE v. SPENCER.

Cr. 3004.

District Court of Appeal, First District,
Division 2, California.

June 16, 1954.

Rehearing Denied July 1, 1954.

Hearing Denied July 14, 1954.

Defendant was convicted of robbery and of grand theft of an automobile. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered judgment, and defendant appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained conviction.

Judgment affirmed.

1. Robbery 🔑24(1)

Evidence sustained conviction for robbery. Pen.Code, § 211.

2. Larceny 🔑65

Evidence sustained conviction for grand theft of an automobile. Pen.Code, § 487.

3. Criminal Law 🔑511(4)

In prosecution for robbery and grand theft of automobile, positive identification of defendant by the hotel clerk who was robbed, and the fact that the clerk's driver's license was found in the stolen automobile together with other personal effects of defendant, in whose possession the key to the automobile was found, corroborated testimony of defendant's accomplice. Pen.Code, §§ 211, 487.

4. Criminal Law 🔑1171(6)

Witnesses 🔑337(5)

Where defendant took stand in his own behalf, his testimony was subject to impeachment by proof of prior conviction of felony, and hence district attorney was not guilty of prejudicial misconduct in referring to defendant's past criminal record.

5. Witnesses 🔑380(5)

Where prosecution witness, who had made statements to grand jury identifying defendant as his accomplice, denied, on first being examined at trial, that defendant was his accomplice, claiming that the accomplice was some other person, district attorney could examine such witness as to his previous statements, on ground of surprise.

6. Criminal Law 🔑1159(3)

Fact that testimony of one witness was contradictory was not ground for reversal of conviction, where even if testimony of such witness was not in record verdict was adequately supported by evidence.

7. Criminal Law 🔑641(1)

Where defendant's rights were zealously safeguarded by both his counsel and court, and witnesses against him were vigorously cross-examined, and all factors that might point toward his innocence were effectively presented in counsel's closing argument to jury, defendant was given effective representation by assistant public defender.

Alonzo Spencer, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William K. Coblentz, Deputy Atty. Gen., for plaintiff-respondent.

KAUFMAN, Justice.

Defendant Alonzo Spencer, appearing in this appeal in pro. per., appeals from judgment after jury verdict finding him guilty of two counts of an indictment that had been returned on October 1, 1953, by the Grand Jury for the City and County of San Francisco. Count One, on which he was found guilty, charged him with the crime of robbery, Section 211, Pen.Code, in that he did on September 16, 1953, feloniously and forcefully take from the person of one Joseph Peterson the sum of $81 against his will and by means of force. Count Two, on which the verdict was not guilty, charged violation of Section 503, Vehicle Code, in that he did on September 17, 1953, wilfully, unlawfully and feloniously, drive and take a vehicle owned by the Morrison-Knudsen Company, without the consent of the owner and with intent to deprive the owner of its title. He was found guilty of Count Three, which charged grand theft, Section 487, Pen.Code, in that on September 17, 1953, in the City and County of San

Francisco, he did wilfully and feloniously take a certain motor vehicle, belonging to the Morrison-Knudsen Company.

[1, 2] On the evening of September 15 and early morning of September 16, 1953, Joseph Peterson, night clerk, was on duty at the Cartwright Hotel, 524 Sutter Street, San Francisco. He was working alone at about 4:00 a. m. when a man entered the hotel, stood in front of him and pointed a gun at him, telling him that this was a stick-up. Peterson identified this man as the appellant, Spencer. Appellant then jumped over the counter, told Peterson to remain quiet, and give him the key to the safe. Another person was with appellant, but Peterson was unable to identify him, since he came in a door right behind the office. Appellant had told Peterson to lie on the floor, thus he only saw the second man's feet and heard his voice in conversation with appellant.

Appellant took Peterson's wallet in which there were only a few dollars, and his glasses. Also in the wallet were Peterson's driver's license and a Shell Oil credit card. Peterson was brought to police headquarters after appellant was apprehended, and viewed the line-up. He stepped out of the room while the five men in the line-up changed positions, and then returned to the room and picked out appellant. He denied that the officers had told him whom to pick out. They told him, he said, first to look over the line-up, then go outside and tell them which man he thought was the person who had held him up, then return to the room and put his finger on the man. He said that he followed these instructions in making the identification.

Glenn Burdick, an employee of the Morrison-Knudsen Company of San Francisco, had assigned to him by his employer a 1949 Buick Super, License 1 B 83692, valued at about $1,250. On September 17, 1953, the day after the Cartwright Hotel robbery, Burdick parked his car at about 2:00 p. m. at 116 Natoma Street in San Francisco, leaving the keys in the car. When he returned at 5:00 p. m. the car was gone. On September 24, 1953, at about 5:00 a. m., Officer James Curran of the San Francisco Police saw this same Buick sedan parked on the east side of 7th Street, about 100 feet from the Greyhound Bus Depot. He noticed a citation on the windshield. The windows were down, so he checked the registration and found that it differed from the license plates. In the car was a briefcase and a pair of black shoes. This briefcase was later identified by appellant as his property. The police had the car towed to a garage. Inspector Hoover of the San Francisco Police, on September 28, 1953, found that a General Motors key which had been taken from the personal property of appellant, fitted the ignition and started the motor of the Buick which had been towed to the garage.

Burdick, from whom the Buick was stolen, examined it at the garage. He noticed that it had been sideswiped, the license numbers were missing and the key was gone. On the front floorboard of the car he found a duplicate driver's license in the name of Joseph John Peterson. Also in the car was a Rolls razor; a trip pass made out to appellant for the New York, New Haven and Hartford Railroad; a brown binder; and a pair of black shoes.

John J. Tobin, aged 16 years, testified that on the morning of September 16, 1953, he went with another person, a colored man, to the Cartwright Hotel, and held it up. The other party had a gun. They took money from the cash drawer as well as from the clerk, Joseph Peterson. The man with whom he held up the hotel used a razor similar to that found in the stolen Buick. At the time of John Tobin's arrest, Joseph Peterson's Shell Oil credit card was found in his possession. Tobin in testifying at the trial first denied that appellant was the man who held up the hotel with him, but admitted that he had so identified appellant before the Grand Jury. The prosecuting attorney then stated that he had previously gone over the matter with this witness, but that before he would make a formal claim of surprise he would request a recess to discuss the matter with Tobin. After the recess Tobin identified appellant as the man with whom he had robbed the hotel. He admitted that he had been afraid to testify that appellant was his accomplice because he was threatened by appellant. He had seen him in the County jail and again in the period between the time he was brought into court and the time when he first testified at the trial. When Tobin, after his arrest, had been first confronted by appellant he identified him as his accomplice. Tobin knew appellant by the name of "Joe Rice."

Inspector Bearden of the San Francisco Police, who arrested Tobin, testified that Tobin admitted having taken part in the Cartwright Hotel robbery and identified his accomplice as one Joe Rice. He described his appearance and clothing, and stated that he might be found at the Greyhound Bus Depot. Bearden went to the depot and located appellant who answered the description given by Tobin. When confronted by appellant, Tobin would say nothing, and appellant denied knowing Tobin.

Appellant testified that he arrived in San Francisco at 7:00 a. m., September 16, 1953, a time subsequent to the robbery. He said that he did not know John Tobin and had first met him when the officers had him in a car outside the Greyhound Bus Depot. He stated that he had never been to the Cartwright Hotel, had never seen the Buick automobile owned by the Morrison-Knudsen Company, and did not have the key to that auto in his possession, and that it had not been taken from him as testified to by the police officer. He had left his brief case and the pass for the New York, New Haven and Hartford Railroad in the parlor of his hotel, he said, having discarded them, and could not explain how they had been placed in the stolen car.

Under cross-examination appellant admitted that he had been convicted of four prior felonies.

There is no merit in appellant's first contention that the evidence does not justify the verdict of the jury as to the two counts on which he was convicted. The above summary of the testimony demonstrates that the evidence was adequate and very convincing.

[3] It is argued that the testimony of the accomplice was not corroborated. The testimony of the accomplice was corroborated by the positive identification of appellant by Joseph Peterson, the hotel clerk who was robbed, as well as by the fact that Joseph Peterson's driver's license was found in the stolen Buick together with other personal effects of appellant, and the key to the stolen car was found in appellant's possession.

[4] Appellant claims that the District Attorney was guilty of prejudicial misconduct in referring to appellant's past criminal record. But since appellant took the stand in his own behalf his testimony was subject to impeachment by proof of prior conviction of a felony. People v. Williams, 27 Cal.2d 220, 229, 163 P.2d 692; People v. Romer, 218 Cal. 449, 452–453, 23 P.2d 749; People v. La Verne, 212 Cal. 29, 32, 297 P. 561.

[5] Appellant apparently maintains error was committed in permitting the prosecution to show John Tobin's statements to the Grand Jury identifying appellant as his accomplice, for he quotes from People v. Follette, 74 Cal.App. 178, 240 P. 502, to the effect that where a witness called by the prosecution does not give adverse testimony but merely states that he does not remember, it is error to permit the prosecution to show previous statements before the Grand Jury. Here, however, Tobin did not have a lapse of memory, but on first being examined at the trial denied that appellant was his accomplice, claiming that the accomplice was some other person. The District Attorney could therefore examine him as to his previous statements on the ground of surprise. 27 Cal.Jur. 174–175, sec. 148.

[6] The fact that the testimony of this one witness is contradictory is not ground for reversal. People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378. Even if Tobin's testimony was not in the record at all, the verdicts are adequately supported by the testimony of Peterson, the police officers, and the circumstantial evidence.

Complaint is made that appellant was forced to stand in eighteen line-ups, but he does not show how this prejudiced him. He was not identified as the accused in any of the alleged line-ups except on the one occasion when Peterson identified him as the Cartwright Hotel robber.

Appellant states that he could not have threatened Tobin the accomplice because white and colored prisoners were segregated in different parts of the jail. But the testimony of Tobin shows that he and appellant did have opportunities to meet.

[7] There is no merit in the final contention that appellant was not given effective representation by the assistant public defender. A reading of the transcript shows that his rights were zealously safeguarded both by his counsel and the court. Witnesses against him were vigorously cross-examined, and all factors that might point toward his innocence were effectively presented in counsel's closing argument to the jury.

We conclude that there is no prejudicial error in the record and that the judgment of conviction is amply supported by the record.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

SWYCAFFER v. SWYCAFFER et al.*

Civ. 4820.

District Court of Appeal, Fourth District, California.

June 18, 1954.

Hearing Granted Aug. 10, 1954.

Action by wife for divorce wherein defendant counterclaimed for annulment. A decree of annulment was entered, and defendant was given custody and control of minor child. Subsquently, plaintiff filed affidavit praying that decree be modified to provide that custody of child be awarded to her, and showing that defendant was not the father of the child. The Superior Court, San Diego County, John A. Hewicker, J., entered order modifying the judgment and denying a motion to strike, and defendant appealed. The District Court of Appeal, Mussell, J., held that failure to disclose to court that defendant was not the child's father, and that the child was plaintiff's by her husband, from whom she had not been divorced at time of her purported marriage to defendant, was extrinsic fraud, and justified court in modifying the custody order.

Order modifying judgment affirmed; appeal from order denying motion to strike dismissed.

1. Bastards 🔑3

Child conceived during marriage was indisputably presumed to be legitimate, and evidence could not be received to the contrary.

2. Parent and Child 🔑2(4)

Father of child was an indispensable party to any proceeding whereby permanent custody of the child was to be awarded to another.

3. Parent and Child 🔑2(4)

Courts are without jurisdiction to make a permanent custody order awarding child to another without notice to each of its parents so that such parents may appear and protect his or her rights.

4. Parent and Child 🔑2(4)

Custody order which awarded permanent custody of child to someone other than its parents, entered in proceeding in which the child's father was not a party, was void upon its face.

5. Judgment 🔑346

A judgment void upon its face may be set aside by the court at any time, and it is immaterial how the invalidity is called to court's attention.

6. Marriage 🔑64

Failure to disclose to court that defendant, to whom court awarded custody of child upon annulment of marriage, was not the child's father, but that the child was plaintiff's by her husband, from whom plaintiff had not been divorced at time of her purported marriage to defendant, was

* Opinion vacated 285 P.2d 1.

"extrinsic fraud", and justified court in modifying the custody order.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud".

7. Fraud ⚷13(2)

The suppression of that which is true by one having knowledge or belief of the fact constitutes "actual fraud", whether suppression is intentional or accidental. Civ.Code, § 1572.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Fraud".

8. Judgment ⚷443(1)

If there is a duty to speak because of a trust or confidential relation, a failure to do so is obviously a fraud for which equity may afford relief, whether such fraud be regarded as extrinsic or an exception to the extrinsic fraud rule.

9. Judgment ⚷443(1)

Fraud or mistake is "extrinsic" when it deprives the unsuccessful party of an opportunity to present his case to the court.

10. Infants ⚷19

Minute entry and formal order denying motion to strike portion of order modifying custody judgment was not an appealable order.

◆

Vernon F. Bennett, San Diego, for appellants.

John R. Sorbo and John T. Holt, San Diego, amicus curiae on behalf of respondent.

MUSSELL, Justice.

It is alleged in the complaint herein that plaintiff and defendant were married in Yuma, Arizona, on July 7, 1950, and separated July 15, 1952; that defendant treated plaintiff with extreme cruelty and that there was one child born the issue of said marriage. Plaintiff sought a divorce, custody of the child, and an order for its support. Defendant answered and at the same time filed a cross-complaint for annulment of the marriage in which he alleged in the first cause of action that on the 7th day of July, 1950, plaintiff had another husband living, from whom she was not divorced, and in the second cause of action that defendant was induced to consent to the marriage by plaintiff falsely representing to him that she was divorced from her former husband and by concealing from defendant the fact that she was then pregnant. In a third cause of action (for divorce) defendant alleged that there were no children born the issue of the marriage of July 7, 1950; that plaintiff was guilty of extreme cruelty toward defendant and cross-complainant. On September 15, 1952, an order to show cause was issued and plaintiff was awarded custody of the minor child. On October 7, 1952, plaintiff, with the knowledge and consent of her then attorney, executed a written stipulation that her complaint might be withdrawn and that the action might proceed to trial upon the cross-complaint without further notice to her, and be heard on the default calendar at any date convenient to the court. On October 10, the trial court signed an order for payment of plaintiff's attorney's fees and on October 17, 1952, the matter was heard by the court. The decree recited that the plaintiff, by an agreement in writing with defendant, had relinquished her right of control of the child to defendant; that defendant had agreed to care for and support said child and had agreed to waive all claims against plaintiff. The court then found that all of the allegations in the first and second causes of action of the cross-complaint were true and ordered the marriage of July 7, 1950, annulled. It was further decreed that the defendant should have the custody and control of the child.

On December 19, 1952, plaintiff Dorothy Swycaffer filed an affidavit praying that the decree of annulment previously entered be modified to provide that the custody of the child be awarded to her and stating that she had been previously married to one George Kent and separated from him in the latter part of June, 1950; that Kent had informed her that he was obtaining a divorce on July 1, 1950; that defendant knew of this marriage and believed, as she did, that they were free to marry on July 7, 1950; that about a week after the marriage she discovered that she was pregnant by Kent and informed the defendant of this fact; that she was induced to enter into the agreement giving defendant the custody of the child by threats made by the defendant that he would file a bigamy charge against her if she did not sign it. The court issued an order to show cause why the decree of annulment should not be modified and the custody of the child given to the mother. At the conclusion of the hearing on this order and on January 29, 1953, the court modified the judgment by striking therefrom certain provisions relating to plaintiff's ability to care for the child, the execution of the agreement, the provisions thereof relating to custody, and particularly that portion of the decree awarding custody of the child to the defendant.

The court, in its order of modification, reaffirmed its findings as to the truth of the allegations in the first and second causes of action in the cross-complaint and its judgment awarding the cross-complainant Joe Swycaffer a decree of annulment. The court further held that the attorney for the defendant Joe W. Swycaffer knowingly and wilfully deceived and defrauded the court into awarding its decree as of October 17, 1952, relative to all portions of the judgment then rendered, which were stricken from it; that it had no power or jurisdiction to award the child to the defendant for the reason that he was not the father of said child and further that the custody of said child "was not an issue within the pleadings of the above case, nor was the contract referred to hereinbefore within the issues of said case"; that defendant's attorney knew these facts and withheld the true information and facts of the case from the court for the purpose of obtaining a fraudulent judgment so that the custody of the child would be awarded to the defendant; that the court would not have awarded the custody of said child or approved the said contract if it had not relied upon the conduct of defendant's attorney.

On March 11, 1953, the defendant and his attorney filed a motion to strike that portion of the order of modification relating to the conduct of the attorney and the reasons stated by the court for its order respecting custody of the child. This motion was denied. Defendant and his attorney, in propria persona, appeal from the order of January 29, 1953, modifying the judgment and striking portions thereof and from the minute entry and order dated March 20, 1953, denying the motion to strike that portion of the order relating to the conduct of defendant's attorney and its stated reasons for awarding custody of the child to defendant.

[1-3] It is at once apparent that the child involved was conceived during the marriage of plaintiff and Kent while they were cohabiting. Under such circumstances the child is indisputably presumed to be legitimate and evidence cannot be received to the contrary. Hill v. Johnson, 102 Cal.App.2d 94, 96, 226 P.2d 655. Furthermore, Kent was not made a party to the proceeding and he was an indispensable party to any proceeding whereby permanent custody of his child was to be awarded to another. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 265, 73 P.2d 1163. Courts are without jurisdiction to make a permanent custody order awarding the child to another without notice to each of its parents so that such parents may appear and protect his or her rights. Titcomb v. Superior Court, 220 Cal. 34, 40, 29 P.2d 206. As soon as the trial court herein discovered that the defendant was not the father of the child involved and that the custody of the child was not an issue under the allegations of the first two causes of action stated in the cross-complaint, he immediately issued an order to show cause and after hearing thereon, modified the judgment by striking the erroneous custody provision therefrom.

[4-7] The custody order in the decree was void upon its face. Such a judgment may be set aside by the court at any time and it is immaterial how the invalidity is called to its attention. Baird v. Smith, 216 Cal. 408, 410, 14 P.2d 749. Furthermore, the evidence presented to the court at the hearing on the order to show cause why the judgment should not be modified was sufficient to permit the court to modify the erroneous custody order made on the ground that extrinsic fraud was practiced upon it. If defendant's attorney had re-

vealed all of the facts to the court, it would doubtless have refused to award the child to defendant. Such conduct upon the part of defendant's attorney constitutes extrinsic fraud and justified the court in modifying the order made. Daut v. Daut, 98 Cal.App. 2d 375, 379, 220 P.2d 63. The suppression of that which is true, by one having knowledge or belief of the fact, constitutes "actual fraud" whether suppression is intentional or accidental. Snyder v. Security First Nat. Bank, 31 Cal.App.2d 660, 88 P.2d 760; Civil Code, § 1572.

[8, 9] As was said in Cardozo v. Bank of America, etc., 116 Cal.App.2d 833, 838, 254 P.2d 949, 952, quoting from Larrabee v. Tracy, 21 Cal.2d 645, 134 P.2d 265, and Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 210, 92 P. 184:

> " 'A common case of extrinsic fraud is where a party is deprived of his opportunity to be heard "by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party." In 3 Freeman on Judgments, supra, section 1235, pages 2575–2576, the author declares that if there is a duty to speak because of a trust or confidential relation, a failure to do so is obviously a fraud for which equity may afford relief whether such fraud be regarded as extrinsic or an exception to the extrinsic fraud rule.' 'Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court.' Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P. 2d 105, 107."

We are not here passing upon the question of whether the acts and conduct of defendant's attorney were wilfully and deliberately done with intent to deceive the court or whether the evidence justified the trial court's holding in that respect. It does appear, however, that the court was deceived and misled and there is sufficient evidence to support a finding of extrinsic fraud.

[10] The minute entry and formal order of March 20, 1953, denying the motion to strike the portion of the order modifying the judgment is not an appealable order. Litvinuk v. Litvinuk, 27 Cal.2d 38, 43–44, 162 P.2d 8; Bixby v. California Trust Co., 33 Cal.2d 495, 499, 202 P.2d 1018; Oppenheimer v. City of Los Angeles, 104 Cal.App.2d 545, 550, 232 P.2d 26.

The order modifying the judgment dated January 29, 1953, is affirmed, and the appeal from the minute entry and order dated March 20, 1953, is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

125 Cal.App.2d 827

SCHESSLER v. KECK et al.

Civ. 20057.

District Court of Appeal, Second District, Division 2, California.

June 11, 1954.

Hearing Denied Aug. 4, 1954.

Action for slander, and for declaratory relief. The Superior Court, Los Angeles County, John J. Ford, J., sustained demurrers to complaint and entered judgment of dismissal upon plaintiff's failure to amend, and plaintiff appealed. The District Court of Appeal, Fox, J., held that where the complaint adequately charged defendants with having acted jointly, according to a preconceived plan, to disseminate and publish statements imputing to plaintiff the present existence of syphilis, and complaint sufficiently apprised defendants of character and type of facts and circumstances upon which plaintiff was relying to establish conspiracy, complaint stated cause of action, but that, with respect to declaration sought by plaintiff establishing the fact that she never had syphilis, such declaratory relief beyond scope of controversy.

Affirmed in part; reversed in part.

1. Libel and Slander 🔑8

Utterances attributed to defendants to effect that plaintiff was being treated for syphilis were of the character which, if false and unprivileged when published, constituted slander per se, for which an action would lie without allegation of special damages. Civ.Code, § 46, subds. 2–4.

2. Limitation of Actions 🔑180(2)

Where plaintiff's complaint alleged that slanderous statements purportedly published by defendants were made in furtherance of a conspiracy formed by defendants to defame and damage her, and an overt act in pursuance of conspiracy was alleged to have occurred less than one year before the filing of the complaint, complaint did not affirmatively show upon its face that the action was outlawed by the one-year statute of limitations, and bar of statute could not be raised by demurrer. Code Civ.Proc. § 340, subd. 3.

3. Limitation of Actions 🔑55(1)

While a conspiracy is in existence, the statute of limitations will not begin to run until there is a cessation of the wrongful acts committed in furtherance of the conspiracy.

4. Limitation of Actions 🔑55(1)

Where complaint alleges that all allegedly libelous acts were committed pursuant to conspiracy formed by defendants, statute of limitations does not commence to run against any of the alleged libelous acts until the commission of the last overt act done in pursuance of the conspiracy.

5. Conspiracy 🔑18

Where complaint adequately charged defendants with having acted jointly, according to a preconceived plan, to disseminate and publish statements imputing to plaintiff the present existence of syphilis, and complaint sufficiently apprised defendants of character and type of facts and circumstances upon which she was relying to establish conspiracy, complaint stated cause of action. Civ.Code, § 46, subds. 2–4.

6. Libel and Slander 🔑83

Where complaint for slander contained no allegations indicating that the publications allegedly made by defendant were conditionally privileged, plaintiff's failure to allege malice in such manner, as to defeat such privilege did not render complaint defective. Civ.Code, § 47, subd. 3.

7. Conspiracy 🔑18

The law recognizes the intrinsic difficulty of proving a conspiracy, and permits greater liberality in pleading of a conspiracy, and allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which the conspiracy may be inferred.

8. Libel and Slander 🔑84

Allegations that defendant repeated and published slanderous statements to numerous other persons unknown to plaintiff but known to defendant, which allegations applied to matters pecularily within knowledge of defendants, were properly based upon information and belief.

9. Pleading 🔑18

Less particularity is required in allegations of complaint where, from nature of matters alleged, the adverse party has a knowledge of the facts superior to the party pleading them.

10. Pleading 🔑192(2)

A demurrer for uncertainty does not lie where the ambiguous facts alleged are presumptively within knowledge of demurring party.

11. Declaratory Judgment 🔑81

Where plaintiff, who brought action for slander against defendants who allegedly made statements to effect that plaintiff was being treated for syphilis, also sought a declaration establishing the fact that she never had syphilis, the declaratory relief sought was beyond scope of controversy, and, since plaintiff's slander action would fully and adequately determine all matters actually in controversy between the parties, court was justified in refusing to entertain count for declaratory relief. Code Civ. Proc. §§ 1060, 1061.

12. Declaratory Judgment 🔑5, 394

The entertainment of an action for declaratory relief is within discretionary power of court, and is not reviewable upon appeal except for an abuse of discretion.

13. Declaratory Judgment 🔑41

An action for declaratory relief is usually unnecessary where an adequate remedy exists under some other form of action.

Randolph J. Soker, Los Angeles, for appellant.

Hanna & Morton and Harold C. Morton, Los Angeles, for respondents.

FOX, Justice.

Defendants' individual demurrers to the second cause of action in plaintiff's first amended complaint were sustained without leave to amend. Their separate demurrers to the first cause of action were sustained with leave to amend within 20 days. Plaintiff appeals from the judgment of dismissal entered after she failed to further amend within that time.

Plaintiff's first cause of action alleges, so far as is here pertinent, that at all times referred to in the complaint she was an unmarried woman whose occupation, from 1946 until the present, was that "of cooking and catering in fine homes in Beverly Hills and Bel Air" in Los Angeles County. During the years 1943–1944, while plaintiff was serving with the United States Women's Army Corps, it was discovered that she had a biologic false positive type of reaction to certain blood tests for syphilis, "and the same was diagnozed as nonsyphilitic." On July 30, 1945, which was approximately the time plaintiff received an honorable discharge from military service, the Chief, Division of Serology, Army Medical Center of the Army Service Forces, Washington, D. C., issued a memorandum which stated these facts regarding plaintiff's biologic false positive (nonsyphilitic) type of reaction.[1] In 1946, in an attempt to eliminate this false positive type of reaction, plaintiff visited the Mayo Clinic in Rochester, Minnesota, where she underwent examinations which resulted "in the same diagnosis as nonspecific." In September, 1946, plaintiff having returned to California for treatment for the purpose of eliminating the false positive type reaction, the Mayo Clinic referred this information at plaintiff's request to Dr. Clyde O. Wood of Beverly Hills, California.

It is next alleged that on about September 23, 1946, plaintiff consulted Dr. Wood in Beverly Hills and presented to him the memorandum from the Army Medical Center previously referred to. This memorandum was clamped "to the top or front" of Dr. Wood's file or chart pertaining to plaintiff, where it remained from about September 23, 1946, to approximately the middle of 1950, a period during which plaintiff was treated in Dr. Wood's office. During 1946, 1947 and 1948, a part of plaintiff's treatment in Dr. Wood's office consisted of injections administered by a registered nurse then known as Jean Florian and now known as Jean Keck, one of the defendants herein. Jean had access to plaintiff's file or chart. During 1946, 1947 and 1948 plaintiff discussed her case with Jean in Dr. Wood's office, and informed Jean of the false positive (nonsyphilitic) diagnoses made by the Army Medical Center and the Mayo Clinic. Plaintiff told Jean she did not have syphilis but was taking the treatments only for the purpose of trying to eliminate the false positive type reaction and requested that Jean read her medical file and particularly the Army memorandum. It is alleged that Jean "stated to plaintiff that she had read and understood the same."

In Paragraph VII of her first cause of action, plaintiff alleges: "That thereafter in about August, 1948, the defendants combined and conspired by common design to defame and damage the plaintiff in the following manner, to wit: that the defendant Jean Florian was associating socially with the defendant William Keck, and visited in his home located at 283 Bel Air Road, Los Angeles, California; and that the defendant Sallie May Ferguson was employed by the defendant William Keck as a secretary-housekeeper, and lived in said home; and that the defendant Hazel Edwards was employed by the defendant William Keck as a maid, and lived in said home, that the defendants then and there discussed the plaintiff and by common understanding, design, purpose and use of language did declare and disseminate opprobrious statements of and concerning the plaintiff, to wit; that the plaintiff was being treated for syphilis in the office of

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[1] A copy of this memorandum was attached to the complaint and incorporated therein by reference.

Dr. Wood, and that the plaintiff should not be employed as a cook. That said statements, so made and published, imputed to plaintiff the present existence of an infectious, contagious, or loathsome disease, and imputed to plaintiff a want of chastity."

Paragraph VIII recites: "That the said statements of and concerning the plaintiff, were repeated and published by the defendants in about August, 1948, in furtherance of their common design, successively, by defendant Jean Florian to defendant, William Keck by the defendant William Keck, to defendant, Sallie May Ferguson, by defendant Sallie May Ferguson to defendant, Hazel Edwards, and by the defendant, Hazel Edwards at various times and places to numerous persons, including to one Ann Storms in the winter of 1949 or spring of 1950, and to one Nell Robinson in about March of 1952, and plaintiff is informed and believes and upon such information and belief alleges that the defendants repeated and published the same to numerous other persons unknown to plaintiff but known to defendants."

Paragraph IX alleges, in part, that "the circumstances were known to the defendants and each of them at the time of the said respective publications, which gave them reason to expect repetition as above alleged, in that the defendants knew the plaintiff to be employed as a cook and cateress in Beverly Hills or Bel Air, where the defendants likewise resided or were employed; that the plaintiff and defendants knew and were acquainted with numerous employers, employees and others in the said vicinity of Beverly Hills and Bel Air; and that said repetition and republication was the natural and probable consequence of the respective acts of the defendants."

Plaintiff's first cause of action concludes with the allegations, among others, that the said statements were false, untrue and unprivileged and constituted slander per se; that they exposed plaintiff to ridicule, contempt, hatred, and social ostracism and tended directly to injure her in her trade of cooking and catering by the imputation that she was not free of an infectious or loathsome disease; and that they were the proximate cause of the special damage to plaintiff therein described.

Plaintiff's second cause of action, after repleading virtually all the allegations of the first cause of action recites: "That whereas the defendants have imputed to plaintiff during the times above alleged the present existence of an infectious, contagious and loathsome disease, to wit: syphilis; and whereas the plaintiff alleges that she has never had and does not have the said disease, a controversy has arisen between the parties, and plaintiff desires a declaration establishing the truth of and concerning the plaintiff, that she has never had and does not now have syphilis, and that such statement and imputations to that effect, as above alleged, are false, untrue and slanderous per se; plaintiff seeks a declaration of the right and duties of the respective parties in the premises; and the plaintiff does not have any remedy which is as plain, speedy and adequate and well suited to the plaintiff's needs as declaratory relief."

The prayer was for a joint and several judgment for damages on the first cause of action; for a declaration on the second cause of action "that plaintiff never had and does not now have syphilis and that such statements to that effect * * * are false, untrue and slanderous per se;" and for general relief.

Defendants William and Jean Keck and Hazel Edwards individually filed general and special demurrers to the complaint, and specifically set up the one-year statute of limitations as contained in section 340 (3), Code of Civil Procedure.

All demurrers to the second count were sustained without leave to amend. Each demurrer to the first cause of action was sustained with leave to amend. Following plaintiff's election to stand upon her pleading, the court dismissed plaintiff's complaint against the demurring defendants. Plaintiff appeals from the judgment of dismissal.

[1-4] It is not disputed that the utterances attributed to defendants are of the character which, if false and unprivileged when published, constitute slander per se, Civ. Code, sec. 46(2-4), for which an action will lie even without an allegation of special damages. Semple v. Andrews, 27 Cal.App.2d 228, 81 P.2d 203; McLean v.

Altringer, 114 Cal.App. 363, 367, 300 P. 79; 16 Cal.Jur., pp. 38–9. However, defendants William and Jean Florian Keck contend that the complaint fails to state a cause of action for slander against them since it appears on the face of the complaint that their allegedly slanderous statements were published more than four years before January 13, 1953, the date upon which the complaint was filed. Code Civ.Proc., sec. 340(3). They seek to invoke the rule that where the complaint affirmatively shows upon its face that the action is outlawed by the passage of the limitation period, the bar of the statute of limitations may be raised by demurrer. Calif. Safe Deposit etc. Co. v. Sierra etc. Co., 158 Cal. 690, 698, 112 P. 274; 16 Cal.Jur. p. 606. However, plaintiff's complaint alleges that all of the slanderous statements purportedly published by the defendants were committed in furtherance of a conspiracy formed by said defendants to defame and damage her. She has alleged a publication by defendant Edwards to Nell Robinson as late as about March, 1952, in furtherance of the common design of the defendants to slander her. While a conspiracy is in existence, the statute of limitations will not begin to run until there is a cessation of the wrongful acts committed in furtherance of the conspiracy. People v. Hess, 104 Cal. App.2d 642, 678, 234 P.2d 65. In 53 C.J.S., Libel and Slander, § 156, p. 240, this proposition is stated as follows: "Where the complaint alleges that all the allegedly libelous acts were committed pursuant to a conspiracy formed by the defendants, the statute of limitations does not commence to run against any of the alleged libelous acts until commission of the last overt act done in pursuance of the conspiracy." The text is supported by Maclaskey v. Mecartney, 324 Ill.App. 498, 58 N.E.2d 630, 636. In the instant case, an overt act in pursuance of defendants' conspiracy is alleged to have occurred less than one year before the filing of the complaint and hence within the statutory period of limitations.

[5] Defendants Jean and William Keck vainly argue that the complaint fails to state a cause of action against them in that it does not sufficiently allege the facts or circumstances of the purported conspiracy. They contend that plaintiff's complaint must contain more than a simple allegation that they "combined and conspired." While it may be that the mere allegations of "conspiracy," "combination" and "common design" which are interspersed in the pleading, standing alone, are conclusions, nevertheless, a reading of the entire complaint shows that these terms are aided by other allegations which elaborate on the mutual understanding arrived at by defendants, and when all of the allegations are considered together, they adequately charge the defendants with having acted jointly, according to a preconceived plan, to disseminate and publish statements imputing to plaintiff the present existence of an infectious or loathsome disease. It is thus abundantly obvious that plaintiff has done far more than confine her complaint to a naked allegation of conspiracy. California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511; See Lorenson v. Superior Court, 35 Cal.2d 49, 57, 58, 61, 216 P.2d 859. A greater quantum of detail was not required. This is particularly true where conspiracy is involved, for the courts recognize that because of the clandestine nature of the scheme or undertaking engaged in, its existence must often be inferentially and circumstantially derived from the character of the acts done, the relations of the parties and other facts and circumstances suggestive of concerted action. Lorenson v. Superior Court, supra; Campbell v. Birch, 19 Cal.2d 778, 789, 122 P.2d 902; California Auto Court Ass'n v. Cohn, supra; Biggs v. Tourtas, 92 Cal. App.2d 316, 322, 206 P.2d 871. Plaintiff's complaint sufficiently apprised defendants of the character and type of facts and circumstances upon which she was relying to establish the conspiracy. California Auto Court Ass'n v. Cohn, supra; Stansberry v. McKenzie, 192 Tenn. 638, 241 S.W.2d 600, 601, 26 A.L.R.2d 1028; Nardyz v. Fulton Fire Ins. Co., 151 Kan. 907, 101 P.2d 1045, 1048; Ketcher v. Sheet Metal Workers' International Ass'n, D.C., 115 F.Supp. 802, 815.

[6] Defendants Jean and William Keck make the further contention that the com-

plaint is fatally defective as against them in that it discloses that the publications allegedly made by them were conditionally privileged yet plaintiff has failed to allege malice in such a manner as to defeat the privilege. They cite section 47(3) of the Civil Code[2] and assert the complaint demonstrates that the defendants had an interest in the fitness of the person who might prepare their food and were therefore privileged to discuss the plaintiff. Unfortunately for the vitality of this proposition, the pleadings are destitute of any allegations which would give rise to the conditionally privileged occasions hypothesized by defendants or of any other qualified privilege. The interpretation contended for by defendants can be achieved only by severely wrenching the facts alleged and implying others not pleaded. The complaint itself comprises no statements that would suggest that plaintiff had ever sought employment by William Keck or any other defendant, nor is there any intimation that the communications published concerned plaintiff as an existing, former or prospective employee. For aught that appears from the pleadings, the statements published by defendants were the irresponsible utterances of a close-knit coterie of scandal-mongers discussing a choice morsel of base gossip, who leagued themselves in a conspiracy to denigrate plaintiff's reputation through the circulation of the slanderous remarks. While defendants may be able to establish privilege in resisting this action, we are concerned only with the complaint as it stands at a time when the verity of its allegations must be accepted.

Similarly, defendants' demurrers on the ground that the complaint was uncertain are not well taken. The uncertainty alleged to exist is that it cannot be ascertained from the complaint: (a) with particular reference to paragraph VII, "how or in what manner the defendants combined and conspired by common design to defame and damage the plaintiff";

(b) "how or in what manner the defendants at the time and place alleged discussed the plaintiff and what agreement, if any, they did reach concerning said plaintiff";

(c) what times, places and persons are referred to in that portion of paragraph VIII reading: "various times and places to numerous persons";

(d) whether the particular demurrant is among those defendants alleged in paragraph VIII to have "repeated and published the same to numerous other persons unknown to plaintiff but known to defendants."

[7] Thus, in (a) and (b) above, each defendant sought a more specific allegation concerning how, or in what manner, they "combined and conspired," and how, or in what manner they discussed plaintiff, and what agreement, if any, they reached. However, as has already been noted, the allegations of the amended complaint were sufficiently clear to acquaint defendants with the issues they were to meet. Furthermore, the considerations we have adverted to which permit greater liberality in the pleading of a conspiracy, apply with equal force at this point. As stated in Biggs v. Tourtas, 92 Cal.App.2d 316, 322, 206 P.2d 871, 875. "'The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which the conspiracy may be inferred.'" With respect to item (d), supra, the amended complaint also clearly indicated that each of the defendants is referred to as having repeated and published the statements complained of to the "numerous persons" mentioned.

[8-10] In specification (c), supra, defendants assert that the complaint was also uncertain in that it alleged publications of the defamatory matter at "various times and places to numerous persons." However, it should be observed that in the same paragraph, plaintiff alleged, upon information and belief, that defendants repeated and published the slanderous statements "to numerous other persons unknown to plaintiff but known to defendants." Such al-

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[2] This section provides, inter alia: "A privileged publication is one made— * * * 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested * * *."

legations, which apply to matters peculiarly within the knowledge of the defendants, may properly be based upon information and belief. McDermont v. Anaheim Union Water Co., 124 Cal. 112, 115, 56 P. 779; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 206, 92 P. 184; Penziner v. West American Finance Co., 133 Cal.App. 578, 591, 24 P.2d 501. Less particularity is required in the allegations of the complaint where, from the nature of the matters alleged, the adverse party has a knowledge of the facts superior to the party pleading them. Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Turner v. Milstein, 103 Cal. App.2d 651, 658, 230 P.2d 25; Gerritt v. Fullerton U. H. School Dist., 24 Cal.App.2d 482, 75 P.2d 627; Swasey v. de L'Etanche, 17 Cal.App.2d 713, 62 P.2d 753. A demurrer for uncertainty does not lie where the ambiguous facts alleged are presumptively within the knowledge of the demurring party. Bacon v. Wahrhaftig, 97 Cal.App.2d 599, 605, 218 P.2d 144; Merlino v. West Coast Macaroni Mfg. Co., 90 Cal.App.2d 106, 108, 202 P.2d 748; Swasey v. de L' Etanche, supra. If, as the complaint alleges, defendants repeated and published statements "to numerous other persons unknown to plaintiff but known to defendants," then plaintiff obviously cannot particularize; and her positive allegations that other statements were made at "various times and places to numerous persons" are matters which are patently within the superior knowledge of defendants. Defendants' special demurrers were therefore not well grounded.

In the light of the foregoing principles, the court erred in sustaining the demurrers to the first cause of action.

So far as plaintiff's action for declaratory relief[3] is concerned, the basis for this remedy stems from the following allegations of the second cause of action, which, after repleading the allegations of the first cause of action, states: "That whereas the defendants have imputed to plaintiff during the times above alleged the present existence of an infectious, contagious and loathsome disease, to wit: syphilis; and whereas the plaintiff alleges that she has never had and does not now have the said disease, a controversy has arisen between the parties, and plaintiff desires a declaration establishing the truth of and concerning the plaintiff, that she has never had and does not now have syphilis, and that such statements and imputations to that effect, as above alleged, are false, untrue and slanderous per se; plaintiff seeks a declaration of the rights and duties of the respective parties in the premises; and the plaintiff does not have any remedy which is as plain, speedy and adequate and well suited to the plaintiff's needs as declaratory relief."

[11-13] It is at once manifest that the lower court was correct in sustaining the demurrer to this count. It is clear from the allegations that the only real controversy between the parties relates to the question of defendants' responsibility for the injury to plaintiff caused by a series of allegedly slanderous publications made in the past, for which damages are sought. From the facts alleged in her first cause of action, plaintiff had an accrued cause of action at law which, if proved, would render all the defendants liable. An adjudication upon the issues raised in plaintiff's first cause of action would fully and adequately determine all matters actually in controversy between the parties. Simpson v. Security First Nat'l Bank, 71 Cal.App.2d 154, 157, 162 P.2d 494; Citizens' Committee for Old Age Pensions v. Board of Supervisors, 91 Cal.App.2d 658, 660, 205 P.2d 761. See Columbia Pictures Corp. v. DeToth, 26 Cal. 2d 753, 761, 161 P.2d 217, 162 A.L.R. 747. While plaintiff also asks for a declaration establishing the fact that she never had syphilis, this is beyond the scope of the controversy and the court was justified in refusing to entertain the count under the declaratory relief provisions of the code "where its declaration or determination is not necessary or proper at the time under

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[3] Section 1060, Code of Civil Procedure, provides, in part, that an interested person "who desires a declaration of his rights or duties with respect to another" may obtain declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties".

all the circumstances." Code Civ.Proc., sec. 1061; City of Alturas v. Gloster, 16 Cal.2d 46, 49, 104 P.2d 810; Simpson v. Security First Nat'l Bank, supra. The rules applicable to the facts of the present case are well epitomized in two decisions of this court in the following language: "'The entertainment of an action for declaratory relief is within the discretionary power of the court (Code Civ.Proc., sec. 1061) and is not reviewable upon appeal except for an abuse of discretion. (Citing cases.) Permission to resort to declaratory relief is a matter of sound discretion of the court. Such an action is usually unnecessary where an adequate remedy exists under some other form of action (citations) * * *'". Wieber v. Worton, 105 Cal.App.2d 626, 627, 234 P.2d 114, 115; Pacific Electric Ry. Co. v. Dewey, 95 Cal.App.2d 69, 71, 212 P.2d 255.

The judgment is reversed with directions to the trial court to overrule the demurrers to the first cause of action in the amended complaint and to allow the defendants a reasonable time within which to file their respective answers. In other respects, the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

125 Cal.App.2d 810

PEOPLE v. ECHOLS et al.

Cr. 2984.

District Court of Appeal, First District, Division 1, California.

June 9, 1954.

Rehearing Denied June 24, 1954.

Hearing Denied July 7, 1954.

Defendants were convicted of Narcotics Law violations. The Superior Court, City and County of San Francisco, Twain Michelsen, J., rendered judgment, and defendants appealed. The District Court of Appeal, Bray, J., held that record showed that defendants had been denied their right to a speedy trial.

Reversed with directions.

1. Constitutional Law 🔑33

California Constitution provision that party accused shall have right to speedy and public trial is self-executing. Const. art. 1, § 13.

2. Criminal Law 🔑576(1)

Penal Code section requiring dismissal of prosecution when case is not brought to trial within 60 days, absent showing of cause, is mandatory. Pen.Code, § 1382.

3. Criminal Law 🔑576(2)

No judge has inherent right to try any particular case nor to refuse to transfer cases out of his department, and mere fact that there are other cases ahead of criminal case in department to which it has been assigned is no justification for denying defendant in such case his right to a speedy jury trial, if assignment to another department can avoid such result. Pen.Code, §§ 681a, 1050, 1382.

4. Criminal Law 🔑576(11)

Burden of showing good cause for delay in bringing defendant to trial is upon prosecution. Const. art. 1, § 13; U.S.C.A. Const. Amend. 6.

5. Criminal Law 🔑576(5)

Right to a speedy trial is one which a defendant may waive, and if he does not raise claim of denial of speedy trial either by application for proper writ or on appeal from his conviction, right is waived. Pen. Code, § 681a.

6. Criminal Law 🔑1134(10)

Validity of order denying defendant's motion to dismiss criminal action against him for failure to award him a speedy trial may be reviewed on appeal from subsequent judgment of conviction. Pen.Code, § 681a.

7. Criminal Law 🔑573

Record on appeal from convictions for narcotics violations showed that defendants had been denied their right to a speedy trial.

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Kenneth C. Zwerin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Both defendants were convicted by a jury of four counts of violating section 11500, Health and Safety Code (one count for possession and one count for transportation, of heroin; one count for possession and one count for transportation, of codeine). Defendant Echols was also convicted of violation of section 506(a), Vehicle Code (driving when addicted to narcotics). Defendant Echols had admitted a prior conviction in Texas of violation of the Internal Revenue Act, a felony. Both defendants appeal from all convictions against them respectively.

Many questions are raised upon this appeal. One of them, the denial to defendants of a speedy trial, is decisive. Therefore it is unnecessary to discuss the other questions or the evidence.

Record.

April 16, 1953, the informations were filed. They and the cause were assigned to Department 6 for trial. April 21st defendants were arraigned. The Vehicle Code information was amended. With consent of counsel the cause was continued to April 28th to plead. Not guilty pleas were entered and the cause continued to May 25th for trial. May 18th defendants were permitted to withdraw their pleas to make certain motions, after which defendants again pleaded not guilty and the case was continued to May 25th for trial, the court stating that was a "tentative date." May 25th defendants answered ready. The district attorney suggested June 10th for trial. Defendants called attention to the fact that defendants were in custody and had been so since the date of their arrest. Defendants stated: "* * * I am trying to arrange my calendar, and tentative dates don't help out very much for trial." The court said that it was difficult to give a date certain, but continued the case to June 10th for trial. On that day defendants pointed out that the informations were filed April 16th, that this was the second or third calling of the trial date and that each time defendants had advised the court that they were ready for trial. The court then said that that was right but the case was not as old as three preceding cases just called. The court said: "It is just too bad that we don't have more trial judges down here." Defendants pointed out that criminal cases have precedence over civil cases, that civil jury cases were being sent out, and that criminal cases should be sent instead. Defendants then asked that this case be "sent out" for trial. (Presumably that meant to another department.) The court said "No, the statutory time hasn't run." A discussion was had as to whether that time was 30 or 60 days. (If 60 days it would run in eight more days.) The district attorney pointed out that this particular department had heard cases on 94 out of the past 100 trial days. The court then stated that the case on trial might consume a month and suggested the instant case be put down for July 8th (practically a month away). Defendants then asked if that would be a definite date. The court stated it would have to be tentative, but it would make it as definite as possible. It was then continued to July 8th. On that day defendants again answered ready for trial. The district attorney asked that it be continued to July 29th. Defendants again pointed out the number of times they had answered ready for trial. The court stated: "It is a No. 2 case now." Defendants stated they had been in jail since March 15th. The court suggested July 16th. Defendants asked if that was a definite date and the court stated it was not as it did not know how long the case then on trial would run. Defendants then asked that the case be transferred to the department of the presiding judge "and farmed out, as it were, to one of the civil departments. There are plenty of civil cases going out." Defendants pointed out that criminal cases were entitled to priority, and that they understood that there was no trial going on that day in Department 12 (another criminal department). The court inquired if there was a jury there. Apparently there was not, for the court asked if defendants would waive a jury if the case went in there. The court then set the case for trial for July 16th and denied the application to transfer. July 16th defendants reminded the court that they had answered ready four or five times, the last time being July 8th, that the case was continued to today and they were under the impression that they were going to trial, that defendants were still in custody and were again ready for trial. The court then continued the case to July 29th. Defendants then asked that the record show there were other departments "in the City Hall available." The court said: "You don't have to do that. You have done that before. Mr. Zwerin [defendants' counsel]: I would like the record to so show. The Court: The record will show that they are not ready to take any case from this Department today. Let's not be facetious. Mr. Zwerin: I am not facetious, your Honor; I have a duty to protect my clients." July 29th defendants again called attention to the number of occasions upon which defendants were ready for trial, that they were still in custody and were ready for trial. The district attorney stated that there was a jury trial in progress. Defendants stated that there were 22 departments of the superior court. The court stated that the record would show that those departments were not fully manned or occupied. Defendants then moved for a dismissal of the informations upon the ground that defendants were not brought to trial within 60 days of the filing of the informations. The court then suggested that the motion be submitted and said it would ask the district attorney to file affidavits. The district attorney asked "Why an affidavit * * *?" The court: "I think it would be proper to show why." The district attorney then stated there were no facts set forth by defendants to which any factual reply was necessary. "I think the record will show whatever the situation has been during those previous appearances." The court stated that defendants should file an affidavit setting forth the reason why they felt their motion should be granted before any answer need be made by the district attorney. Defendants then submitted their motion. The court did not formally act upon the motion, but continued the case to August 5th. On that day the district attorney again amended the Vehicle Code information and the trial proceeded.

It is obvious from the foregoing and from the record that both the court and the district attorney were under the erroneous impression that (1) once a criminal case is assigned to a trial department of the superior court, it may remain in that department if other cases filed ahead of it are being tried, even though a defendant's right to a speedy jury trial be violated; (2) in continuing cases beyond the statutory period without defendants' consent no showing as to the situation in other departments of the same court, civil or criminal need be made; and (3) the burden of proving such situations is on the defendants, and not on the court or the prosecution.

Right to Speedy Trial.

[1] The People by both the United States and the California Constitutions, the Legislature by certain statutes, and the courts by certain decisions, have emphasized the right of every person charged with a crime to a speedy trial. The Legislature and the courts have defined what is meant by "speedy trial." The procedure followed in this case is completely at variance with the spirit and law of the right to a speedy trial. The Sixth Amendment to the United States Constitution provides "the accused shall enjoy the right to a speedy and public trial * * *". Article I, § 13, California Constitution, provides "the party accused shall have the right to a speedy and public trial * * *". "This provision of the Constitution is self-executing." Harris v. Municipal Court, 209 Cal. 55, 60, 285 P. 699, 701.

Section 1050, Penal Code, defines in no uncertain terms what is meant by the term "speedy trial." It first states: "The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea * * *." Then (2): "No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance." (3): "No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require." (4): If a continuance is granted "the court shall enter in its minutes the facts proved which require the continuance." (5): *"Criminal cases shall be given precedence over all civil matters and* *proceedings.*" (6): "If any court is unable to hear all criminal cases pending before it within thirty (30) days" after plea "it must immediately notify the Chairman of the Judicial Council,"[1] (Emphasis added.)

Section 681a, Penal Code, provides: "The welfare of the people of the state of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice."

[2] Section 1382 provides: "The court, *unless good cause to the contrary is shown, must order the prosecution to be dismissed* * * *. 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the * * * filing of the information." (Emphasis added.) This section is mandatory. People v. Perea, supra, 96 Cal.App. 183, 185, 273 P. 836; People v. Morino, 85 Cal. 515, 517, 24 P. 892; Matter of Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882.

Having in mind the policy of the law as above set forth, let us see what was done in this case to protect this "fundamental right granted to the accused * * *." Harris v. Municipal Court, supra, 209 Cal. 55, 60, 285 P. 699, 701. Although answering ready for trial time after time defendants were kept waiting until approximately 50 days after the 60 days which the Legislature has fixed as the limit of the time which can be considered "speedy," unless good cause is shown. See Harris v. Municipal Court, supra, 209 Cal. 55, 61, 285 P. 699. No attempt was made to show good cause other than that the particular department was busy during that time. The San Francisco Superior Court had 22 regular departments and one extra sessions department. No showing was made at any time why this case could not have been tried in one of the other criminal departments. Assuming, without a showing to that effect, that they were all busy, no reason was given why the case could not have been assigned to one of the many civil departments. "Criminal cases shall be given precedence over all civil matters and proceedings." Penal Code § 1050. "The welfare of the people * * * requires that all * * * criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of" criminal cases "to the greatest degree that is consistent with the ends of justice." Penal Code, § 681a. We are informed that of the 23 departments only four try criminal cases (not counting the juvenile court which also tries certain types of criminal cases). Apparently, this is approximately the same number of criminal departments San Francisco had when its total departments numbered only 16. The following language in Dearth v. Superior Court, 40 Cal.App.2d 56, 104 P.2d 376, is applicable here: "To comply with the provision contained in section 1050 of the Penal Code that criminal matters should be given precedence over civil matters and to enable defendants in criminal actions to have the speedy trials which are guaranteed by the Constitution a greater number of judges should have been assigned to departments handling criminal matters. There are fifty judges in the superior court of Los Angeles county, and the showing that a large number of civil cases were pending does not excuse the failure to assign a sufficient number of judges to handle criminal matters. Nor was there any showing made that the chairman of the judicial council was notified that a sufficient number of judges was not available to try criminal cases. In rule 25, adopted by the judicial council for the guidance of the superior court, it is provided that the departments handling criminal cases 'shall be sufficient in number to hear all criminal cases within the time required by law'". 40 Cal.App. at page 59, 104 P.2d at page 378.

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[1] This section has been held merely directory, principally because it contains no provision for dismissal of the case if not complied with. See People v. Perea, 96 Cal.App. 183, 273 P. 836; Ray v. Superior Court, 208 Cal. 357, 281 P. 391; and People v. Marshall, 209 Cal. 540, 289 P. 629. However, as we said in Zamloch v. Municipal Court, 106 Cal.App. 2d 260, 235 P.2d 25, the section "declares a policy that should not lightly be disregarded." 106 Cal.App.2d at page 263, 235 P.2d at page 27.

[3, 4] With 23 departments to choose from, in order to protect the fundamental rights of persons charged with crime more departments could be assigned criminal cases. Or, at the very least, when such rights appear to be violated, some showing should be made to show the necessity therefor. The burden rests upon the prosecution to show such necessity. Zamloch v. Municipal Court, supra, 106 Cal.App.2d 260, 235 P.2d 25. The trial court at first recognized that fact, because when defendants on July 29th moved for a dismissal the court stated that the district attorney should make an affidavit, apparently to show good cause for the delay. But the court then changed its view and placed the burden upon defendant of showing lack of necessity by requiring that the defendants make an affidavit. Defendants are not required so to do. As said in People v. Morino, supra, 85 Cal. 515, 517, 24 P. 892, 893: "It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial it was for the prosecution to show it. The court could not presume it." "There is no presumption in such case, at least in the trial court, that the court has acted regularly * *." In re Bergerow, 133 Cal. 349, 352, 65 P. 828, 56 L.R.A. 513. Section 1382 provides that "unless good cause to the contrary is shown" the court *must* dismiss the action. The court should have done so. No judge has an inherent right to try any particular case nor to refuse to transfer cases out of his department. Plaintiff makes some point of the fact that on the hearing of the motion to dismiss, the court suggested that the matter be continued to give the district attorney time to prepare an affidavit and when the district attorney seemed doubtful of the necessity, then suggested that defendants make an affidavit. Defendants did not do so but submitted their motion. Defendants were well within their rights in doing so. It was the duty of the district attorney to have been prepared with a showing of the necessity therefor when asking that day or any day beyond the 60-day period for a continuance for trial. Under the law the case should not have been continued without a showing by the prosecution of good cause therefor. Thus, when defendants moved for a dismissal the prosecution was not entitled to a continuance to make a showing in opposition to the motion. In the absence of a showing of good cause, the court should have dismissed the case. "The burden is on the prosecution to show good cause for the delay when a motion for dismissal * * * is made on that account." People v. Angelopoulos, 30 Cal.App.2d 538, 545, 86 P.2d 873, 877.

Cases cited by plaintiff are not in point. In People v. Benc, 130 Cal. 159, 62 P. 404, all of the continuances were consented to by the defendant. The decision makes the statement that the fact that the court was engaged in the trial of another case was good cause for excluding the time the court was so engaged from the statutory time, but that was a one-judge court. In re Lopez, 39 Cal.2d 118, 245 P.2d 1, dealt with a situation where the defendant consented to continuances beyond the 60-day period. It was held that a delay of 21 days from the date to which he had last consented was excused by the fact that the court was busy with other criminal cases. The decision states that although a defendant is not entitled to go to trial as of right on the day to which he last consented if good cause appears for further delay, the delay must not be unreasonable. The defendant is still entitled to a speedy trial, and what is a speedy trial, says the court, "depends on the circumstances of each case bearing on the factors of good cause and a reasonable exercise of discretion in allowing postponements." 39 Cal.2d at page 120, 245 P.2d at page 2. In our case the defendants at no time after April 21st consented to the postponements, were consistently insisting upon immediate trial, both within and after the 60-day period. So far as the record shows, they were denied a speedy trial because of the insistence of the court that the case remain in an already overburdened department.

[5] It should be pointed out for its effect in other cases where the situation may be different from the one here, that the right to a speedy trial is one which a defendant may waive and that if he does not raise the claim of denial of a speedy trial either by application for a proper writ or on appeal from his conviction, the right is waived.

[6, 7] The motion to dismiss the cause should have been granted. "The validity of the order denying a defendant's motion to dismiss a criminal action against him for failure to award him a speedy trial * * * may be reviewed on appeal from a subsequent judgment of conviction." People v. Angelopoulos, supra, 30 Cal.App. 2d 538, 545, 86 P.2d 873, 877.

The judgments are reversed and the trial court is directed to dismiss the action against both defendants.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

126 Cal.App.2d 154

GEORGE PEPPERDINE FOUNDATION et al.
v.
PEPPERDINE et al.

Civ. 19929.

District Court of Appeal, Second District, Division 2, California.

June 22, 1954.

Amended on Denial of Rehearing July 13, 1954.

As Modified July 19, 1954.

Hearing Denied Aug. 19, 1954.

Action was brought against president and former directors of charitable corporation to recover damages for loss resulting from the unsuccessful investment of corporation's assets by president with acquiescence of former directors. The Superior Court of Los Angeles County, John J. Ford, J., entered judgments adverse to plaintiffs, and they appealed. The District Court of Appeal, Moore, P. J., held that where philanthropist established and gave large sum of money to charitable corporation, and he became the president and manager of the corporation, and, acting in good faith, and not for personal gain, he invested corporation's assets unwisely, with result that corporation sustained large losses, and directors of corporation acquiesced in philanthropist's management of corporation and his investments, neither the philanthropist or the directors were liable for loss sustained by corporation.

Judgments affirmed.

1. Charities 🔑46

Though a director of a charitable corporation is held to highest degree of honor and integrity, he is not personally liable for mistake of judgment.

2. Charities 🔑46

Where philanthropist established and gave large sum of money to charitable corporation, and he became the president and manager of the corporation, and, acting in good faith, and not for personal gain, he invested corporation's assets unwisely, with result that corporation sustained large losses, and directors of corporation acquiesced in philanthropist's management of corporation and his investments, neither the philanthropist nor the directors were liable for loss sustained by corporation.

3. Charities 🔑49

Action against president and former directors of charitable corporation to recover for losses sustained by corporation as the result of investment of corporation's assets by president with acquiescence of former directors, could not be maintained by the corporation, but only by the Attorney General.

4. Charities 🔑50

The Attorney General is a necessary party to an action affecting the disposition of assets of a charitable trust, and he must protect them.

5. Charities 🔑46

The director of a charitable corporation is not chargeable with the alleged wrongful acts of other directors, in absence of a conspiracy.

6. Charities ⚷50

In action against president and former directors of charitable corporation to recover damages for losses sustained by corporation because of unsuccessful investments of corporation's assets by president with acquiescence of former directors, dates of the investments were required to be alleged with certainty.

7. Charities ⚷50

In action against president and former directors of charitable corporation to recover damages for losses sustained by corporation because of unsuccessful investments of corporation's assets by president with acquiescence of former directors, complaint alleging that president and one of the directors concealed from all "inquirers" the fact that corporate assets were being dissipated, was defective for failure to declare who the "inquirers" were, their right to such knowledge, and the extent to which they were injured by concealments.

◆

Sidney H. Wyse, Pasadena, for appellant.

Benjamin S. Crow, Los Angeles, for respondent Helen Louise Pepperdine.

Dwain Tarbet, Los Angeles, for respondent George Pepperdine.

Slane, Mantalica & Davis, Los Angeles, Frank Barclay, Los Angeles, for respondent Lonnie T. Vanderveer.

MOORE, Presiding Justice.

Appeal from judgment of dismissal after demurrers, general and special, had been sustained and plaintiff had declined to amend its second amended complaint, herein referred to as complaint.

The complaint is by a nonprofit, charitable corporation against its former directors for damages resulting from "dissipation of its assets through illegal and speculative transactions and mismanagement of its affairs" by defendants during their incumbencies. It alleges a loss in eleven years of $3,000,000 of assets and the unlawfully incurring of indebtedness in the sum of $525,000. It demands judgment against the several directors as follows:

George Pepperdine	$823,013.49
Helen Louise Pepperdine	648,179.68
Lonnie T. Vanderveer	267,553.33
Otto F. Lee	601.038.16
Moore Lynn	355,124.94
John Allen Hudson	322,223.84
P. L. Rogers	174,833.81

The complaint is in 16 counts and is grounded on "two basic theories of liability" says its author; "the first theory of liability will be referred to as the *note* theory and is grounded upon the actions of defendants in causing plaintiff to issue to the public some $551,300 in promissory notes without first obtaining a permit * * * and for considerations of no value or of less value than the principal amounts of the notes involved."

The second theory of liability is "mismanagement" which is grounded upon the acts of defendants in dissipating all the assets of plaintiff over a period of years in speculative transactions and by making gifts of its assets after it became insolvent. Further describing the complaint appellant proceeds as follows:

"In the first statement of each of these two theories, in Counts Nos. 1 and 5, it is alleged that the transactions in question were carried out by George Pepperdine with the consent and approval of all other defendants and that concealment of the insolvent condition of the Foundation was effected by representations of George Pepperdine and Otto F. Lee, with the consent and approval of all other defendants. Count No. 3 is the same as Count No. 1 except that, in place of the allegations with respect to consent and approval, it is alleged that the defendants not personally participating in the transactions were negligent in failing to ascertain and stop these activities. Count No. 7 is the same as Count No. 5 with a similar alternative allegation.

"The even-numbered counts, Nos. 2, 4, 6 and 8, are in each case identical with the preceding odd-numbered count, with the additional allegation that the actions of the defendants as alleged constituted constructive fraud against the Foundation, its creditors and the public.

"Counts Nos. 9 through 16 are identical, respectively, with Counts Nos. 1 through 8, except for the additional allegation in each case of facts constituting an estoppel against the defense of the statute of limitations.

"The above analysis of the structure of plaintiff's complaint is summarized in the following chart which appellant believes may be an aid to the Court in keeping in mind the relationship of the various counts.

Count No.		Corresponding Count Plus Estoppel
1	Note Theory (Consent & Approval)	9
2	Same as 1, plus Constructive Fraud	10
3	Note Theory (Negligent Supervision)	11
4	Same as 3, plus Constructive Fraud	12
5	Mismanagement Theory (Consent & Approval)	13
6	Same as 5, plus Constructive Fraud	14
7	Mismanagement Theory (Negligent Supervision)	15
8	Same as 7, plus Constructive Fraud	16"

The special demurrers to each count plead (1) the action is barred by the two-year statute of limitations, Code Civ.Proc. § 339; (2) it unites several causes of action and does not separately state them, that is, the negligent issuance of certain promissory notes, whereas each note was a separate transaction, involving different considerations and following dissimilar patterns; (3) it is uncertain in that it cannot be ascertained therefrom in what manner any negligence of defendants constituted constructive fraud against plaintiff or its creditors or any person; (4) it cannot be ascertained therefrom whether it was known to the defendant that plaintiff did not have assets of sufficient value to pay the notes as they matured, or that the assurances he is alleged to have made were false or in what manner said concealments and assurances were wrongful or fraudulent or consisted of a breach of duty; (5) it is both ambiguous and uncertain for the same reasons that it is uncertain. While all of such special demurrers correctly picture the vices of the pleading, this court has concluded that the complaint does not state a cause of action and, on that ground, the judgment should be affirmed.

No Cause of Action Stated.

It is alleged that at the time of plaintiff's incorporation on April 18, 1931, George Pepperdine was possessed of considerable personal fortune, was widely known in California as one interested in and a supporter of charitable, educational and religious work and religious organizations. After 1937 he was widely known in connection with Pepperdine College in Los Angeles, which college was well known as the results of its educational and athletic activities and which was believed to hold and own properties of great value and investments of the character suitable for substantial, charitable institutions.

The pleading makes the affirmative declaration that Mr. Pepperdine endowed the foundation and the college with his own private fortune in the amount of not less than $3,000,000. From the time of its incorporation, he dominated and controlled it and "at no time did any of said other defendant directors and officers attempt to exercise any control over said George Pepperdine or in any way direct or restrict his complete domination of plaintiff or exercise any independent judgment or make any independent investigation with respect to any of the transactions entered into by defendant George Pepperdine or in any way direct or restrict his complete domination of plaintiff or exercise any independent judgment." As a rule, there were only three trustees. They held few and infrequent meetings at which a quorum was seldom present, and at such meetings nothing was done except to vote approval of the inter-meeting transactions of President Pepperdine who was also treasurer and general factotum; in other words, the corporation was George Pepperdine's other self.

From the text of the complaint, it is observed that between December 31, 1939 and December 1948 plaintiff's assets "continually diminished by reason of losses through bad investments and other transactions, with the result that, not later than December of 1948, plaintiff was insolvent and without moneys or assets readily convertible into money with which to meet its obligations as they became due or with which to make further investments."

The pleading proceeds to allege plaintiff's entry into transactions, to wit, the sale of its promissory notes to the public to raise money or to purchase securities of foreign corporations. It describes the manner of selling such notes as violative of the corporate securities act, the payment of commissions, no permit having been obtained. It recites the negligent acquisition of assets of no value or of little value while plaintiff's promissory notes found their ways into the hands of innocent holders for value. The result was the dissipation of the $3,000,000 and the incurring of a debt of $551,300 for which it had received property worth no more than $120,900. A regretable situation! but is it one that requires a burnt offering or that demands the swinging of human forms from the gibbet to gratify the rancor of intimate observers? The instant action is a new demonstration of a familar social phenomenon: when a tragic loss occurs, find a victim to throw to the lions. The perspicacity of the trial court was not overtaxed to discern the weakness of plaintiff's position and thrice registered disapproval. While its counsel has brilliantly unraveled the mysteries of a pleading and argued well for the certainty of causes not united and separately stated, yet he has not woven a pattern of justice out of the materials at hand whereby to adjudicate liability on the part of respondents.

Plaintiff is a nonprofit corporation. Its creative statute and, impliedly, its articles permit it to invest and reinvest its funds and properties. Corp.Code, § 9501, formerly Civ.Code, § 593. It was an enterprise created by the brain and brawn of one only George Pepperdine. He had the vision, the industry, the thrift and the charitable instincts to accumulate a fortune and to dedicate it to the public good and his services to its expansion and increment and to the disbursement of its revenues and corpus to deserving charitable, benevolent or religious institutions. Had he confined his investments to his own field in which he accumulated his millions, or had he with wizard-like precision so invested the corpus of the trust as to reap more millions for the public benefit through his very own corporation, he would now walk in a wilderness of praises of himself and of the foundation's memorials unto his saint-like character. But now, after he and his friends have without promise or hope of reward unsuccessfully attempted to steer the institution of his creation to a harbor of safety and properly to dispense its charities to worthy causes, the current directorate seek to reduce them all to penury for ill-conceived plans, unwisely pondered and hastily executed. Each director sought only the public good. Not a chirp in the voluminous pleading intimates that a corrupt motive marred the character or inspired the acts of one of them. Aside from President Pepperdine, all directors were evidently devoting their time to the enterprise primarily for the purpose of acquiring an intimacy with the institution and of gaining knowledge of methods of dispensing charity. Inasmuch as the foundation was the progeny of the president's imagination, they naturally deferred to his judgment or his wishes in weighing the merits of proposals submitted to the board. With the exception of a financial genius who might arise, how could one of his appointees resist his conclusion upon facts pertaining to the art of investing wealth for gain? He had been educated in the university of hard knocks[1], and by virtue thereof, and of his success as a man of practical affairs, it was protocol to defer to his judgments. Now, an adverse judgment entered against such directors would operate a gross injustice for no crime but nonfeasance or neglect.

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[1] The pleading is verbose in relating how widely and well he was known for his religious and benevolent activities, but not a word about his learning.

[1] Assuming that the alleged losses were due to the alleged egregious blunders of the board under the leadership of President Pepperdine, and to have been the result of his negligence and of the lack of zealous interest on the part of the others, why should he be now required to restore to his corporation what he once gave from his bounty and which was lost solely by reason of his ignorant or careless reckoning? Although a director of such a corporation is held to the highest degree of honor and integrity, he is not personally liable for mistake of judgment. Graham Bros. Co. v. Galloway, Woman's College, 190 Ark. 692, 81 S.W.2d 837, 840. President Pepperdine could not have purposed to sabotage his own enterprise, so stupendous and magnificent as to extend its influence into the far reaches of many necessitous fields of human endeavor. His inclinations, inferred from the allegations, were such as naturally to incline him to foster and prosper an institution of his own creation. His ambition to propagate the Christian system, to spread the influence of religion, and to widen the paths of learning was a girding support for his scheme to make the Foundation a success.

He and his associates are now sued for damages in enormous sums of money for neglect, for delicts, for erroneous judgments in the government and management of the Foundation, If Mr. Pepperdine had had never organized the Foundation, but had set himself up to bestow his fortune on deserving charities and had at the same time continued to "invest and reinvest" his own moneys and properties and finally by miscalculations have lost it all, would any one be so crazy and cruel as to assert a claim against him for his carelessness in not holding intact the fortune which he intended to bestow on others? Who is "Foundation" otherwise than the shadow of George Pepperdine, if not his alter ego? If he as an individual could not be sued for negligently investing his own moneys intended for charitable uses, why should his own "Foundation" under the management of strangers prosecute an action to recover from the original doner and his friends what, through negligence, they lost for the Foundation?

The only rational explanation of Mr. Pepperdine's failure in steering the course of plaintiff is that he was lost in the new sphere into which his charities brought him or he suffered an internal change. It is no uncommon thing for a man of the practical business world to fail as a statesman or philosopher. For illustration, it is a far cry from the daily grind of operating a line of ocean steamers, farming extensive acres, drilling oil wells, mining, or of buying, sorting, storing and distributing merchandise, to the experience of a man sitting on a plush chair and choosing the field in which to invest his wealth and selecting the groups on which to bestow it.

[2] Or Mr. Pepperdine could have experienced a deterioration of his mental processes with advancing years, or a change of occupation could have frustrated his talents. If any of such misfortunes encompassed him and deprived him of his erstwhile powers, should he and his patriotic associates now be plundered of their personal possessions to fill the never-to-be gratified maw of charity? If Mr. Pepperdine experienced either a breakdown of his intellectual powers or a transmutation of his intelligence in his new world of disbursing charity, he should not be further victimized by an action at law initiated by the very agency he created to serve mankind. In his zeal to conserve the status quo he caused securities of the foundation to be issued without having obtained a permit, but even by doing this forbidden act he sought no personal gain. His aim was not to impair the peace or welfare of the state, but to enhance its dignity and enlarge its welfare by increasing the opportunities of its citizens for a richer life. The losses to the Foundation thereby entailed are the product of impoverished thought or inaccurate calculation and are on a parity with his improvident, ill-conceived investments. But whatever they are, it does not properly lie with appellant to accept and retain the fruits of them and then denounce them as

bases for recovery on account of the negligence of respondent.

Reason, justice, equity and law stand aghast at the judgment proposed by the second amended complaint.

[3] Moreover, appellant is without capacity to prosecute the instant action. The assets of a charitable corporation, in the final analysis, belong to the state and a suit for their recovery can be maintained only by the officer designated by law.

[4] If the beneficiaries of the Foundation had been specified by name and were capable of receiving, holding and using the gift in the manner intended, they could prosecute an action on their own account to recover the corpus of the trust. Larkin v. Wikoff, 75 N.J.Eq. 462, 72 A. 98, 79 A. 365. But the Pepperdine Foundation is a purely benevolent, public, charitable trust whose beneficiaries are of an indefinite class of persons. Consequently, the only person qualified to maintain an action on behalf of the Foundation is the Attorney General. He shall institute in the name of the State the necessary proceedings when he shall have ascertained that a charitable corporation has failed "to comply with trusts which it has assumed" or has departed "from the general purpose for which it is formed." Corporation Code, § 10207; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 137, 45 P. 270, 35 L.R.A. 269; Stowell v. Prentiss, 323 Ill. 309, 154 N.E. 120, 50 A.L.R. 584; Trustees of Andover Theological Seminary v. Visitors of Theological Institution, 253 Mass. 256, 148 N.E. 900, 920; Jenkins v. Berry, 119 Ky. 350, 83 S.W. 594, 597; Note, 62 A.L.R. 881. He is a necessary party to an action affecting the disposition of assets of a charitable trust and he must protect them. In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 861, 257 P.2d 1.

The Special Demurrers.

[5] Turning now to the special demurrers, those pleadings state fairly the vices of the complaint. The court below committed no prejudicial error in sustaining any of them. Not a single cause of action applies to all respondents. It is egregiously uncertain. While actions for negligence are barred after the lapse of two years from the act complained of, no dates are given whereby it can be ascertained which investments were made after February 6, 1950. Neither can it be ascertained which notes were sold after that date or which transactions were completed prior to February 6, 1952, the date the action was filed. Where only a portion of a cause is barred, it is uncertain if such portion is not alleged in language and with such certainty that a general demurrer can be applied. Lord v. Garland, 27 Cal.2d 840, 842, 853, 168 P.2d 5; Gardiner v. Royer, 167 Cal. 238, 243, 139 P. 75. While the complaint attempts to ascribe fraud to certain acts of respondents, it is uncertain in not declaring in what the asserted fraud consisted. No fraudulent acts are alleged. It cannot be ascertained whether appellant means to charge that the acts of certain defendants were done by such defendants or whether the complaint intends to make such allegation based upon the theory that the acts were done by one or more defendants pursuant to a conspiracy of all defendants. No defendant is chargeable with wrongful acts done by others in the absence of a conspiracy to do such act. San Leandro Canning Company, Inc, v. Perillo, 211 Cal. 482, 295 P. 1026. While the complaint charges ill-advised investments by Mr. Pepperdine, it is not made certain that any other defendant except Mr. Lee participated in his act. And where it alleges that Mr. Pepperdine and director Lee caused a loss of over $601,000 during the latter's incumbency, it is not certain what acts were done by each of them, nor is it certain that any other defendant participated in such transactions or in what way any defendant participated in the act that caused the loss.

[6] It is alleged that the directors advanced $95,000 to Albert Nobell between January 6, 1948 and July 18, 1950.[2] It is not certain what significance should be ascribed to such allegations. The failure

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[2] One of the unfortunate investments. It is reviewed in the case of Wilson v. Nobell, 119 Cal.App.2d 341, 259 P.2d 720.

to allege specific dates of such advances makes an intelligible answer impossible. Appellant has custody of all its books and correspondence; respondents have none of them. The dates of the occurrences of such events must be alleged with certainty. Williamson v. Joyce, 137 Cal. 151, 152, 69 P. 980; Baird v. Olsheski, 102 Cal.App. 452, 455, 283 P. 321.

[7] The allegation that directors Pepperdine and Lee concealed from all inquirers the fact that corporate assets were being dissipated is uncertain in that it does not declare who the inquirers were, the reason, if any, of their right to such knowledge, to what extent they were injured by such concealments. Nor is it certain how the acts of directors Pepperdine and Lee can be charged to the other directors who did not learn of the concealments prior to their leaving the Board. The complaint is uncertain for the reason that it does not allege who had demanded knowledge or what facts he desired to know. If it was the intuition of the pleader to try to allege fraud by either the replies or the silence of the directors, he failed to state the fraud action separately.

The pleading is uncertain for the further reason that it does not appear how appellant could have been damaged by representing itself to be solvent. Also, it alleges that creditors were deceived by the concealments. What creditors? What concealments? If creditors were cheated by any act of appellant's former officers, the pleading does not show why they cannot sue for themselves.

Finally, the pleading is uncertain in that it cannot be told which directors were negligent of the affairs of appellant during the two years prior to the filing of the action. No director can be held for his neglect of corporate interests for more than two years, absent fraud.

Further vices of the complaint might be shown in that it is ambiguous and in that it contains two causes in certain counts without being separately stated. But inasmuch as the affirmance of the judgment on the grounds of uncertainty is final, no advantage can be gained by prolonging the discussion of its various infirmities.

The judgments are and each of them is affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

On Petition for Rehearing.

Appellant claims error in the closing paragraph of the opinion in stating that "the affirmance of the judgment on the grounds of uncertainty is final." By inadvertence, we neglected to declare that the special demurrers were not identical. However, they generally attack the complaint for uncertainty and ambiguity. Defendant Vanderveer omitted such demurrers but he did plead that the action was barred by virtue of the statutes of limitation which was concededly a final defense as to him.

It is ordered that the opinion be amended by striking its final words, to wit, "Judgment affirmed" and substituting: "The judgments are and each of them is affirmed."

A rehearing is denied.

126 Cal.App.2d 45

FINN v. WITHERBEE et al.

Civ. 19783.

District Court of Appeal, Second District,
Division 2, California.

June 16, 1954.

Owner of recording machines, on which writ of attachment had been wrongfully levied, brought action against one who attached the machines to recover damages and against his sureties. The Superior Court, Los Angeles County, Lothrop E. Smith, J., entered judgment, and the one who attached the property and his sureties appealed, and the owner cross-appealed. The District Court of Appeal, Moore, P. J., held that fact that owner of recording machines, on which writ of attachment had been wrongfully levied, had gratuitously loaned the machine to corporation, in which he had an interest, before attachment was levied, did not prevent owner from recovering damages from the one who caused the writ of attachment to be issued and his sureties.

Judgment affirmed.

1. Appeal and Error ⚿110, 782

Order denying motion for new trial was nonappealable, and appeal therefrom would be dismissed.

2. Attachment ⚿363

Fact that owner of recording machines, on which writ of attachment had been wrongfully levied, had gratuitously loaned the machine to corporation, in which he had an interest, before attachment was levied, did not prevent owner from recovering damages from the one who caused the writ of attachment to be issued and his sureties. Code Civ.Proc. § 539.

3. Attachment ⚿356

Whoever takes and holds property of another without right under wrongful attachment, is liable to the owner for the reasonable value of the use of the property during the detention.

4. Attachment ⚿363

Fact that owner of recording machines, on which writ of attachment had been wrongfully levied, had offered the machines for sale would not preclude owner from recovering for the wrongful detention of the machines from the one who caused the writ of attachment to be issued and his sureties. Code Civ.Proc. § 539.

5. Attachment ⚿356

The basis for recovery of damages for wrongful detention of property under writ of attachment which has been wrongfully levied is not that the property was used while in custodia legis, but because the property was kept from the possession of the owner.

6. Attachment ⚿363

Neither fact that owner had a plan to dispose of his chattel by a speculative sale nor fact that he intended to lend it gratis to a friend, is ground for denial of recovery by him of the reasonable market value of the chattel for period of its detention under writ of attachment that was wrongfully levied.

7. Attachment ⚿344

Where recording machines were wrongfully levied on under writ of attachment, sureties of the one who wrongfully levied on the machines were liable to the owner, notwithstanding that owner made no demand on one who levied the writ of attachment. Civ.Code, § 2807.

8. Pleading ⚿236(5)

Where context of complaint justified inference that plaintiff intended "paragraph IV" instead of "paragraph III" in allegation incorporating certain paragraphs of first count in second count, and defendants could not have been misled as to plaintiff's true intention, action of court in permitting amendment to substitute "paragraph IV" for "paragraph III" so as to conform to the proof was an exercise of a reasonable discretion.

9. Pleading ⚿237(3)

Court may authorize amendment to a complaint to conform with the proof at any stage of a trial.

10. Trial ⚿66

If defendants desired to submit any additional evidence because of amendment of complaint in order to conform to the proof, it was incumbent on defendants to make their offer then.

11. Attachment ⚿356

One who wrongfully attaches property is not liable at common law merely because his action and attachment were unsuccessful, and it is only when the attachment is levied maliciously and without probable cause that the one wrongfully attaching can be forced to pay for the detriment caused.

12. Attachment ⚿356

Where owner of property, which was wrongfully attached, did not prove malice on part of the one attaching the property, no judgment was authorized in favor of owner against the one who wrongfully attached the property, and the owner's only remedy was on the undertaking signed by sureties. Code Civ.Proc. § 539; Civ. Code, § 3333.

13. Appeal and Error ⚩907(1)

Trial court, which heard parties and their witnesses, was presumed to have heard all that was said, to have seen all that was done, and to have exercised a sincere judgment in determining what the facts were.

Marvin Osburn, Los Angeles, for defendants-appellants.

Edward M. Rose, David G. Licht, Beverly Hills, for plaintiff-respondent, and cross-appellant.

MOORE, Presiding Justice.

Appellant Witherbee sued plaintiff Finn in the municipal court for rent and caused a writ of attachment to be issued and levied upon three recording machines of plaintiff. Prior to issuance of such writ, Witherbee filed an undertaking on attachment whereby appellants Lunsden and Bobnik as sureties promised to pay all costs and damages that might be sustained by Finn if he should prevail in the attachment suit, not to exceed $2,400. Thereafter final judgment was entered in favor of Finn, denying Witherbee any recovery. The instant action was subsequently filed in four counts as follows: count I against the sureties for $2,400, the amount of their undertaking and against Witherbee for $4,300, the alleged loss of value of the attached property; count II, against the same parties for the same sums except he alleged his damage to have been $5,400, the reasonable rental value for 54 days—the time the marshal of the municipal court held the recording machines; counts III and IV were respectively identical with counts I and II except that III and IV charged that Witherbee in causing Finn's property to be attached acted with malice and that such malice entitles Finn to punitive damages. The court found against the charge of malice but found that the attachment was wrongfully levied; that Finn was deprived of the use of the three machines for eight weeks; that the reasonable rental value thereof was $375 per week; that Finn's counsel fees for effecting the attachments' release was $300, making the total damage $3,300. However, the court entered judgment against the sureties only for the sum of $2,400, the amount of their undertaking.

[1] The defendants appeal from the judgment and the order denying their motion for a new trial. The latter order is nonappealable and the appeal therefrom will be dismissed.

Plaintiff filed his notice of cross appeal from so much of the judgment as is adverse to the plaintiff and more particularly from the judgment in favor of Donald L. Witherbee and against plaintiff on the third and fourth causes of action and especially from the failure of the court to assess damages against Witherbee in the sum of $3,300 in conformity with the findings of fact and conclusions of law and appeals "from that part of the judgment which fails to find malice and to assess damages therefor, in favor of plaintiff and against defendant Witherbee."

Defendants' Appeal

The sureties suffered judgment not solely because Witherbee was unsuccessful in his attachment suit. Judgment went for Finn by virtue of the undertaking the sureties executed as a basis for the attachment. They there promised to pay Finn all costs and "damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking". Code Civ.Proc., sec. 539. Vesper v. Crane, 165 Cal. 36, 130 P. 876, L.R.A.1915A, 541, cited by appellants, was not a happy choice of authorities. The court denied Vesper's claim for actual damage in the absence of malice and want of probable cause. He had sued solely on those grounds and since the attachment had been issued without malice, he could not recover.

[2–6] Defendants contend that by virtue of the fact that the recording machines had been gratuitously loaned to Finn's corporation before the attachment was levied, they had no rental value and therefore Finn was deprived of nothing. Such contention is a delusion and a snare. Because Finn exercised his liberty to loan without charge his property to another, affords no license for Witherbee or any other person to appropriate or detain it in storage. Whoever takes and holds the property of another without right, is liable to the owner for the reasonable value of its use during such detention. Atlas Development Co. v. National Surety Co., 190 Cal. 329, 332, 212 P. 196. Ross v. Thomas, 24 Cal.App. 734, 142 P. 102, is not pertinent. Mr. Ross had sold the property under a conditional sales agreement and held only the naked legal title thereto. The damages were suffered only by the conditional vendee in whose possession it was attached. In the case at bar there was ample proof that the reasonable rental value of the articles attached was, during their detention, $75 a day. Of the three witnesses who gave such testimony, while there was variance on the part of only one of them, he testified that he would never permit the Arcturas Lathe to be removed from his premises on a rental basis. He conceded that there might be an isolated case of its rental for less than $50 per day. The other two witnesses placed the reasonable rental value of the three machines at $75 per day. Appellants are in no position to maintain that the property unlawfully taken by the marshal had no rental value. The basis for recovery is not that it was used while in custodia legis, but rather because it was kept from plaintiff's possession. That the latter had offered it for sale is no hindrance to his recovery. If that were ground for invading a neighbor's garage and driving away his car, very few men could recover for the unauthorized detention of their movables for most of them are for sale. Whether personable property, unjustly taken, is put to use or placed in storage, its reasonable rental value is just the same. It belongs to its owner and he is entitled to the value of its use. Morneault v. National Surety, 37 Cal.App. 285, 174 P. 81, is not in point. There the owner had placed his automobile on a used-car lot for sale and had procured no license plates. It could not be operated by himself or by the wrongful taker. Therefore, it had no rental value. Neither the fact that an owner had other plans for disposing of his chattel by a speculative sale or for lending it gratis to a friend is ground for denial of his recovering its reasonable market value for the period of its detention. Atlas Development Co. v. National Surety Co., 190 Cal. 329, 333, 212 P. 196.

[7] Appellants contend that the court erred in not sustaining their demurrer to the second count for the reason that it does not state sufficient facts to constitute a cause of action against the sureties in that (1) it did not allege the promise of the sureties in the undertaking; (2) purported to state a cause against Witherbee only in that he was the plaintiff who caused the attachment to be issued, and (3) did not allege a demand upon Witherbee. Such claims are contrary to the allegations of paragraph IV of the first count incorporated into count II. The contention that a demand on Witherbee should have been alleged is without support. The sureties became liable "without demand or notice" immediately upon the default of their principal Witherbee. Civ.Code, sec. 2807. No basis is found for appellants' assertion that the second count "purported to state a cause of action against defendant Witherbee alone."

[8–10] No prejudice was caused appellants by permitting an amendment to conform with the proof. The only amendment was substituting paragraph "IV" for paragraph "III" in the allegation incorporating certain paragraphs of count I in count II. The permitting of such amendment was the exercise of a reasonable discretion. The context of the complaint justifies the inference that the pleader intended IV instead of III. Paragraph IV of count I contains the only narrative of Witherbee's action against Finn in the municipal court, of the execution of the undertaking by Lunsden and Bobnik and their promise to pay the damages suffered by Finn by reason of the attachment and Witherbee's defeat in the action. The trial proceeded upon the theory that plaintiff claimed damages based upon the allegations of paragraph IV of count I, and the answer admitted the execution of the undertaking. Therefore, appellants could not have been misled by the amendment. See Atlas Development Co. v. National Surety Co., supra. The court may authorize an amendment to a complaint to conform with the proof at any stage of a trial. Sandvold v. Perrot, 74 Cal.App.2d 344, 348, 168 P. 995. If the defendants had desired to submit any additional evidence because of the amendment, it was incumbent upon them to make their offer then. Ibid. 74 Cal.App.2d at page 349, 168 P. 995.

The Cross Appeal

Plaintiff deems himself to be aggrieved by the court's refusal to award him judgment "for all the detriment proximately caused" by the acts of Witherbee and which the court found him to have suffered. While the court found his losses to have been sufficient to support a judgment for $3,300, he is sent out with a recovery of $900 less. In support of his claim he cites section 3333 of the Civil Code, decisions of the courts of sister states and 7 C.J.S., Attachment, § 556, p. 680. Although the predicament of plaintiff evokes sympathetic consideration, the attachment laws of this state were apparently not framed to oblige his wishes.

[11, 12] It is provided that before issuing the writ, the clerk must require a written undertaking "on the part of the plaintiff" with sureties to the effect that if defendant recovers judgment, the plaintiff will pay all costs and all damages sustained by reason of the attachment "not exceeding the sum specified in the undertaking" and if the attachment is discharged on the ground that plaintiff was not entitled thereto, the plaintiff will pay "all damages which the defendant may have sustained by reason of the attachment, *not exceeding the sum specified in the undertaking.*" While it is true that a clerk will not always be able to adjudge the sum that will fully protect the defendant, yet, if the defendant has a different idea he is at liberty to apply to the court for a bond of a larger amount. No one is in as good position as the defendant to estimate the loss he will suffer by reason of the attachment and detention of his property. There is no statutory provision for a judgment against an attachment plaintiff. He is not liable at common law merely because his action and attachment were unsuccessful. It is only when the attachment is levied maliciously and without probable cause that the plaintiff can be forced to pay for the detriment caused. Vesper v. Crane Co., 165 Cal. 36, 41, 130 P. 876, L.R.A. 1915A, 541. Inasmuch as Finn did not prove malice, no judgment is authorized against Witherbee who in good faith sued to collect a claim. Therefore, Finn's only remedy was on the undertaking signed by Lunsden and Bobnik as sureties pursuant to section 539, supra.

[13] Respondent's contention is that all the evidence proved Witherbee's malice. The trial court heard the parties and their witnesses and is presumed to have heard all that was said, to have seen all that was done and to have exercised a sincere judgment in determining what the facts were.

The appeal from the order denying the motion for a new trial is dismissed.

The cross-appeal for a modification of the judgment is denied.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

126 Cal.App.2d 56

EDENS v. STODDARD.

Civ. 20147.

District Court of Appeal, Second District,
Division 2, California.

June 16, 1954.

Hearing Denied Aug. 10, 1954.

Broker brought action against owner of realty to recover broker's commission. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to broker and broker appealed. The District Court of Appeal, Moore, P. J., held that where listing signed by owner of realty did not give broker an exclusive right to sell realty but indicated that owner reserved right to herself to sell realty, and owner designated to broker a potential purchaser, and broker did not effect a sale of the realty to such prospective purchaser, either by collecting price agreeable to owner or by receiving an executed offer for purchase of the realty on terms satisfactory to owner, broker could not recover commission from owner after sale by owner directly to such prospective purchaser.

Judgment affirmed.

1. Brokers 🔑52

Where listing signed by owner of realty did not give broker an exclusive right to sell realty but indicated that owner reserved right to herself to sell realty, and owner designated to broker a potential purchaser, it devolved on broker, as a broker anticipating receipt of a commission, to effect a sale to such prospective purchaser by either collecting price agreeable to owner or by receiving an executed offer for purchase of the realty on terms satisfactory to the owner.

2. Brokers 🔑56(3)

Where listing signed by owner of realty did not give broker an exclusive right to sell realty but indicated that owner reserved right to herself to sell realty, and owner designated to broker a potential purchaser, and broker did not effect a sale of the realty to such prospective purchaser either by collecting price agreeable to owner or by receiving an executed offer for purchase of the realty on terms satisfactory to owner, broker could not recover commission from owner when owner sold directly to such prospective purchaser.

3. Brokers 🔑82(3)

Where listing agreement contains provision which, if signed by owner of realty, would have given broker the exclusive right to a commission in the event of sale of realty, but such words were consciously stricken by owner before she delivered listing to broker, and owner sold realty directly to prospective purchaser, and broker brought action against owner to recover commission, court properly refused to permit broker to amend complaint so that broker could introduce evidence of alleged oral conversation with owner to effect that if a sale of realty was made to such prospective purchaser broker would receive a commission. Civ.Code, § 1624, subd. 5; Code Civ.Proc. §§ 1856, 1973.

4. Evidence 🔑450(6)

Though parol evidence is admissible where writing employing real estate broker is ambiguous or uncertain, in order to ascertain the true meaning, it is not admissible if there is either uncertainty or ambiguity in the writing. Civ.Code, § 1624, subd. 5; Code Civ.Proc. §§ 1856, 1973.

5. Brokers 🔑40

A contract between broker and owner of realty stating that owner will sell certain realty on certain conditions is insufficient to entitle broker to commission when owner sells the realty, since the contract does not show employment.

6. Brokers 🔑40

A listing of realty by owner with broker is nothing more than an offer to use the broker's services.

7. Brokers 🔑43(2)

A listing of realty with broker is of no value to broker unless the listing conforms with the statute of frauds. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973.

◆

Victor Bewley and George R. Coan, Los Angeles, for appellant.

A. G. Van Deventer, Pasadena, for respondent.

MOORE, Presiding Justice.

Appellant sued for a broker's commission alleging his oral employment February 3, 1952, by respondent to negotiate for the sale of the latter's hotel and hotel business to one Mrs. Bidwell for a five per cent commission. He alleges a confirmation thereof by a writing, his repeated negotiation with Mrs. Bidwell to induce the purchase, and, during the period of his alleged contract, the execution of a contract of sale by respondent to the same Mrs. Bidwell for $96,000. He demands judgment for $4800. Respondent filed her general denial and set forth three affirmative defenses, to wit: (1) the complaint does not state facts sufficient to constitute a causes of action; (2) the alleged agreements are invalid in that they are not in writing subscribed by respondent as required, Civ.Code, § 1624(5) and Code Civ. Proc. § 1973, and (3) the transaction concerning the hotel between respondent and Mrs. Bidwell was exclusively the result of negotiations between the principals and their attorneys between December 1951 and the time of the sale.

Immediately upon the calling of the first witness for appellant, respondent objected to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action for a broker's commission. The objection was sustained and a judgment of dismissal with prejudice was entered from which comes this appeal.

The only writing executed by respondent is a "Business Opportunity Listing" * set out on the margin hereof. It was marked exhibit A and will be so referred to herein. Not a word in it can be interpreted as an employment of appellant. After including the location of the hotel, its price at $125,000 and statistical information with reference to it, exhibit A expressly gives to appellant and associate the "open right to sell my property as listed above for the 120 day period from 15 February 1952. * * * If a sale or exchange is effected during their agency for the above described property, I agree to pay 5% per cent of the selling price as commission * * *"

Had it been respondent's purpose to employ appellant, it could have been done with the stroke of a pen. The Statute of Frauds, Civ.Code, § 1624(5), makes void any oral agreement to employ an agent or broker to purchase or sell real estate for compensation. Moreover, when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all the terms and no evidence thereof other than the writing itself shall be admissible except where a mistake in the writing or its invalidity is in dispute. Code Civ.Proc. § 1856.

[1, 2] Since there is no "employment" by exhibit A and it did not give appellant an exclusive right to make the sale during the 120 days, there is no basis for appellant's contention that he was "employed" except

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* "Business Opportunity Listing

Type of Business Hotel known as La Solana Inn

Location 450 So. Grand, Pasadena, Calif.

Location	Expense $ Approx. mo.	Rent $
Phone	Lic. & Taxes 80.00	Lease
Fixtures	Pay Roll $490.00	Price $125,000?
	Water $20.00	Terms Less if no trade
	Gas $75.00	Cash Req $ Any amt.
	Lt. $75.00	Stock over $40,000.
Income $	Laundry $70.00	$810.00

Potential inc. 3,800.00 per mo. exclusive of inc. of Dining Room—(European plan.)

Trust deed of 35,000.00 payable $280.00 per mo.

Summer inc. not too good, must be worked up with publicity for perm. guests.

Date 15 February 1952

In consideration of services to be rendered, I hereby give to E. V. Edens, with L. V. Lindsey & Assoc.
16 N. Mentor Ave., Pasadena, Calif.
the Open right to sell my property as listed above, for the 120
State if exclusive
day period from 15 February 1952 to ———————— 19—,
and within reasonable days thereafter to parties with whom said Broker negotiated during said period, provided said Broker notifies me in writing of said negotiation.

If a sale or exchange is effected ———————— during their agency for the above described property, I agree to pay them 5%———— per cent of the selling price, as commission for their services, and to furnish satisfactory title to said property.

Owner acknowledges receipt of a copy of this listing.

Owner ————————————————

THEODORA V. STODDARD

Address ————————————————

Telephone ———————— A. A. Schramm Form No. 107

EXHIBIT 'A'"

the printed matter on the reverse side of exhibit A. Not only was he not employed but the "Listing" was such as to indicate that respondent reserved the right to herself to sell her property or to allow anyone else the privilege. (Nelson v. Mayer, 122 Cal.App.2d 438, 265 P.2d 52). In that state of the contract, there was no inhibition against respondent's making the sale; no claim resulted to appellant to collect a commission for his attempts to close a sale to Mrs. Bidwell. With a potential purchaser designated to him by respondent, it devolved upon him as a broker anticipating the receipt of a commission to effect a sale to such prospect by either collecting the price agreeable to respondent or receiving an executed offer for the purchase of the property on terms satisfactory to respondent. He did neither. Having failed to achieve his desire, he cannot collect on the success of respondent in selling directly to Mrs. Bidwell. Had he intended to collect on respondent's success, he might have demanded an exclusive listing before commencing negotiations for the sale.

[3–7] Having found himself without a written contract for a commission for making a sale of the hotel and hotel business, he besought the trial court to allow an amendment to his complaint "by showing that this written listing that I put in as exhibit *A* contained on it the following language, on the reverse side, and through inadvertence it was not typed on there also. 'I, Mrs. T. V. Stoddard also hereby give to the broker named herein an exclusive right of sale to my tenant at present in the La Solana Inn, Mrs. Bidwell, as per the listing agreement on the reverse side. This agreement shall be considered as included on the reverse side hereof' * * *" While such writing was crossed out, appellant asserted his claim for the allowance of the amendment in order that he might introduce in evidence an "oral conversation to the effect that if a sale is made involving Mrs. Bidwell they will get their five per cent." The court correctly denied leave to amend the complaint. On the very paper that contained the "listing," were printed words which, if signed by the seller, would have given appellant the exclusive right to a commission in the event of sale. But it had been consciously stricken by respondent before she delivered exhibit A to appellant. In other words, appellant contends that while such printed words were stricken, still he would offer to prove by a conversation that respondent intended to prove an agreement for the exclusive listing. Such contention is contrary to the code provisions, supra, requiring a broker's employment to be in writing. While parol evidence is admissible where a writing is ambiguous or uncertain (Love v. Gulyas, 87 Cal.App.2d 608, 614, 197 P.2d 405), in order to ascertain the true meaning, it is not admissible where there is neither uncertainty nor ambiguity in a commission contract. (Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 157, 245 P.2d 650.) Appellant's insistence that he had an "exclusive as to Bidwell" is contrary to the facts. All he had was an open listing, i. e., the privilege of inducing Mrs. Bidwell to buy at $125,000. "A writing from the owner to a broker which merely states that the former will sell certain property on certain conditions is insufficient because it does not show employment." (Hooper v. Mayfield, 114 Cal.App.2d 802, 807, 251 P.2d 330, 334; Blanchard v. Pauley, 92 Cal.App.2d 244, 247, 206 P.2d 864.) A listing is nothing more than an offer to use the broker's services. It is of no value unless it conforms with the statute. (Hooper v. Mayfield, supra, 114 Cal.App.2d at page 809, 251 P.2d 330.)

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., dissenting.

STEINMETZ
v.
CALIFORNIA STATE BOARD OF EDUCATION et al.*

Civ. 8586.

District Court of Appeal, Third District, California.

June 22, 1954.

Hearing Granted Aug. 19, 1954.

Proceeding for writ of mandate to compel restoration of petitioner to his position as an associate professor at a state college. The District Court of Appeal, Van Dyke, P. J., held that petitioner's refusal to give direct and unconditional answers at his appearance before the Board of Education, to questions as to whether he was a member of the Communist Party or had been at any time since September 10, 1948, was a violation of his duty, and an act of insubordination which justified his discharge.

Alternative writ discharged and peremptory writ denied.

1. Officers ⚷18

Government has right to direct that its employees shall not belong to organizations which they know advocate overthrow of government by force or other unlawful means.

2. Officers ⚷18

Government employees may be compelled, as condition to obtaining or continuing in public employment, to make sworn statements to effect that they do not advocate or belong to organization that advocates overthrow of government by unlawful means, that within 5 years immediately preceding, they have not been member of any such organization except those they list, and that while employed by designated agency they will not advocate or become members of organization that advocates such doctrines. Const. art. 20, § 3.

3. Officers ⚷18

A person's associates, as well as his conduct, are relevant factors in determining fitness for public office and loyalty to government.

4. Schools and School Districts ⚷45

State, under its police power, may properly limit a person's freedom of choice between membership in organizations which advocate overthrow of government by unlawful means, and employment in school system.

5. Officers ⚷18

Government may subject employee at reasonable times and places and on reasonable notice to direct inquiry, under oath, and require that he then answer inquiries relevant to his past or present loyalty or membership in organizations which advocate overthrow of government by force or other unlawful means. Education Code, §§ 171 et seq., 20301 et seq., 20396(e); Government Code, § 1028.1.

6. Officers ⚷18

That answering questions concerning past or present membership in organizations which advocate overthrow of government by force or other unlawful means may amount to self-incrimination does not divest power of government to require answer as condition of public employment. Education Code, §§ 171 et seq., 20301 et seq., 20396(e); Government Code, § 1028.1.

7. Master and Servant ⚷1, 30(1)

It is duty of employee to answer questions of employer touching occurrences in employment affecting subject thereof and to answer questions touching fitness of employee to remain in service; and a violation of that duty with or without specific statutory declaration constitutes cause for dismissal upon grounds of insubordination and conduct unbecoming such employment.

8. Colleges and Universities ⚷8

Refusal of associate professor of state college, on appearance before state board of education, to give direct and unconditional answer to questions as to whether he was member of Communist Party or had been since September 10, 1948, was violation of his duty, and an act of insubordination which justified his discharge. Education Code, §§ 171 et seq., 20301 et seq., 20396 (e); Government Code, § 1028.1.

Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, for petitioner.

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* Opinion vacated 285 P.2d 617.

Edmund G. Brown, Atty. Gen., Richard L. Mayers, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

Petitioner was an Associate Professor of Psychology at San Diego State College. He asks this Court for a writ of mandate directed to the California State Board of Education and others, commanding them to reinstate him in his position and make him whole for loss of salary upon the ground that the respondents have unlawfully discharged him. We issued an alternative writ of mandate and the matter is now before us for decision.

Purporting to act under the authority of Article 3 of Chapter 1 of Division 1 of the Education Code and Chapter 2 of Division 10 of the Education Code and Section 1028.1 of the Government Code, respondent board directed petitioner to appear before the board and its Director to answer questions relating to:

(a) Present personal advocacy of the forceful or violent overthrow of the Government of the United States or of this State.

(b) Present knowing membership in any organization so advocating.

(c) Past knowing membership at any time since September 10, 1948 in any organization which to his knowledge and during his membership so advocated.

(d) Present knowing membership in the Communist Party or past knowing membership in that party at any time since September 10, 1948. Gov.Code, § 1028.1.

Responsive to questions asked him, petitioner testified that for eighteen years he had been Associate Professor of Psychology at San Diego State College; that he had no knowledge as to whether or not the Communist Party advocates the forceful or violent overthrow of the United States or of any state; that he had never belonged to, and would never so long as he was a State employee, belong to, an organization that advocated force and violence against the United States, this State or any subdivision thereof; that he had taken the Levering oath, art. XX, § 3, Calif. Const., had taken it honestly and that he then reaffirmed it in all of its parts and, specifically, that he did not advocate, never had advocated and never would advocate so long as he was publicly employed, the violent overthrow of government; that he had not at any time since September 10, 1948 knowingly been a member of the Communist Party when to his knowledge it advocated the violent or forceful overthrow of the Government of the United States or of any state. When asked, "Are you now knowingly a member of the Communist Party?" he refused to answer. When asked, "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" he refused to answer. The examining board adopted a resolution recommending to the Director of Education that for these refusals petitioner be dismissed from his position. The Director took such action. Petitioner applied to the State Personnel Board for a hearing, which body, after hearing, found that the failure to answer these questions was ground for dismissal under Section 20396(e) of the Education Code and Section 1028.1 of the Government Code and having so found affirmed petitioner's dismissal.

This cause presents questions as to the method, nature and extent of permissible inquiries touching the loyalty of government employees, which questions for some ten or more years have engaged the attention of courts throughout the country. The purpose of the subject legislation under which these proceedings were taken was to statutorily authorize the government and its agencies to inquire from time to time into such matters; and the legislature, after adopting certain legislative findings, declared that it should be the duty of any employee who might be subpoenaed or ordered by the governing body of the state or of any local agency to appear before such governing body or agency to answer under oath questions relating to loyalty in the field of advocacy of, or membership in, organizations that advocate violent overthrow of government.

Petitioner's contentions are broader than the isssues presented to us. It is to be noted that petitioner has not been separated from State service because he is or ever was a Communist or a member of the Communist Party or because he is or ever was a member of any organization advocating violence against government or because he does so advocate or ever has so advocated. He was separated from service because he refused to answer two specific questions. Although in his arguments the petitioner makes broad attacks upon the subject legislation, we are not called upon to do more and we do no more than to determine whether or not his refusal to answer these two questions constituted cause for his dismissal. We are not concerned with and do not decide what would be proof of disloyalty in fact, sufficient for dismissal upon that ground.

[1-5] Government has the right to direct that its employees shall not belong to organizations which they know advocate the overthrow of the government by force or other unlawful means and such employees may be required to make sworn statements similar to the Levering oath as a condition to obtaining or continuing in public employment. Pockman v. Leonard, 39 Cal.2d 676, 686, 249 P.2d 267. A person's associates, as well as his conduct, are relevant factors in determining fitness and loyalty. The State, under its police power, may properly limit a person's freedom of choice in such organizations and employment in the school system. Pockman v. Leonard, supra, citing Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 386, 96 L.Ed. 517. Government, in achieving its object of having in its employ no disloyal person, is not limited to requiring its employees to take loyalty oaths. It may also subject such employees at reasonable times and places and upon reasonable notice to direct inquiry, under oath, and require that they then answer questions relevant to such matters.

We see no substantial difference in requiring sworn affidavits as to membership or non-membership in the Communist Party and in requiring sworn statements at a hearing. And as to the right of government to require the former, the Supreme Court of the Nation said in Garner v. Board of Public Works, 341 U.S. 716, 720, 71 S.Ct. 909, 912, 95 L.Ed. 1317, 1322:

> "The affidavit raises the issue of whether the City of Los Angles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.
>
> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

[6, 7] In such inquiry, since past conduct and loyalty bears a reasonable relationship to present fitness and trustworthiness, information may be required regarding it. Garner v. Board of Public Works, supra, 341 U.S. at page 720, 71 S.Ct. 909; see also Pockman v. Leonard, supra, 39 Cal. 2d at page 687, 249 P.2d 267. And the fact that divulging past or present membership in such organizations may under some circumstances amount to self-incrimination does not divest the power of government to require answer as a condition or qualification of employment. Pockman v. Leonard, supra, 39 Cal.2d at page 687, 249 P.2d 267, citing Christal v. Police Commission, 33 Cal.App.2d 564, 92 P.2d 416. It is the duty of an employee to answer questions of the employer touching occurrences in employment affecting the subject thereof and to answer questions touching fitness of the employee to remain in service; and a violation of that duty with or without a specific statutory declaration would constitute cause for dismissal upon grounds of insubordination and conduct unbecoming such employment. Christal v. Police Commission, supra, 33 Cal.App.2d at page 568, 92 P.2d 416. We think the legislature was acting wholly within its well-recognized powers when it enacted Section 1028.1 whereunder it specifically authorized the respondents to order petitioner to appear

and to answer questions relating to the subject matter set forth in said section.

The legislature in said section has not attempted to word the questions that may be asked. It has declared as to each subject mentioned therein that questions relevant thereto may be asked and must be answered. Thus, while inquiring as to present personal advocacy by an employee of violent overthrow of government, any question fairly relevant to that subject may be asked. So with the other subjects of inquiry stated in the section; and many questions would be relevant to all alike. It would have been relevant, after petitioner had answered any question which he did answer to have asked this further question: "Are you a member of the Communist Party?", or this question: "Have you at any time since September 10, 1948 been a member of the Communist Party?" We hold further that in this inquiry these specific questions could have been asked without asking the others, for if, as has been held, government may inquire of its employees touching their loyalty to it then government may ask any questions relative to that inquiry and the question as to membership, past or present, in the Communist Party is relevant to such inquiry. It is well known that there is a Communist Party in this country and that it purposely has acted and does act subversively; that it and its purposes have been the subject of legislative findings by the Congress, and by the legislatures of many of the states, as well as of this State; and that, based upon such findings, Congress and the legislatures of the various states have enacted legislation in recognition not only of the existence of the party in this country, but also of its unlawful and subversive activities and purposes. So in promulgating the National Labor Relations Act, Congress made detailed findings upon the matter of that party's existence. In American Communications Ass'n, C. I. O. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, the Supreme Court upheld those provisions of the act which required the officers of a union, seeking to utilize the opportunities afforded by the act, to file an affidavit with the board that they were not members of the Communist Party or affiliated therewith and that they did not believe in and were not members or supporters of any organization that believed in or taught the overthrow of government by force. Commenting upon the nature of that party as revealed by the Congressional findings, Mr. Justice Jackson in a concurring opinion stated that from information before it and from facts of general knowledge Congress could rationally conclude that behind its political party facade the Communist Party was a conspiratorial and revolutionary junta organized to reach ends and to use methods incompatible with our constitutional system; that its goal was to seize power of government by and for a minority rather than to acquire power through the vote of a free electorate; that it alone among American parties is dominated and controlled by a foreign government; that violent and undemocratic means are the methods used to attain its goal; and that every member of it is an agent to execute the Communist program. It is not, rightly speaking, a political party. Pockman v. Leonard, supra, 39 Cal.2d at page 686, 249 P.2d 267. While enacting the subject legislation here our Legislature made similar findings. In addition to all of this, many trials have been held in the courts of this Nation wherein the existence and the subversive purposes and activities of the Communist Party have been put directly in issue. The triers of fact in those trials have frequently held that the party does exist in this country and that its purposes and activities are subversive; and these findings have been upheld by the highest courts in the states, and by the Supreme Court of the United States, as having been abundantly supported by the evidence introduced. It is, therefore, proper to say that in an inquiry touching the loyalty of public employees to the government by whom they are employed, with particular reference to whether or not they belong to subversive organizations or advocate their unlawful purposes, they may be asked and required to answer as to whether or not they belong to the Communist Party. Such a question is relevant to the inquiry and the employee is required to answer upon pain of separation from government service for refusal. And in this aspect it is immaterial whether or not the question is limited to membership with knowledge of the party's subversive purposes. It has been held that separation from service cannot be predicated upon innocent membership, that is, membership without knowledge of such unlawful purposes and activities. But we are not now discussing, nor are we required here to discuss, the limitations that must be imposed upon separation from service lest the innocent be discharged as well as the guilty. We are concerned here only with the relevancy to the subject of inquiry of the question: "Are you a member of the Communist Party?" It is relevant to inquire as to membership in the Communist Party without attaching to that question any qualifications whatever. If the answer be that the questionee is not a member of the Communist Party and that answer is by the inquirer accepted as true, further inquiry could be dropped. If the inquirer suspects the good faith of that answer, further questions could properly be asked to develop its truth or falsity. If the questionee answers that he is a member, then further inquiry would be relevant touching the question of whether his membership was innocent or guilty. And if it be that only guilty membership will sustain expulsion from service it nevertheless remains true that the inquirer, in order to develop the inquiry in orderly manner, may ask flatly whether or not the questionee is or has been a member of the Communist Party.

The questions which the petitioner refused to answer were couched in the language of the legislation, that is, petitioner was asked as to present *knowing* membership in the Communist Party and as to past *knowing* membership therein. We have said that the question could have been directed to membership, whether guilty or innocent, knowledgeable or otherwise, and of course that means that the question could also be asked in the form in which it was asked. The legislature was not concerned, nor are we, with the wording of the questions. It and this Court were and are concerned only with the relevancy of those questions. The questions as asked in this proceeding were relevant to the inquiry and it was the duty of the petitioner to answer them. This he refused to do and his separation from the service was, therefore, justified.

In all essentials the proceedings here were like those under attack in Adler v. Wilson, decided by the Appellate Division of the Supreme Court of New York, reported in 282 App.Div. 418, 123 N.Y.S.2d 655, 657–658:

> "The basic question before us is as to the right of the Board or the Superintendent of Schools to question teachers as to their Communist Party membership, past or present, and their obligation to answer. None of the petitioners admits membership in the Communist Party, nor is the latter a party to this proceeding and appeal. The question here posed was answered in Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317. * * *
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> * * * * * *
>
> "The Garner case remains conclusive as to the Board's right of inquiry concerning a teacher's membership in the Communist Party, as well as his obligation to answer. * * * In a concurring opinion Mr. Justice Frankfurter said, 341 U.S. 716, 725, 71 S.Ct. 909, 915, 95 L.Ed. at page 1325, 'A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government.'"

[8] Petitioner further contends that he substantially complied with Section 1028.1 of the Government Code by the answers he did give to other questions asked of him. We think it apparent from what has been

said that this contention cannot be sustained. Petitioner says that by his answers which were heretofore delineated he did substantially answer the questions: "Are you now knowingly a member of the Communist Party?" and "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" If the petitioner believes that contention to be sound we cannot understand why he did not make direct answers to the specific questions asked. Petitioner's questioners were not required to submit to quibbling. They were entitled to have a direct and unconditional answer to the specific questions as to his past or present membership in the Communist Party. His refusal to so answer was a violation of his duty, an act of insubordination and justified his discharge.

The alternative writ heretofore issued is discharged and the peremptory writ is denied.

SCHOTTKY and PEEK, JJ., concur.

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126 Cal.App.2d 164

PEOPLE v. MEAD.

Cr. 2517.

District Court of Appeal, Third District, California.

June 22, 1954.

As Modified on Denial of Rehearing July 2, 1954.

Driver of taxicab, who was involved in accident, in which his passengers were killed, was convicted of manslaughter. The Superior Court of Mendocino County, Lilburn Gibson, J., entered judgment and an order denying motion for new trial, and driver appealed. The District Court of Appeal, Schottky, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1159(2)

A reviewing court will not attempt to determine weight of evidence, but will decide only whether on face of evidence sufficient facts could not have been found by jury to warrant inference of guilt.

2. Criminal Law 🔑741(1), 1160

It is function of jury in first instance, and of trial court after verdict, to determine what facts are established by the evidence, and before jury's verdict, which has been approved by trial court, can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

3. Criminal Law 🔑562

Determination of charge in a criminal case requires proof that offense charged was committed and that it was perpetrated by the accused.

4. Criminal Law 🔑1144(13)

On appeal in a criminal case, reviewing court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict.

5. Criminal Law 🔑1159(2)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

6. Automobiles 🔑355(13)

Evidence sustained manslaughter conviction of driver of taxicab, whose passengers were killed when taxicab went off highway. Pen.Code, § 192.

7. Automobiles 🔑344

If driver of taxicab was driving taxicab while he was under the influence of intoxicating liquor, such driving constituted an "unlawful act not amounting to a felony," so as to justify manslaughter conviction of driver. Pen.Code, § 192; Vehicle Code, § 502.

See publication Words and Phrases, for other judicial constructions and definitions of "Unlawful Act Not Amounting To A Felony".

8. Automobiles 🔑344

Driver of taxicab was not required to be drunk or intoxicated, in order to be "under the influence of intoxicating liquor", and hence guilty of manslaughter because of death of his passengers, and it was sufficient if the liquor had so far affected his nervous system, brain, or muscles, as to impair to an appreciable degree his ability to operate the taxicab in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties, using reasonable care under like conditions. Pen.Code, § 192; Vehicle Code, § 502.

See publication Words and Phrases, for other judicial constructions and definitions of "Under The Influence Of Intoxicating Liquor".

9. Criminal Law 🔑1171(3)

Where witness for the prosecution, who testified in manslaughter prosecution of driver of taxicab that when driver was taken to hospital after fatal accident attending physician had stated to driver that he was a "murderer on the highways," had never discussed matter personally with district attorney before trial, and driver did not object to such testimony when it was given, and district attorney acted in good faith in arguing in presence of jury that such testimony was admissible as an implied admission on part of driver, because he allegedly did not reply to accusation of attending physician, district attorney's argument to jury with reference to admissibility of such testimony was not prejudicial error. Pen.Code, § 192.

10. Carriers 🔑280(1)

Driver of taxicab, as a carrier of passengers for hire, owed to passengers the utmost care and diligence for their safety.

11. Automobiles 🔑354

Actions of driver of taxicab, as related to surrounding circumstances, could be considered in determining whether he was indifferent to the consequences at time of fatal accident in which his passengers were killed, so that he could be found guilty of manslaughter. Pen.Code, § 192.

12. Criminal Law 🔑1171(3)

Where driver of taxicab, who was involved in accident in which his passengers were killed, was charged with manslaughter in the commission of an unlawful act not amounting to a felony with gross negligence, and jury found him guilty of the offense charged without gross negligence, statement of district attorney in argument to jury that driver was transporting passengers for hire and that he had a greater obligation to see that they were safely transported than two friends who go out on a joint venture and get intoxicated, was not prejudicial error. Pen.Code, § 192; Const. art. 6, § 4½.

13. Criminal Law 🔑774

In homicide prosecution of driver of taxicab, who was involved in accident in which his passengers were killed, driver's requested instruction that where one commits an act without being conscious thereof, such act is not criminal even though, if committed by person who was conscious, it would be a crime was erroneous because it required acquittal even though jury might find that driver was rendered unconscious by his voluntary act in becoming intoxicated. Pen.Code, § 192.

14. Criminal Law 🔑53

Unconsciousness caused by voluntary act in becoming intoxicated is not a defense to a crime, such as manslaughter committed with a motor vehicle. Pen.Code, § 192.

15. Criminal Law 🔑814(3)

In manslaughter prosecution of driver of taxicab, who was involved in accident in which his passengers were killed, wherein driver testified that he was conscious right up to moment of impact, requested instruction of driver that where one commits an act without being conscious thereof, such act is not criminal, even though, if committed by person who was conscious, it would be a crime was properly refused because not applicable to the case. Pen. Code, § 192.

16. Criminal Law 🔑813, 830

Instructions, which state abstract rules of law not applicable to the case, or which do not state the law accurately, are properly refused.

17. Criminal Law 🔑409

In manslaughter prosecution of driver of taxicab, who was involved in accident in which his passengers were killed, evidence was sufficient, independent of driver's own statements and admissions, to prove the corpus delicti. Pen.Code, § 192.

18. Criminal Law ⟹822(6)

In manslaughter prosecution of driver of taxicab, who was involved in accident in which his passengers were killed, instructions given on definition of manslaughter, driving while intoxicated, and proximate cause, when read together, did not deprive driver of defense that his act was not the proximate cause of the deaths of the passengers. Pen.Code, § 192.

19. Criminal Law ⟹824(2)

If defendant in manslaughter prosecution desired a fuller definition of manslaughter, he should have presented a request therefor. Pen.Code, § 192.

◆

Burke & Rawles, Newell Rawles & John E. Nelson, Ukiah (Arguello & Giometti, San Francisco, on rehearing only), for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier & Frederick G. Girard, Deputies, for respondent.

SCHOTTKY, Justice.

Appellant was charged with the crime of manslaughter as defined in section 192 of the Penal Code, it being alleged in the information that "on or about the 21st day of June, 1953, in the County of Mendocino, State of California, said defendant did then and there, unlawfully, feloniously and without malice, kill two human beings, to-wit, Vernon Newbury and Evelyn Laura Cass Newbury, in the driving of a vehicle in the commission of an unlawful act not amounting to felony with gross negligence." He was found guilty by the jury of the offense charged "without gross negligence," his motion for a new trial was denied, judgment was pronounced, and this appeal is from the judgment of conviction and from the order denying appellant's motion for a new trial.

[1–5] Appellant urges a number of grounds for a reversal of the judgment and order, the principal contention being that the evidence is insufficient to support the judgment. Before discussing these contentions we deem it appropriate to quote the following language of our Supreme Court in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779:

> "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. [Citing cases.]"

Bearing in mind the rule just quoted we shall summarize the evidence as shown by the record.

On June 21, 1953, Vernon Newberry anc his wife, Evelyn Newberry, were killed as a result of an automobile accident. The accident occurred at approximately 4:30 p. m., about 16 to 18 miles south of Ukiah, on U. S. Highway No. 101. The only vehicle involved was a taxicab in which the Newberrys and appellant were riding. There were no eye-witnesses to the accident, but the cab had crossed over the center line of the highway and crashed into a bank on the left side. When a state highway patrolman arrived, shortly after the accident, there were quite a few people there; the Newberrys were in the front seat of the cab and appellant was lying on the ground approximately 15 feet away. Appellant's testimony established that he was engaged in the taxicab business in Ukiah; that the Newberrys had engaged him to take them by cab from Ukiah to Santa Rosa and had paid him $25 for the service; that they were en route to this destination when the accident occurred; and that he was driving the cab. Appellant, too, was injured in the accident; he had a circular bruise, 16 to 18 inches in diameter, on his chest, which might have been caused by his having been thrown against the steering wheel.

At the place where the accident occurred, the paved portion of the highway was 36 feet wide; there were two lanes for traffic and the center line was painted white. On the east side of the pavement (this being the left-hand side with respect to the cab which was proceeding south) there was a gravel shoulder about 6 to 8 feet in width. There was no intersection at this point, and no road repairs were being made there. The cab ran into the bank at an angle of west to east, in a southerly direction, which might be taken to indicate that it did not make an abrupt left turn into the bank. There were no skid marks on the highway. Appellant testified that he was driving at a normal speed (50 to 55 miles per hour) when "the car just suddenly cut across the road and hit the bank," and that he could not account for it unless something had happened to the steering apparatus. He stated that he saw "the bank coming" and the next thing he knew he was lying on top of the steering wheel. He also testified that just before the accident he did not feel abnormal in any way, so far as his physical condition was concerned. Appellant was an uncontrolled diabetic, and there is evidence that diabetics sometimes lapse into a diabetic coma. No evidence was introduced to show any mechanial defect in the cab.

There is testimony by eye-witnesses that appellant drank at least three bottles of beer prior to the accident on that day, and appellant admitted that he had consumed a bottle and a half of beer. A specimen of appellant's blood was taken sometime between five and six o'clock that evening, while he was in the hospital, and it showed an alcoholic content of 3.5 milligrams "per c.c." There is medical testimony showing that 1.5 milligrams of alcohol is generally taken as the dividing line between sobriety and drunkenness, and that a person with 3.5 milligrams of alcohol in his blood should be highly intoxicated. One medical doctor testified that in order to reach the 3.5 milligram level, a person (drinking beer) normally would have to consume 15.2 bottles of beer having an alcoholic content of 5 per cent. This same doctor indicated in his testimony that the degree of intoxication would not be affected by the presence of diabetis. Appellant was kept in the hospital for several days, and a second blood specimen was taken about 39 hours after the first one. This second specimen showed an alcoholic content of one-tenth of a milligram. One doctor testified that the normal person will usually diminish his blood level of alcohol at the rate of one-tenth milligram per hour.

There was medical testimony that a person having a 3.5 level of blood alcohol would have difficulty in walking and talking, and would appear to be sluggish mentally. He would fall asleep easily. One prosecution witness, who saw appellant shortly before the accident and who had had three bottles of beer himself, testified that appellant's "face was kind of red and kind of flushed and kind of sleepy," but that appellant did not appear to be drunk. Another witness testified that appellant looked like he had been drinking, but in effect admitted that it might have been a hangover. However, a state highway patrolman testified that he smelled the odor of intoxicating liquor near appellant at the scene of the accident, although he did not know whether it was on appellant's breath, and the assistant ambulance driver testified that he could smell stale beer when he was near appellant. A doctor, who attended appellant at the scene of the accident and administered 2 c.c.'s of Demerol to him, testified that he saw no evidence that appellant was under the influence of intoxicating liquor at that time. And another doctor who examined appellant at the hospital before the blood specimen was taken testified that he had no reason to think that appellant was "deeply intoxicated." This last witness also testified that appellant was in shock at the time, and there is other medical testimony in the record that shock and attendant pain may stimulate a person and tend to keep him awake, although it does not get rid of the alcohol.

Regarding the cause of the accident, the highway patrolman who testified to the odor of intoxicants near appellant also testified that at the scene of the accident appellant was asked how it happened, and appellant replied "I must have dozed." This same officer testified further that on the following day he visited appellant at the hospital and asked him what caused the accident, and that appellant replied "I must have dozed or went to sleep."

[6] We find no merit in appellant's contention that the evidence is insufficient to support the judgment of conviction. Appellant was charged with having caused the death of Mr. and Mrs. Newberry "in the driving of a vehicle in the commission of an unlawful act not amounting to a felony."

[7, 8] If appellant was driving the cab while under the influence of intoxicating liquor, such driving constituted an unlawful act not amounting to a felony. Vehicle Code, § 502. He need not be drunk or intoxicated in order to be under the influence of intoxicating liquor; it is sufficient if such liquor has so far affected his nervous system, brain, or muscles, as to impair to an appreciable degree his ability to operate the cab in a manner like that of an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care and under like conditions. People v. Haeussler, 41 Cal.2d 252, 261, 260 P.2d 8. Applying the rule of People v. Newland, supra, appellant's admission that he had drunk some beer prior to the trip, his explanation that he must have dozed or fallen asleep, the circumstances surrounding the accident (there was no evidence of mechanical failure), the odor of alcohol about him, the blood analysis showing a high alcoholic content, and the medical testimony evaluating the blood analysis, all support the jury's implied finding that appellant was under the influence of intoxicants, if not intoxicated, when the accident occurred. The fact that there was considerable evidence tending to show that appellant was not under the influence of intoxicating liquor at the time of the accident only served to create a conflict in the evidence.

Appellant next contends that the district attorney committed prejudicial misconduct in offering hearsay testimony of Mrs. Sadie Thurston that Dr. Vest had told appellant that he was a murderer on the highway.

Appellant states in his brief:

> "Mrs. Sadie Thurston testified over objection as to a conversation between Dr. Vest and the defendant as follows: 'Dr. Vest asked Mr. Mead how he was injured and where he was injured when he examined him and asked him if he had been drinking and Mr. Mead said he had a little beer. And the doctor made some remarks to the effect that he was murder on the highway.' (Rep.Tr. Vol. 2, p. 360, lines 12 to 16.) These remarks were stricken by the Court. (Rep.Tr. Vol. 2, p. 360, lines 9 to 12.) Thereafter the District Attorney, Mr. James E. Busch, argued in the presence of the jury and reiterated the phraseology 'You are a murderer on the highways' quoting that. (Rep. Tr. Vol. 2, p. 360, lines 13 to 18.) Nevertheless, the Court ordered the matter stricken. After the close of the defense case, Mr. Busch reintroduced Mrs. Thurston to testify that Dr. Vest had said that Mr. Mead was a murderer on the highway. (Rep.Tr. Vol. 3, p. 545, lines 1 and 2.) Because the witness could not remember whether or not a response was or was not made, the evidence was thereafter stricken. (Rep.Tr. Vol. 3, p. 553, line 13.)

> "That this was highly inflammatory and prejudicial testimony, there can be no doubt. It is therefore respectfully submitted that the action of the District Attorney in bringing in twice before the attention of the jury such testimony was prejudicial misconduct, that the motion of the defense for a mistrial at that stage of the proceedings should properly have been granted."

In reply respondent points out that Mrs. Thurston was the nurse who attended appellant upon his admission to the hospital and Dr. Vest was the attending physician; that Mrs. Thurston was asked if she had heard a conversation between Dr. Vest and appellant and that she gave the answer above stated. The court ordered the language "The Doctor made some remark to the effect that he was a murderer on the highway" stricken, and the district attorney then stated to the court that he intended to show an implied admission by appellant, stating: "Dr. Vest said 'You are a murderer upon the highways' and I seek to prove by this witness that he did not deny that, that he did not answer that accusation." The court refused to change the ruling.

On cross-examination of Mrs. Thurston by appellant, it was established that she had not informed the district attorney's office of the conversation between Dr. Vest and appellant until her first testimony on October 28, 1953. Moreover, it was brought out on cross-examination of Mrs. Thurston that appellant appeared to be rational at the time the accusation was made.

In an argument addressed solely to the court (the jury having been excused), the district attorney argued that this evidence was admissible as an implied admission. The court stated the evidence was denied admission because the prosecution was taking inconsistent positions, i. e., arguing on one hand appellant was drunk and then relying on an implied admission which requires an understanding of the nature of the communciated accusation.

In the presentation of his defense appellant attempted to show, through his own testimony and that of the physician who attended him at the scene of the accident, that he was rational although suffering pain. In rebuttal, the prosecution again called Mrs. Thurston, and on direct examination she testified as follows:

> "A. Well, Dr. Vest then made the remark sometime through the conversation that Mr. Mead was a murderer on the highway.
>
> "Q. And did Mr. Mead deny that or say anything in reply? A. I don't remember Mr. Mead making any remark.
>
> "Q. As far as you remember, he said nothing, is that right? A. To the best of my memory. I can't remember."

On cross-examination and recross-examination, Mrs. Thurston testified she had not discussed the related conversation with the district attorney personally and that her only contact with his office subsequent to the date of the trial was on October 29, 1953, when she first advised a prosecution investigator of the conversation.

On recross-examination Mrs. Thurston testified that she did not remember whether appellant answered at all.

A motion to strike the testimony with respect to the statement of the doctor made in the witness' presence was then made and granted. The appellant then requested a mistrial, stating that the district attorney knowingly, after discussing the matter with the witness, introduced the testimony for the sole purpose of inflaming the jury prejudicially against the appellant. The court denied the motion for mistrial and strongly admonished the jury to disregard the testimony concerning the conversation between Dr. Vest and appellant.

[9] We are unable to agree with appellant that the district attorney was guilty of prejudicial misconduct. The record shows testimony by Mrs. Thurston that she had never discussed the matter personally with the district attorney and that she had discussed it only on one occasion with an investigator from the district attorney's office. On two occasions the district attorney made full and adequate offers of proof. Moreover, Mrs. Thurston's testimony indi-

cated an opportunity to hear any replies. On the witness stand she had stated she had heard a conversation between appellant and Dr. Vest. Moreover, she answered questions directed to her recollection of appellant's reply to the accusation in the following terms: "I don't remember Mr. Mead making any remark" and to the question "He said nothing, is that right?" she replied, "To the best of my memory. I can't remember."

The record shows appellant did not object to this testimony when given. It was only on recross-examination that the first hint that Mrs. Thurston's testimony was inadmissible on the ground that she did not remember whether appellant replied to the accusation, appeared.

There is nothing to indicate bad faith on the part of the district attorney, as he was fully justified in believing that Mrs. Thurston's testimony was admissible as an implied admission, and the trial court would have been fully justified in refusing to strike it. For as stated in People v. Yeager, 194 Cal. 452, at page 486, 229 P. 40, at page 54:

> "The admission of such evidence is an exception to the hearsay rule. Evidence of conduct is receivable if it tends to show a consciousness of guilt or intent—such as flight, concealment, preparation, or other acts or declarations inconsistent with the theory of innocence. 8 Cal.Jur. § 157, p. 42. Such evidence is not admissible for the purpose of proving the truth of the accusatory statements, but rather as indicating a consciousness of guilt on the part of the accused by allowing an imputation opposed to the presumption of innocence to pass unchallenged. It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, and it is then for the jury to decide whether the accused was aware the statements were made, whether, under all the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether, if he did not do so, such failure showed criminal intent or a consciousness of guilt. If these propositions of fact are resolved in favor of the prosecution, the item of conduct should be given the effect to which upon the entire case it is entitled."

Appellant's next contention is that the district attorney committed prejudicial error in his argument to the jury. In his closing argument to the jury, the district attorney stated that appellant was transporting passengers for hire and that he certainly had a greater obligation to see that they were safely transported than, say, two friends who go out on a joint venture and get intoxicated. Appellant's counsel objected immediately, stating that the district attorney's statement was a misstatement of the law, to which the trial court replied:

> "Well, the jury will take the law from the Court. And counsel are arguing their case as they see it. If there is any difference between what they argue to be the law and what the Court instructs you is the law, you will, of course, take the law from the Court."

The district attorney again told the jury that a person operating a vehicle for hire has a great obligation to see that he transports them safely, and counsel for appellant cited these remarks as prejudicial misconduct.

[10–12] Appellant, as a carrier of passengers for hire, owed to the Newberrys the utmost care and diligence for their safety. Sipperly v. San Diego Yellow Cabs, 89 Cal.App.2d 645, 649, 201 P.2d 543. The manslaughter charge, as set out in the information, involved the element of gross negligence. The term "gross negligence," as used in section 192 of the Penal Code, has been defined as the want of slight care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, or that want of care which would raise a presumption of the conscious indifference to consequences. People v. Costa, 40 Cal.2d 160, 166, 252 P.2d 1. Appellant's actions, as related to the surrounding circumstances, may be considered in determining his state of mind, i. e., whether he was indifferent to the consequences. People v. Costa, supra. Respondent contends that the district attorney's remarks were directed to the issue of gross negligence, and that no harm was done, in any event, for the jury found that appellant was not grossly negligent. Appellant has not shown in what way he was prejudiced by the alleged error, and injury will not be presumed. Const., Art. VI, § 4½; People v. Baskins, 72 Cal.App.2d 728, 733, 165 P.2d 510.

Appellant contends also that the court erred in refusing to give the following instruction offered by him:

> "I further instruct you as follows: Where a person commits an act without being conscious thereof, such act is not criminal even though if committed by a person who was conscious it would be a crime.
>
> "When the evidence shows that the Defendant act*ing* as if he was conscious the law presumes that he then was conscious. This presumption, however, is disputable, and may be overcome or questioned by evidence to the contrary, and, if you should find that the Defendant committed an act which, if he was conscious, would constitute the crime charged against him, or be an element of that crime, and if you should not be convinced beyond a reasonable doubt that he then was conscious, you shall find that he then was unconscious, and return a verdict of not guilty."

[13–16] Appellant argues that the evidence shows that he was an uncontrolled diabetic and, as such, was subject to periods of diabetic coma, and he complains that no instruction was given on this phase of the case. The proposed instruction was erroneous, in that it would have required an acquittal even though the jury found that appellant was rendered unconscious by his voluntary act in becoming intoxicated. Unconsciousness so caused is not a defense to a crime such as that charged here. People v. Anderson, 87 Cal.App.2d 857, 860, 197 P.2d 839. Further, appellant testified that he was conscious up to the moment of the impact. Instructions which state abstract rules of law not applicable to the case at bar, or which do not state the law accurately, are properly refused.

[17] Appellant's next contention is that the trial court erred in denying his motion for a directed verdict, his argument being, in effect, that there was no proof of the corpus delicti independent of his own statements and admissions. This contention is likewise without merit. The rule applicable to this contention is aptly stated in People v. Cullen, 37 Cal.2d 614, 624–625, 234 P.2d 1, 6, as follows:

> "Here the corpus delicti consists of two elements, the death of the alleged victims and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially. [Citing cases.]
>
> * * * * * *
>
> "Proof of the corpus delicti does not require identity of the perpetrators. It is not necessary that it connect the defendant with the commission of the crime although it may do so. * * *
>
> "It is the settled rule, however, that the corpus delicti must be established independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof *aliunde* of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing that the alleged victims met death by a criminal agency is all that is required. The defendant's extra-judicial statements are then admissible, the order of proof being discretionary, and together with the prima facie showing must satisfy the jury beyond a reasonable doubt. [Citing cases.]"

The record shows that the only vehicle involved was a taxicab owned by appellant. At the scene of the accident the Newberrys were found in the cab, fatally injured. Appellant was lying on the ground about 15 feet away, and he had a fresh circular bruise about 16 to 18 inches in diameter on his chest. The steering wheel of the cab was also about 16 to 18 inches in diameter, and one doctor who attended appellant testified that appellant had been injured by being thrown against the steering post. About an hour before the accident, appellant and the Newberrys stopped at a road house about two and one-half miles south of Ukiah and, while there, appellant stated that he was going to Santa Rosa and asked a friend if he would care to go along. The angle of impact indicates that the cab was proceeding in a southerly direction on the highway, that it crossed over the center line and proceeded for some undetermined distance along the left side of the highway before crashing into the bank at the left. There were no skid marks, no road repairs were in progress, and no evidence of mechanical failure was introduced. There was ample evidence that appellant was under the influence of intoxicants, if not highly intoxicated. The above evidence certainly makes a prima facie showing that appellant was operating the cab while intoxicated, and that two deaths resulted therefrom.

[18] Equally without merit is appellant's final contention that the instructions given on the definition of manslaughter, driving while intoxicated, and proximate cause, when read together, deprived him of the defense that his act was not the proximate cause of the deaths. The record shows that the trial court gave the following instructions, among others:

> "As applicable to this case, manslaughter is the unlawful killing of a human being without malice in the driving of a vehicle: (a) In the commission of an unlawful act not amounting to a felony with gross negligence; (b) in the commission of an unlawful act not amounting to a felony without gross negligence.
>
> "To constitute the kind of manslaughter charged in this case, the death of the human being in question must be the proximate result of the commission of an unlawful act not amounting to a felony."
>
> "I instruct you that the phrase 'under the influence of intoxicating liquor' does not mean that the driver must be drunk or intoxicated, but means that if intoxicating liquor has so far affected his nervous system, brain, or muscles, as to impair to an appreciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent and cautious man in the full possession of his faculties, using reasonable care, and under like conditions, then such driver is under the influence of intoxicating liquor within the meaning of the statute.
>
> "I instruct you that any person who drives an automobile upon a public highway while under the influence of intoxicating liquor is committing an unlawful act not amounting to a felony.
>
> "Notice that I have heretofore indicated something to you about proximate cause. And I find that you should be informed as to what proximate cause means in order for you to be fully instructed upon the law of this case. And therefore I do instruct you that the proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produced the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury."

[19] The instruction on manslaughter follows the language of the code provision. Pen.Code, § 192. If appellant desired a fuller definition, he should have presented a request therefor. People v. Cayer, 102 Cal.App.2d 643, 652, 228 P.2d 70. The instruction defining the phrase "under the influence of intoxicating liquor" is approved in People v. Haeussler, 41 Cal.2d 252, 261, 260 P.2d 8, and that covering the driving of an automobile while under the influence of intoxicating liquor finds support in section 502 of the Vehicle Code. The instruction as to proximate cause contains the standard definition of proximate cause and correctly states the rule.

We are convinced that the appellant was given a fair and impartial trial, that he was ably defended, that the jury was fully, fairly and correctly instructed, that no prejudicial errors were committed and that there was ample evidence to support the judgment of conviction.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

126 Cal.App.2d 137

BUCK v. BUCK.

Civ. 20136.

District Court of Appeal, Second District,
Division 1, California.
June 22, 1954.

Proceeding upon wife's motion to vacate her default and set aside ensuing decree of annulment. The Superior Court, Los Angeles County, Vernon W. Hunt, J., entered order denying motion, and wife appealed. The District Court of Appeal, White, P. J., held that evidence which revealed that wife understood and believed that, at time of last reconciliation, it was agreed that all actions between husband and wife would be dismissed, was sufficient to establish that trial court abused its discretion in denying relief.

Order reversed and cause remanded with directions.

1. Judgment 🔑139

Granting of relief under statute pertaining to the setting aside of the default judgment severing the marital status is primarily committed to trial court's discretion, but such decision must be founded upon sound discretion predicated upon fair consideration of evidence in its entirety and reasonable and logical inferences to be drawn therefrom and upon principles of justice and fair dealing. Code Civ.Proc. § 473.

2. Judgment 🔑162(2)

In proceeding by defaulting party to vacate default and to set aside the ensuing decree of annulment, burden of proving excusable neglect was upon such party who would have to establish his thesis by preponderance of the evidence.

3. Action 🔑66

Sound public policy favors determination of actions upon their merits.

4. Marriage 🔑65

In proceeding upon wife's motion to vacate her default and to set aside ensuing decree of annulment, evidence which revealed that question of legitimacy of child was involved and that wife understood and believed that, at time of last reconciliation, it was agreed that all actions between husband and wife would be dismissed, was sufficient to establish that trial court abused its discretion in denying relief. Code Civ. Proc. § 473; Civ.Code § 84.

◆

A. Albert Spar, Hollywood, for appellant.

Samuel Maidman, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by plaintiff from an order denying the motion to vacate her default and to set aside the ensuing decree of annulment.

The parties intermarried on July 31, 1952, and less than two months thereafter, on September 16, defendant husband herein filed an action for annulment on the ground that at all times after the marriage ceremony plaintiff herein refused to consummate said marriage or to live and cohabit with defendant as husband and wife. A reconciliation was effected about October 1, 1952, and the parties again lived together for about ten days when another separation occurred continuing until November 20, 1952 when they again reconciled and lived together until about January 5, 1953. Whether any subsequent reconciliation occurred is not revealed by the record, but it is conceded that the above action was dismissed by the defendant herein who filed the same.

On February 20, 1953, plaintiff in the instant proceeding filed an action for separate maintenance on the ground of extreme cruelty, alleging that the date of separation was January 5, 1953. On September 6 of the same year a child was born to plaintiff.

Defendant filed an answer to the last-mentioned complaint and also a cross-complaint for annulment on the ground of fraud, or in the alternative, a divorce on the ground of extreme cruelty.

Thereafter, on March 25, 1953, plaintiff and defendant, through their respective counsel, entered into a stipulation, as follows: " * * * that the complaint in the within action may be deemed to be withdrawn and that the cross-complaint on file herein may be heard as a default".

Pursuant to the foregoing stipulation, the cause was set for hearing and on April 20, 1953, on the testimony of cross-complainant (defendant husband), a judgment of annulment was rendered. Thereafter, plaintiff discharged her attorneys and procured other counsel. On July 10, 1953, through her present counsel, plaintiff filed her motion to vacate the decree of annulment. After a hearing had upon affidavits and counter-affidavits, the motion was denied. From the order denying her said motion plaintiff prosecutes this appeal.

The only ground urged as a reason for reversal of the order in question is that the court abused its discretion in refusing to set aside the default decree of annulment.

Plaintiff's Supporting Affidavit.

In support of the motion, plaintiff presented her own affidavit in which she avers that she and her husband lived together as husband and wife from September 26, 1952 until January 5, 1953, "during all of which time the parties cohabited and affiant became pregnant. That on January 2, 1953 she conferred with her husband's attorney and was advised that there could be no annulment of affiant's marriage if she was with child". That on January 9, 1953, at the request of her husband, she consulted a physician to ascertain if she was pregnant and that said physician advised plaintiff and her husband that she was pregnant. That from February to April, 1953 she and her husband often cohabited and had sexual relations. That following the filing of her complaint for separate maintenance on February 20, 1953, defendant husband filed his cross-complaint for annulment on the grounds of fraud in that affiant secretly intended not to consummate said marriage or cohabit with her husband at the time of said marriage and married him for the sole purpose of becoming a permanent resident of the United States. That actually, said allegations were false, affiant and her husband having consummated the marriage and cohabited as hereinabove set forth. That "On or about March 7th or 8th, 1953, affiant and husband again agreed to reconcile and further agreed to cause all litigations pending between them to be dismissed; that in furtherance thereof affiant instructed her counsel Anthony Newman to dismiss her complaint; that in furtherance thereof husband's complaint of September 16, 1952, was dismissed on March 13th, 1953; that in furtherance thereof husband and affiant again reconciled and had sexual relations on March 9th, 1953 at the San Marino Street residence, and thereafter had such relations a number of times, including on March 29th, 1953." After averring that defendant husband failed to have his cross-complaint for annulment dismissed and entered her default thereto, plaintiff avers that, "On March 30, 1953, affiant's attorney * * * without the knowledge of affiant, entered into a stipulation that the cross-complaint could be heard as a default; that if affiant had known or understood that a default against her would have been taken she would not have permitted her counsel to dismiss her complaint, nor permitted him to stipulate that the cross-complaint could be heard as a default, since affiant has at all times mentioned herein had a good and meritorious cause of action for separate maintenance or divorce against husband for his extreme cruelty as hereinbefore alleged, and a good and meritorious defense to husband's cross-complaint; that further, since affiant was at this time, the month of March, 1953, pregnant and bearing the child of her husband she would have refused under any circumstances to deprive the child of the parties, while unborn, of its rights, and condemn it to the stigma of bastard; and that affiant at all times believed husband would dismiss his part of this action as he had agreed and promised to do."

It is then averred that plaintiff first learned of the decree annuling her marriage when defendant husband visited her at Tiajuana, Mexico, on April 25, 1953, and after spending the night together and having sexual intercourse, her husband, on the following morning informed her of the annulment decree. That at said time, "The conduct of husband placed affiant in such a condition of confusion, hysteria, emotional upheaval, and fear of deportation that affiant has been unable to secure counsel and advice until this time". Plaintiff then avers that she first entered the United States from Argentina in December, 1951, that she is a native of Argentina, that she "was completely ignorant of any of the procedural and substantive laws of California; that affiant at all times mentioned herein did not speak or understand the English language; that affiant at all times mentioned herein did not have education or training sufficient to enable her to comprehend that a decree of annulment could be entered against her; and that affiant understood that if she stopped her part of the lawsuit the entire lawsuit would also stop."

Defendant's Counter-Affidavit.

After setting forth the filing of his original annulment action on September 16, 1952, and the successive separations and reconciliations of the parties, defendant avers "That during all of said time and from the beginning of the marriage of the parties, plaintiff on many occasions told your affiant that the only reason she married him was to preserve her status in the United States as a desirable alien and to have affiant assist her in furnishing transportation and support for a minor child of plaintiff's then and now residing in Argentina."

Referring to plaintiff wife's averments of reconciliation between them defendant husband avers that he refused such offers. He further stated, that "on a number of occasions plaintiff stated to your affiant that she was well aware of the nature of the annulment action filed by your affiant on or about March 5, 1953, and on several occasions plaintiff told your affiant she was returning to Argentina to rejoin her family."

With reference to the occasion when plaintiff claims she first learned of the decree of annulment defendant avers that following the entry of such decree, "he visited plaintiff on or about April 25, 1953, for the purpose of informing her that the annulment had been granted; that when he so informed plaintiff, she implored him to remain with her that night as a parting remembrance of their relation; that plaintiff stated to your affiant at said time that she was satisfied any further reconciliation would be impossible and she would return to her home in Argentina; that affiant acceded to plaintiff's entreaties and spent the night with her at the Mission Santa Isobel Hotel in Ensenada, Mexico.

"That at said time plaintiff was not confused, hysterical or emotionally upset, but had completely resigned herself to the fact that she would return to her home in Argentina, or possibly to Peru; that affiant stated to plaintiff his desire to part from her as a friend, and in the event she needed any financial assistance upon the birth of a child, he would be helpful to the extent his finances would permit."

Defendant's attorney in his affidavit admits that plaintiff herein visited him in his office about January 2, 1953, but that he advised her he was representing her husband and that she should seek independent legal counsel; that at no time did he state to defendant, "that there could be no annulment of her marriage if she was with child". Defendant's attorney then avers that subsequently he had conversations with plaintiff's attorney who advised him that plaintiff, "had approved a request for entry of dismissal of her complaint, and that he had filed the same". That subsequently thereto, the formal stipulation above set forth was prepared, signed and filed.

[1] We are not unmindful of the doctrine that the granting of relief under Section 473 of the Code of Civil Procedure is primarily committed to the discretion of the trial court, but such decision must be founded upon a sound discretion, predicated upon a fair consideration of the evidence in its entirety and the reasonable and logical inferences to be drawn therefrom. And, in all cases, it must be founded upon the principles of justice and fair dealing.

[2] As we said in Elms v. Elms, 72 Cal. App.2d 508, 519, 164 P.2d 936, 942: "It is not a mental discretion but an impartial discretion guided by fixed legal principles 'to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' Brill v. Fox, 211 Cal. 739, 743, 297 P. 25, 26; Bailey v. Taaffe, 29 Cal. 422, 424. The burden of proving excusable neglect is upon the defendant who must establish his thesis by a preponderance of the evidence. Bruskey v. Bruskey, 4 Cal.App.2d 472, 479, 41 P.2d 203. If from a scrutiny of all of the evidence in a proceeding under section 473 to vacate a judgment of annulment it is clear that the court abused its discretion in holding that there was excusable neglect on the part of the defendant, the order must be reversed. Essig v. Seaman, 89 Cal.App. 295, 264 P. 552."

This is an annulment proceeding and the principles which are applicable when a motion is made under Section 473 of the Code of Civil Procedure to set aside a default judgment severing the marital status are concisely stated in Garcia v. Garcia, 105 Cal.App.2d 289, 290, 233 P.2d 23, 24, as follows: "'As said in Rehfuss v. Rehfuss, 169 Cal. 86, 92, 145 P. 1020, 1022: "The rules of practice applicable to divorce actions differ in many respects from those which govern other actions. In an action for divorce, upon very slight showing the court will set aside a default, if application for relief be made in due time. * * * The law is at all times very solicitous to preserve the integrity of the marriage relation. That relation is the basis of the family, the foundation of society. * * * An action for divorce concerns not only the parties immediately interested, but also the state. * * * It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together." In Hambrick v. Hambrick, 77 Cal.App.2d 372, 377, 175 P.2d 269, 271, the court said: "As has been said repeatedly: '* * * An appellate court, owing to the remedial character of the statute and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief * * *.' 14 Cal.Jur. 1076; see, also, Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, supra, and cases cited; Brill v. Fox, 211 Cal. 739, 743–744, 297 P. 25. Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application. 14 Cal.Jur. p. 1076."' See, also, McBlain v. McBlain, 77 Cal. 507, 509, 20 P. 61; Wadsworth v. Wadsworth, 81 Cal. 182, 183, 22 P. 648 [15 Am.St.Rep. 38]; Landon v. Landon, 74 Cal.App.2d 954, 958, 169 P.2d 980." See also Gregory v. Gregory, 92 Cal.App. 2d 343, 345, 206 P.2d 1122.

[3] It has been held that a default judgment by which a marriage is dissolved, property rights lost, character assailed and children of tender years taken from a parent is a harsh judgment, and should, upon proper application, be vacated. That failure to do so constitutes an abuse of discretion, Mulkey v. Mulkey, 100 Cal. 91, 34 P. 621; Rehfuss v. Rehfuss, supra, 169 Cal. at pages 89, 90, 91, 145 P. at pages 1021, 1022; Landon v. Landon, 74 Cal. App.2d 954, 958, 169 P.2d 980. If, under the circumstances just alluded to, the judgment is a harsh one, surely a judgment which, as in the instant case, affects for all practical purposes, the legitimacy of a child, must be characterized as harsh, and brings the present action within the sound public policy which favors the determination of actions on their merits.

It is true, as respondent urges, that Section 84 of the Civil Code legitimatizes children conceived or born before the judgment but in the instant case the judgment of annulment makes no mention of the child here in question, and so far as the record before us discloses, defendant father, upon information and belief, denies paternity of the child. We also search the annulment decree in vain for any support provision or order of custody as provided for in Section 84 of the Civil Code.

It is true, as stated by respondent, that there was a stipulation for the entry of plaintiff's default and that defendant's cross-complaint might be heard as a default matter, but when consideration is given to the circumstances and plight of plaintiff there is much to be said in favor of her contention that it was her understanding and belief that at the time of the last reconciliation of the parties, it was agreed that all actions between them were to be dismissed.

[4] We are persuaded that under the circumstances surrounding this case any doubt as to whether the judgment of annulment should be set aside should be resolved in favor of the applicant for remedial relief. Having in mind the foregoing legal principles and the circumstances presented by the record herein, we are impressed that it was an abuse of discretion to deny the relief sought by plaintiff.

The order appealed from is reversed and the cause remanded with directions to the court below to vacate and set aside the judgment and to allow plaintiff to file an answer to defendant's cross-complaint, if she be so advised, within a reasonable time.

DORAN and DRAPEAU, JJ., concur.

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126 Cal.App.2d 122

LEVINSON
v.
BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.
Civ. 20129.

District Court of Appeal, Second District, Division 1, California.

June 21, 1954.

Suit in equity to have judgment vacated and declared void on ground of extrinsic fraud. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment of dismissal. Plaintiff appealed. The District Court of Appeal, Mosk, J. pro tem., held that where plaintiff was properly notified of prior action filed answer and denial, and was heard in open court, any fraud perpetrated by defendant was intrinsic and not sufficient to support equity action attacking judgment after time for appeal had expired.

Judgment affirmed.

1. Judgment 🔑443(1)

Final judgment of court having jurisdiction over persons and subject matter can be attacked collaterally in equity after the time for appeal or other direct attack has expired only if extrinsic fraud is alleged.

2. Judgment 🔑460(4)

Where time for appeal from judgment had expired, complaint, in collateral attack in equity action, to allege extrinsic fraud, must allege representation or concealment by defendant which prevented plaintiff from having his day in court.

3. Judgment 🔑443(1)

Where party had been given proper notice of action, had not been prevented from full participation therein, and had opportunity to present his case to court and protect himself from any fraud attempted by adversary, any fraud perpetrated was intrinsic, and not sufficient to support collateral attack on judgment after time for appeal had elapsed. Code Civ.Proc. § 581, subd. 3.

4. Judgment 🔑443(1)

Where debtor signed note payable to bank upon bank's promise to pay proceeds to third person, no fiduciary relationship was thereby created, and debtor was not justified in relying upon statements of agents and employees of bank that proceeds were actually paid to third person, and statements did not constitute extrinsic fraud as would support collateral attack on judgment on note after time for appeal had elapsed.

Jesse A. Levinson, in propria persona.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, Robert Van Buskirk, Los Angeles, for respondent.

MOSK, Justice pro tem.

On May 25, 1948, respondent bank obtained a judgment in the Municipal Court of the City of Los Angeles against appellant on a promissory note. A motion for new trial was denied on September 7, 1948, no appeal was taken, and the judgment became final.

Thereafter, on September 24, 1948, appellant filed in the Superior Court a new suit in equity praying that the Municipal Court judgment be vacated and declared void, that respondent be enjoined from enforcing the judgment, and that the promissory note be delivered to appellant and cancelled.

The complaint alleged that the note was executed by appellant and delivered for the express purpose of securing a loan from respondent bank, "and said Bank to pay over the proceeds of said loan to the Capital Company (a California corporation)"; that the bank accepted the note but at no time paid the proceeds to the Capital Company; that no consideration of any kind passed from respondent to appellant; that during the course of proceedings in the Municipal Court appellant "was led to believe" from conversations with agents and employees of respondent bank that the proceeds of the note had been paid to the Capital Company; that "immediately after the trial of the action in the Municipal Court" appellant discovered the statements made by respondent through its agents and employees were false; that the representations were known to be false by respondent's agents and employees and were made for the purpose of misleading and deceiving appellant, in order that appellant would not introduce evidence at the trial to the effect that the proceeds of the loan were not paid over to the Capital Company; that subsequent correspondence (quoted in *haec verba*) was not answered satisfactorily to appellant; that appellant has a good and sufficient defense to the Municipal Court action.

To this complaint the respondent demurred. On October 29, 1948, the demurrer was sustained and appellant was given fifteen days in which to amend. Notice of the ruling was waived in open court. Appellant did not amend during that period or at all.

The record discloses nothing further transpired until June 24, 1953, when motions of both appellant and respondent for dismissal came on for hearing. The court granted the motion of respondent pursuant to Code Civ.Proc. § 581(3), whereupon appellant withdrew his motion. Judgment was thereupon given to respondent, from which this appeal was taken.

Appellant maintains he has stated a proper cause of action based on extrinsic fraud, and that his complaint should have prevailed against the demurrer.

We are limited on this appeal to an examination of the complaint to ascertain if it states a cause of action, not to whether appellant might have been able to do so. Lynch v. Rheinschild, 86 Cal.App.2d 672, 673, 195 P.2d 448.

[1, 2] The final judgment of a court having jurisdiction over persons and subject matter can be attacked collaterally in equity after the time for appeal or other direct attack has expired only if extrinsic fraud is alleged. Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105. To constitute extrinsic fraud there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court. Gale v. Witt, 31 Cal.2d 362, 366, 188 P.2d 755; Smith v. Smith, 125 Cal.App.2d 154, 270 P.2d 613.

Duffy v. Duffy, 82 Cal.App.2d 203, 186 P.2d 61, Bacon v. Bacon, 150 Cal. 477, 89 P. 317, Ringwalt v. Bank of America etc. Ass'n, 3 Cal.2d 680, 45 P.2d 967, and other cases cite with approval the illustrations in this quotation from United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93: "But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to the suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

Where a party has been given proper notice of an action, has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary, fraud perpetrated under such circumstances is intrinsic. This applies even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had the opportunity to protect his interests, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Westphal v. Westphal, supra.

It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case. Jorgensen v. Jorgensen, 32 Cal.2d 13, 19, 193 P.2d 728.

[3] Applying the foregoing rules of law, it is apparent that if any fraud was practiced upon appellant herein it was not extrinsic in nature. He was properly notified of proceedings, he filed his verified answer and denial, the matter was heard in open court, he filed a motion for new trial, after argument in open court the motion for new trial was denied. The record before us further discloses that his motion for new trial was based upon the ground, among others, of newly discovered evidence. That it was undoubtedly the same evidence which he desires to present in this suit is indicated by the complaint herein alleging discovery of the purported falsity of representations "immediately after the trial of the action".

Appellant maintains that he had a good defense to the prior action, meaning failure of consideration, and cites Oakland Medical Bldg. Corp. v. Aureguy, 41 Cal.2d 521, 261 P.2d 249 as authority. The facts here, however, indicate he did raise that defense.

In his verified Municipal Court answer, appellant pleaded as a separate affirmative defense failure of consideration for the execution of the note. Thus there was placed before the court in that proceeding the very issue which appellant desires to litigate in the instant case. That he failed to present evidence on that subject and therefore an adverse decision resulted does not justify a second lawsuit on the same issue. He has had the day in court to which he is entitled.

[4] Appellant further contends there was a fiduciary relationship between him and respondent by virtue of a promise to pay the note proceeds to the Capital Company. The complaint alleges the purpose of the loan was for the bank to pay the proceeds to Capital, but it specifies no promise, either oral or written, made by the bank to do so. Nor are any facts alleged from which an agency or fiduciary obligation can be established. All that is revealed here is a simple debtor-creditor relationship.

Under those circumstances, appellant was not justified in relying upon statements of unnamed agents and employees of respondent with whom he was not only dealing at arm's length, but who were then his adversaries in litigation. Jorgensen v. Jorgensen, supra. He had several procedural means of ascertaining the facts in the Municipal Court action, and in view of his defense of failure of consideration, he had an affirmative duty to avail himself of them.

Although not material to our determination of this appeal, we find there is no merit to appellant's contention that he was prevented from expeditiously proceeding with this appeal because of respondent's procrastination from 1948 when the demurrer was sustained to 1953 when respondent finally moved the court for dismissal under Code Civ.Proc. § 581(3). Provisions of that section are not exclusive. Richards v. Bradley, 129 Cal. 670, 62 P. 316. Appellant, even though plaintiff in the action, could have properly noticed a motion and sought court dismissal at any time after expiration of the period allotted for amendment of his complaint.

Examination of the pleadings and the record herein makes it clear that appellant's complaint failed to state a cause of action and the demurrer to it was properly sustained. We therefore cannot disturb the subsequent granting of the motion to dismiss and the judgment of dismissal after failure to take advantage of an opportunity to amend.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

JENSEN et al. v. MINARD.*

Civ. 8385.

District Court of Appeal, Third District, California.

June 22, 1954.

Hearing Granted Aug. 19, 1954.

Action for death of child who was struck by bullet from defendant's rifle. The Superior Court, Stanislaus County, Sherrill Halbert, J., entered judgment upon verdict for defendant, and plaintiffs appealed therefrom, and from order denying motion for new trial. The District Court of Appeal, Schottky, J., held that evidence sustained jury's implied part finding that defendant was not negligent in aiming his shot at a bird in his strawberry patch, or in failing to foresee the remote possibility that the bullet might ricochet, but, on the contrary, that defendant exercised the high degree of care which was required under the circumstances.

Judgment affirmed; appeal from order denying motion for new trial dismissed.

1. Appeal and Error 🔑930(1)

Where appellant attacks verdict as unsupported by evidence, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible.

2. Appeal and Error 🔑989

When a verdict is attacked as being unsupported by evidence, power of reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

3. Appeal and Error 🔑996

Where two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of jury or trial court.

4. Negligence 🔑136(8, 9)

It is only where facts are undisputed, and no inference but that of negligence can be drawn from them, that a court can determine that negligence is shown as matter of law.

5. Weapons 🔑18(1)

A firearm is a dangerous instrumentality, and hence the standard of care required of one handling firearms is very high, but test of liability is power of a prudent person to foresee injury, which is a question dependent upon the particular circumstances of the case.

6. Weapons 🔑18(2)

In action for death of child who was struck by a bullet from defendant's rifle, evidence sustained jury's implied finding that defendant was not negligent in aiming his shot at a bird in his strawberry patch, or in failing to foresee the remote possibility that the bullet might ricochet but, on the contrary, that defendant exercised the high degree of care which was required under the circumstances.

7. Weapons 🔑18(2)

In action for death of child who was struck by bullet from defendant's rifle, court did not err, after correctly advising the jury that defendant was required to exercise that high degree of care commensurate with and in proportion with the danger involved in handling firearm, in refusing to instruct further that defendant was required to show that he was absolutely without fault.

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* Vacated 282 P.2d 7.

8. Trial ⚷243

Weapons ⚷18(2)

In action for death of child who was struck by bullet from defendant's rifle, court properly explained to jury the legal import and meaning of the relative terms "negligence" and "ordinary care", and instructions correctly defining such terms were not in conflict with instructions given as to high degree of care required when one discharges a dangerous weapon.

9. Appeal and Error ⚷882(12)

Appellants could not complain of instructions which they themselves offered.

10. Trial ⚷295(1)

Instructions to jury must be read and considered as a whole.

11. Trial ⚷251(1)

A court is not required to give all of the instructions offered by a party, but is only required to instruct jury as to all phases of law applicable to issues in case.

12. Appeal and Error ⚷110

Order denying motion for new trial was nonappealable. Code Civ.Proc. § 963.

Vernon F. Gant, Modesto, for appellants.

David F. Bush of Bush, Ackley & Milich, Oakdale, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment entered upon a defense verdict returned by a jury in an action for wrongful death brought by the parents and minor sister of twelve-year-old Bonnie Jensen who was struck by a bullet from respondent's rifle on the afternoon of May 21, 1951. Appellants have also appealed from the order denying their motion for a new trial.

[1–3] Appellants' first contention is that the evidence is insufficient to justify the verdict and that it is against law. Before proceeding to discuss this contention we shall quote the well settled rule so aptly expressed in Juchert v. California Water Service Co., 16 Cal.2d 500, at page 503, 106 P.2d 886, at page 888, as follows:

> "As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. (Citing cases.)"

Bearing this familiar rule in mind, we shall summarize briefly the factual situation as shown by the record.

Defendant Minard owned and operated a dairy farm near Oakdale, California, at the intersection of the Sierra Road, running east and west, and the Wren Road, which runs south from the Sierra Road to the Jensen home. His house faced the Wren Road. Some 60 feet to the northeast from the concrete porch of the Minard home, and between it and the Wren Road, was a small strawberry bed. Defendant testified that the soil in this bed was a "fairly heavy, sandy loam" and that "there might have been a little pebble here and there, but not many." Behind the strawberry bed was a panel fence, and angling behind this fence towards the southeast was an irrigation canal with banks approximately five feet high. There was a bridge where this canal crossed the Wren Road, considerably south and east of the strawberry bed.

On the afternoon of May 21, 1951, according to defendant's testimony, he and a friend named Kreitzer were sitting on the front porch of the Minard house. Defendant had a .22 rifle with him, and on two occasions he had stood up and fired into the strawberry bed at birds which lit there to feed on the ripe berries, using Peters .22 short high velocity cartridges.

About 4:10 p. m. the two Jensen girls, Bonnie and Carolyn, got off the school bus at the intersection of the Sierra and Wren Roads, and started down the Wren Road towards their home. Defendant saw them get off the bus and watched them walk down the road to the bridge over the canal and then on southward along the road until they were lost from his view. Some little time afterwards a small bird flew into the strawberry bed and lit there. Defendant stood up and fired at the bird on the ground in the strawberry bed. Before he did this, he looked up and down Wren Road "to see if the children were there," and also into the field beyond. The Jensen girls were in fact clear out of his sight down the road *south* of the bridge over the canal. His line of fire was considerably *north* of the bridge. Bonnie, who with her younger sister was walking along the road, was struck in the side of the head with the bullet. The spot where she was hit was about 200 yards from the point where defendant was standing when he fired at the bird in the strawberry bed and about 180 feet to the south of his line of fire.

After he shot, defendant went back to his chair and sat down. Then he heard a scream. He started running towards the sound. He testified that the possibility that he might have hit one of the little girls never even entered his mind. He thought his Guernsey bull had got loose and had molested or scared the little girls. He found Bonnie lying on her side badly hurt. He and Kreitzer rushed her to Oakdale, where she died that evening.

Dr. J. K. Ransom, County Coroner, testified that he performed an autopsy and found a bullet just under the skin in front of the ear which had pierced both sides of the skull and come to rest just under the skin. The path of the bullet was *downward and forward.*

George W. Lacy, a forensic chemist, employed by the Los Angeles County Sheriff's Department as Director of the Crime Laboratory, was called as a witness by plaintiffs and testified that he examined the bullet; that it was not mutilated to any extent and had no foreign substance on it other than human blood and flesh. He expressed the opinion that the bullet had not ricocheted. He further testified that a bullet of the type involved fired from a .22 calibre high velocity cartridge would drop 28 inches in 200 yards. However, the witness Lacy stated, when cross-examined, that he made "principally a microscopic examination of the bullet," and that he made no actual tests with the rifle at all.

Dr. Paul L. Kirk, Professor of Biochemistry and Criminalistics at the University of California, called as an expert witness by defendant, after making various tests, including firing the rifle some 20 times with similar ammunition to observe the effect of ricochets from the earth on the bullets, and then comparing them with the fatal bullet, "concluded that the markings were so similar that the fatal bullet very definitely could have ricocheted from the soil." He admitted that he could not state positively that the bullet did ricochet but believed it did since the markings and effects were such as he got from a ricochet bullet. He was of the further opinion that the contact of the bullet with the soil in the strawberry bed could have deflected its course sharply to the right and with sufficient force to carry it to the spot where it struck Bonnie Jensen. However, he admitted that this was merely possible and not probable and that the chances of such an unexpected occurrence were one in ten million.

Appellants contend with great earnestness that it must be held as a matter of law that the evidence is insufficient to support the implied finding of the jury that respondent was not negligent. They cite the following annotation from 53 A.L.R. at page 1205:

> "One who has in his possession, or under his control, an instrumentality exceptionally dangerous in character, is bound to take exceptional precautions to prevent an injury being done thereby. A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business,

> which involve little or no risk of injury to person or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. The test of liability is the power of a prudent person to foresee injury; and this question, of course, depends on the particular circumstances of the case, including the nature of the instrumentality, the time, the place and the status of the person injured."

Appellants also rely heavily upon Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L.R.A.,N.S., 134. In that case it appeared from plaintiff's testimony that on October 10, 1905, he, in company with the defendant and one Lima, went out along the Big River in Mendocino County to hunt deer. On the north bank of the river they parted company. Byrnes and Lima remained on the north side. The plaintiff, Rudd, crossed the stream, taking a dog with him. The dog started along a ridge and down through the brush into a flat across the river from Byrnes. Rudd thought the dog was after a deer, and ran in after. When he came out on the flat opposite Byrnes he heard a shot and was struck by a bullet. There was no question of the fact that Byrnes fired this shot. His own testimony was that he saw an object moving in the brush, and fired at it, thinking it to be a deer. It was testified that the three hunters had agreed that they were, respectively, to station themselves at three crossings, Byrnes' station being about 200 yards above and Rudd's about the same distance below that of Lima. When Byrnes fired he was at the point at which, under the agreement, he should have been. Rudd, instead of going down the river, as agreed, went up, and was opposite Byrnes' station when shot. The trial court instructed the jury that plaintiff was entitled to a verdict and that the only question for the jury was the amount of damages. The court refused to submit the issue of contributory negligence to the jury. Upon appeal after a judgment in favor of plaintiff, the Supreme Court held that the trial court erred in not submitting the issue of contributory negligence to the jury. In the course of its opinion the court said at page 640 of 156 Cal., at page 959 of 105 P.:

> "* * * That the defendant's conduct was negligent may well be conceded. 'As firearms are extra ordinarily dangerous, a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to strict accountability for a want of such care.' 12 Am. & Eng.Ency. of Law (2d Ed.) [p.] 518; Bahel v. Manning, 112 Mich. 24, 70 N.W. 327, 36 L.R.A. 523, 67 Am. St.Rep. 381; Judd v. Ballard, 66 Vt. 668, 30 A. 96; Moebus v. Becker, 46 N.J.L. 41; Morgan v. Cox, 22 Mo. 373, 66 Am.Dec. 623. One who causes injury to another by discharging a firearm must, in order to excuse himself from liability, show that he was absolutely without fault. 12 Am. & Eng.Ency. of Law (2d Ed.) [p.] 519; Bahel v. Manning [112 Mich. 24 (70 N.W. 327, 36 L.R.A. 523, 67 Am.St. Rep. 381)]; Morgan v. Cox [22 Mo. 373 (66 Am.Dec. 623)]; Tally v. Ayers, 3 Sneed (Tenn.) 677; Wright v. Clark, 50 Vt. 130, 28 Am.Rep. 496. While the question of negligence is ordinarily one to be determined by the jury, yet where the facts are undisputed, and no inference but that of negligence can be drawn from them, the court may determine that negligence is shown as matter of law. Studer v. Southern Pacific Co., 121 Cal. 400, 53 P. 942, 66 Am.St.Rep. 39; Nagle v. California South R. Co., 88 Cal. 86, 25 P. 1106. It is plain, from defendant's own story, that he did not, in this instance, exercise the care required of one handling firearms. He saw an object moving in the underbrush, and fired at it without taking time to discover whether it was a deer, as he supposed it to be, or a human being. There can be no room for doubt that, in so doing, he acted without that

> regard for the safety of others which is to be expected of one handling dangerous implements or substances."

[4] We do not believe that Rudd v. Byrnes or any of the other authorities cited by appellants establishes a standard which would impose liability upon appellant in the instant case as a matter of law. The facts in the Rudd case are clearly distinguishable. There the defendant fired at an object moving in the brush without first determining whether or not it was an animal or another hunter. He intended his bullet to go where he aimed. There was no unexpected ricocheting of the bullet as is claimed in the instant case. Furthermore, as stated by the court on page 640 of 156 Cal., on page 959 of 105 P., it is only "where the facts are undisputed, and no inference but that of negligence can be drawn from them" that a court can determine that negligence is shown as a matter of law.

[5] While it is, of course, true that the standard of care required of one handling firearms is and should be very high because a firearm is a dangerous instrumentality, yet the test of liability as stated in the quotation by appellants from 53 A.L.R. supra, "is the power of a prudent person to foresee injury; and this question, of course, depends on the particular circumstances of the case."

[6] We believe that it was for the jury to resolve the conflicts in the experts' testimony and to determine from all the evidence and the inferences to be drawn therefrom how and in what manner this unfortunate accident happened. We cannot hold as a matter of law that the evidence was insufficient to warrant the jury in finding that the respondent aimed his shot at the strawberry patch and that he was not negligent in so doing or in failing to foresee that there was one possibility in ten million that the bullet might ricochet. Respondent was not chargeable, as a matter of law, with knowledge that such a highly unlikely result could possibly ensue. Cleghorn v. Thompson, 62 Kan. 727, 64 P. 605, 54 L.R.A. 402. We cannot hold that the evidence is wholly insufficient to support the jury's implied finding that respondent exercised that high degree of care which was required under the circumstances.

Appellants have made an able and earnest argument, but in view of the conflict in the evidence, and in the inferences which may reasonably be drawn therefrom, we cannot, as an appellate tribunal, substitute our deductions for those of the jury and the trial court. It was for the jury in the first instance to weigh the evidence, and it was for the trial court to grant appellants' motion for a new trial if the trial court considered the verdict against the weight of the evidence. The trial judge has the power to weigh the evidence upon a motion for a new trial and to grant a new trial notwithstanding a conflict in the evidence if he is convinced the verdict is clearly against the weight of the evidence (a power which an appellate court does not possess), and in the instant case appellants' motion for a new trial was denied.

[7] Appellants next contend that the court committed prejudicial error in refusing to give to the jury the following instruction offered by them:

> "One who causes injury to another by discharging a firearm must, in order to excuse himself from liability show that he was absolutely without fault."

The language of this instruction is taken verbatim from the opinion in Rudd v. Byrnes, supra. However, in the instant case the court at appellants' request did instruct the jury that

> "* * * firearms are extraordinarily dangerous and a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to strict accountability for a want of such care."

Also:

> "What ordinary care is in any particular case depends upon what the circumstances are. Here the defendant was firing a gun which is an extremely dangerous activity. Ordinary

> care while firing a gun demands that the person firing the gun must exercise extreme caution while so doing. If you find that the defendant did not use extreme caution, then you must find that he was negligent."

Thus, the jury was correctly advised that respondent was required to exercise that degree of care commensurate with and in proportion to the danger involved. There was no error in refusing to instruct that he must "show that he was absolutely without fault." If the jury had found that respondent failed to use "extraordinary care" and "extreme caution," under the instructions given, they were compelled to find that he had not excused himself from liability or shown that he was without fault, but, on the contrary, had violated the legal duty he owed to the deceased child and that, therefore, he must respond in damages for her wrongful death. Conversely, if the jury found, as they impliedly did, that respondent exercised the extraordinary care and extreme caution that a reasonable person would exercise under similar circumstances, it was not incumbent upon respondent to prove that he was "absolutely without fault" in order for him to exonerate himself. As pointed out by respondent, the case was tried and submitted to the jury on the issue of negligence and it cannot be held on this appeal that the respondent was absolutely liable for the highly improbable consequences of his act. The jury was instructed as to the high degree of care to which respondent was held and appellants were entitled to no more.

[8, 9] Appellants further complain that instructions defining ordinary care, negligence, and the burden of proof were contradictory, confusing, and misleading in view of the instructions given as to high degree of care required in the handling of firearms. Not only did the instructions given contain a correct statement of the law, but appellants themselves requested the instruction given which defined negligence in terms of ordinary care. Likewise at their request, the jury was charged as to what constituted ordinary care, and that if they found that "an ordinarily prudent person would not have shot the gun, or at least would not have shot in the direction and manner as did the defendant, where such prudent person was faced with the same situation and knew what the defendant knew, or reasonably should have known, then you must find the defendant guilty of negligence."

Since negligence and ordinary care are relative terms it was proper for the court to explain to the jury their legal import and meaning. There is no conflict between these instructions and the instructions given as to the high degree of care required when one discharges a dangerous weapon, and if there were such conflict appellants would hardly be in a position to complain of instructions which they themselves offered.

[10, 11] Instructions to juries must be read and considered as a whole, and a study of all the instructions in the instant case convinces us that the jury was not only fully and fairly instructed but that the instructions are singularly free from error. A court is not required to give all of the instructions offered by a party but is only required to instruct the jury as to all phases of the law applicable to the issues in the case.

[12] The judgment is affirmed, and the appeal from the order denying appellants' motion for a new trial is dismissed, said order being non-appealable. Code Civ. Proc. § 963.

VAN DYKE, P. J., and PEEK, J., concur.

126 Cal.App.2d 199

PEOPLE v. WATKINS.

Cr. 2962.

District Court of Appeal, First District,
Division 2, California.
June 23, 1954.

Defendant was convicted of (1) unlawfully and feloniously occupying premises with books, papers and paraphernalia for purpose of recording and registering bets on horse races and (2) of accepting bets on results of horse races. The Superior Court, City and County of San Francisco, Twain Michelsen, J., rendered judgment, and defendant appealed. The District Court of Appeal, Kaufman, J., held that the evidence sustained the convictions, but decided that reversal was required because of the People's concession that the fine imposed was excessive.

Reversed with directions.

1. Gaming 🔑75(1)

To sustain conviction under Penal Code subsection penalizing keeping or occupying of place with papers for purpose of recording a bet, person charged must have (1) kept or occupied the room, (2) containing specified paraphernalia, (3) for purpose of recording or registering bets. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑98(5)

It is not necessary to conviction for violation of Penal Code subsection penalizing keeping or occupying of place with paraphernalia to record or register bets that record of bet be shown to be in handwriting of person occupying premises, and whether or not it is proved to be in his handwriting merely goes to weight of evidence.

3. Gaming 🔑96

It is not necessary to sustain conviction for keeping and occupying place with papers and paraphernalia for purpose of recording and registering bets that it be proved that any bets were actually made. Pen.Code, § 337a, subd. 2.

4. Gaming 🔑75(1)

Telephone found on defendant's premises could be considered "paraphernalia" within Penal Code subsection penalizing keeping or occupying of place with papers and paraphernalia for purpose of recording a bet. Pen.Code, § 337a, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Paraphernalia".

5. Criminal Law 🔑13

The word "paraphernalia" is not a technical word in the law of crimes, although it may be in law of property, and its use in Penal Code subsection penalizing keeping or occupying place with papers and paraphernalia for purpose of recording and registering bets does not render statute unconstitutional for vagueness. Pen.Code, § 337a, subd. 2.

6. Gaming 🔑98(5)

Evidence was sufficient to support judgment of conviction for keeping and occupying a place with papers and paraphernalia for purpose of recording and registering bets. Pen.Code, § 337a, subd. 2.

7. Judgment 🔑751

An acquittal of alleged violation of one subdivision of statute penalizing pool selling, bookmaking, keeping or occupying place with papers and paraphernalia for purpose of recording and registering bets, etc., does not preclude use of facts relating to acts condemned by such subdivision in prosecution for violation of another subdivision. Pen.Code, § 337a, subds. 2, 4, 6.

8. Criminal Law 🔑511(2)

Corroboration may be slight, so long as it in some degree tends to implicate defendant.

9. Criminal Law 🔑511(7)

Defendant's failure to deny when questioned directly by inspector as to placing of bets with him by third person on specified date, could be interpreted as an admission, and would be some corroboration of third person's testimony that such bets had been placed with him by third person, where circumstances under which alleged admission was made were not such as would compel trial judge to consider it inadmissible.

10. Gaming 🔑98(3)

Conviction for accepting bets on results of horse races was sustained by evidence. Pen.Code, § 337a, subd. 6.

Andrew J. Eyman, San Francisco, Ralph Irby White, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William K. Coblentz, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal by defendant Howard Watkins from a judgment of conviction on two counts of an information after trial by the court sitting without a jury. Appellant pleaded not guilty to the three counts of the information. He was acquitted on Count 2 and found guilty on Counts 1 and 3.

An information filed by the District Attorney of the City and County of San Francisco charged Howard Watkins with the crime of a felony, violation of Sec. 337a, subdivisions 2, 4, and 6 of the Penal Code (bookmaking and pool-selling). Count 1 charged defendant with unlawfully and feloniously occuppying premises at 128 Balboa Street, with books, papers and paraphernalia for the purpose of recording and registering bets, wagers and for selling pools on horse races on or about September 17, 1953. Count 2 of which he was acquitted, charged that on or about September 17, 1952, defendant wilfully, unlawfully and feloniously recorded and registered bets and wagers on the results of horse races. Count 3, charged violation of subd. 6 of Sec. 337a, Penal Code, in that on or about September 17, 1952, defendant did wilfully, unlawfully and feloniously lay, make, offer and accept bets and wages on the results of horse races.

Appellant's motion for probation was denied and he was sentenced to six months in the County Jail and a fine of $2,000 was imposed, defendant to serve one day for each $5 of the fine remaining unpaid.

Two witnesses testified for the prosecution, Carl W. Anderson and Inspector Marion Overstreet of the San Francisco Police Department. It was stipulated that Overstreet was an expert on bookmaking. Defendant did not take the stand. There were no witnesses for the defense.

Inspector Overstreet testified that on September 17, 1952, he visited Carl's Signal Service Station of 1001 Franklin Street, where he met and spoke to Carl Anderson. There he found a scratch sheet and a small Signal Oil Company tablet (Peo. Exh. 2). The tablet, he said, was a bookmaker's account. Anderson told Overstreet that these were records of bets for that day, September 17, 1952. On cross-examination Overstreet testified that Anderson told him that the figures on page 2 of Exhibit No. 2 were written by appellant as the balances that were due on how he was to collect from the bettors. The bets on the third and fourth sheets were written by persons other than Anderson—by the bettors themselves, with the exception of the bets on the last three lines which were in Anderson's handwriting and were his own bets. The telephone number at Carl's service station was GRaystone 4–9886.

Carl Anderson, an auto mechanic, was on September 17, 1952, employed at Carl's Signal Service Station, Ellis and Franklin Streets in San Francisco. He testified that he met Inspector Overstreet on that day at the service station. Later that day, he went to 128 Balboa Street, San Francisco and Inspector Overstreet was there as well as Officer Lawler of the San Francisco Police and appellant. The witness had known appellant since 1949. He stated that he talked with appellant ten or eleven times a day over the telephone and that he talked with him on September 17, 1952. Plaintiff's Exhibit No. 2 which Anderson identified as a record of bets for September 17, 1952, showed sixteen bets for that day. He said he had phoned two of them to appellant, but hadn't had a chance to phone in the remainder.

Anderson was shown People's Exhibit No. 3, a piece of yellow paper with the lettered heading "Carl's Signal Service." Anderson said that on September 17, 1952, he first saw that paper at 128 Balboa Street. On the back of this paper were the words "Howard from Bill" in Anderson's handwriting. The witness said that this paper had been left at the service station with some money which was to be given to appellant. He said that "Howard" was appellant and "Bill" was a bettor who came to the gas station, leaving money for Howard with the witness.

Inspector Overstreet testified that he went to 128 Balboa Street on September 17, 1952. Later Carl Anderson arrived there. Overstreet brought Anderson into the dining room where appellant Watkins was seated. Appellant said that he knew the witness by the name of "Carl Anderson". Overstreet asked Anderson if he knew appellant, and he acknowledged that he knew him by the name of "Howard" but didn't know his last name. He asked Anderson if appellant was the man with whom he had been making bets on horse races, and he said that he was such person. He was asked if he had made bets with him that day. He admitted that he had done so by telephone. When Overstreet asked appellant if that was right, appellant remained mute.

In the drawer of a small table on which the telephone rested, in the dining room of appellant's home, Overstreet found a small piece of paper with "Carl's Signal Service" in printing at the top (Peo. Exh. No. 3) and a white piece of paper (Peo. Exh. No. 4) with the number GRaystone 4-9886 on it, as well as the name "Carl" written thereon. Overstreet had observed earlier that day that GR-4-9886 was the telephone number of Carl's Signal Service Station.

Exhibit No. 3 was the yellow "Howard from Bell" memo which Anderson said had previously been attached to a five dollar bill left at the station by one of the bettors for appellant. Overstreet said this paper contained the name "Reward", the amount 33 to the right of that name, and on the fifth line down "Carl—22—" and words "Lose two". In appellant's presence the inspector asked Anderson if the "22" represented bets made with appellant and Anderson replied in the affirmative. Appellant remained silent.

There was a telephone in appellant's home which had a switch about eight feet from the instrument. This switch placed in the wall, could not be distinguished from an ordinary light switch. When placed in an "off" position it rendered the telephone line dead. The switch was finally found to be connected to the light switch by a telephone company service man who had arrived with a special agent of the Pacific Telephone & Telegraph Company at Overstreet's request.

Shortly after the telephone switch was flipped to an on-position, the telephone rang. Overstreet answered it, and heard a woman's voice ask, "Is this Howard?" Overstreet said "No." She said "Where is he?" The inspector said that Howard had gone downtown. When she asked "Who is this?" he said, "This is Johnny." When he asked if he could help her she said, "Well, I had a couple of bets." He offered to take them and she said "Well, I don't know if it is all right—" He said "Well, if it wasn't all right, I wouldn't be here on the phone." Then she said "Well, this is Jan," and continued, "On Dixie Lad and Kay Laddie. Dixie Lad, I want one to win and one to show, and Kay Laddie, one to win and one to show, and Catchie Lass, one to win, and I want to hook up Kay Laddie and Catchie Lass on a combination of one to win." He repeated the bets to her, and that ended the conversation. The telephone was immediately disconnected.

Inspector Overstreet asked appellant if he had installed the switch but he did not answer, nor would he answer any other question which the inspector asked regarding bookmaking. The telephone equipment and switch were introduced in evidence as People's Exhibit No. 5.

Anderson was not arrested by Overstreet as the inspector was of the opinion that the witness was one of the bettors and not a bookmaker. He found no evidence that Anderson received any percentage from appellant. He stated that he had never arrested anyone in the position of the witness Anderson on evidence similar to that given by said witness in this case. He also stated that he had given Anderson no promise of immunity from arrest.

[1] Appellant contends that the evidence is insufficient to support the judgment that appellant violated Penal Code Sec. 337a(2). The corpus delicti of this crime are set forth in People v. Foreman,

112 Cal.App.2d 616, 246 P.2d 979, where it is stated that it is essential that the person so charged (1) keep or occupy the room, (2) that the room contain specified paraphernalia, (3) and that such occupancy and paraphernalia are for the purpose of recording or registering bets. It is conceded herein that the room in question was occupied by defendant and his wife at the time the alleged offense was committed. Therefore we do not have a situation such as existed in People v. Simon, 66 Cal.App.2d 860, 153 P.2d 420, which was reversed because although the evidence was sufficient to show the room was used for recording bets, it was insufficient to show that defendant so occupied it.

[2, 3] Appellant attacks People's Exhibits, 3, 4 and 5 as being insufficient evidence of violation of Sec. 337a(2), which requires occupancy of premises "with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets". Exhibit No. 3, the "Howard from Bill" memo found in appellant's dining room which the witness Anderson testified he had earlier left for appellant in the gas station with a five dollar bill from the bettor. When questioned by Inspector Overstreet about this exhibit as well as No. 4, the paper containing the telephone number of Carl's Signal Service, appellant refused to answer. Overstreet's expert testimony was to the effect that Exhibit No. 3 was the record of a bet. There is nothing in the statute which requires that the record of the bet must be shown to be in the handwriting of the person occupying the premises. Whether or not it is proved to be in his handwriting would go merely to the weight of the evidence. Exhibit No. 3 could certainly be considered by the trial court as a record of a bet found upon appellant's premises which he did not at the time deny or explain when he was questioned concerning it. At the trial he did not take the stand in his own behalf. The trial court was therefore entitled to consider it as the record of a bet placed with appellant although it may be noted that to support a conviction under Sec. 337a(2), it need not be proved that any bet was made. People v. Gompertz, 103 Cal.App.2d 153, 229 P.2d 105; People v. Smith, 113 Cal.App.2d 416, 248 P.2d 444. The accusatory statements here were of a type which were admissible and were not of any of the types of accusatory statements held inadmissible in People v. Simmons, 28 Cal.2d 699, 172 P.2d 18. Here all statements to the accused were made in the presence of Inspector Overstreet and the witness Anderson, both of whom testified at the trial and were subject to cross-examination. The circumstances were such that the trial court here could properly consider the failure of appellant to answer the questions of the inspector as to the exhibit found on appellant's premises.

[4, 5] Appellant maintains that the telephone found on appellant's premises cannot be considered paraphernalia. He ingeniously argues that since the California statute when first enacted was based on Sec. 351 of the Penal Code of the State of New York, see Ex parte Roberts, 157 Cal. 472, 108 P. 315, the construction given to the statute by the courts of that state is of great value and persuasive force in its interpretation. Appellant says that the New York statute contained the word "paraphernalia" for the first time in 1877, and that since it is a historical fact that the first commercial telephone switchboard was not installed until 1878, it could not have been intended by the New York Legislature that the word paraphernalia could be interpreted as embracing telephones. Such a rule is helpful, of course, where no construction has been placed on the meaning of a statute by the courts of this state. However, California does not have to wait for New York to first construe the meaning of a term in such statute before her courts may do so. Our courts have heretofore referred to telephones as paraphernalia within the context of Penal Code, Sec. 337a. See People v. Gompertz, 103 Cal.App.2d 153, 229 P.2d 105, People v. Smith, 35 Cal.App.2d 73, 94 P.2d 633; People v. Battaglia, 107 Cal.App.2d 476, 237 P.2d 70; People v. Kobey, 105 Cal.App.2d 548, 234 P.2d 251. And see, State v. Caruso, 3 Terry, 310 Del., 32 A.2d 771, 774.

Appellant contends further that the word "paraphernalia" renders the statute unconstitutional for vagueness. He cites definitions of the legal meaning of the word as a wife's personal property exclusive of her dower. It is quite fantastic to presume that the Legislature had this definition in mind in using the language "book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording * * * bets". Penal Code, Sec. 7, Paragraph 16, provides that words are to be construed according to their context and approved usage of the language, but technical words and phrases and those which have acquired a peculiar and appropriate meaning must be construed according to such peculiar or appropriate meaning. The word paraphernalia is not a technical word in the law of crimes, although it may be in the law of property. The word is a word in common usage. Roget's Thesaurus defines it as a noun, plural, meaning belongings, equipment, accessories. In construing this word in a statute concerned with bookmaking, the court in State v. Caruso, supra, pointed out that what is termed the law meaning of the word is not helpful, but that the definition in Funk and Wagnalls New Standard Dictionary, "miscellaneous articles, belongings" expresses the generally accepted meaning of the word.

The statute does not require that the accused possess every item enumerated in the statute to be guilty of the offense. The items are in the disjunctive. He could therefore be convicted with only a book, or a paper or an apparatus or a device or paraphernalia if the evidence showed that it was used by him in bookmaking. A telephone can certainly be included within the terms device or apparatus.

The telephone conversation received by Inspector Overstreet from the caller "Jan" is certainly convincing evidence that the premises were used by appellant for bookmaking. The caller asked for appellant by name and stated that she wanted to make a bet, even though she knew it was not Howard who answered and before she inquired as to the identity of the speaker. See, People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552; People v. Onofrio, 65 Cal. App.2d 584, 151 P.2d 158; People v. Reifenstuhl, 37 Cal.App.2d 402, 99 P.2d 564.

[6] We conclude that there was ample evidence to warrant the conviction of appellant on Count 1.

[7–10] Appellant was found not guilty on Count 2, recording and registering a bet. He contends that therefore he could not be guilty as an accomplice, accessory or principal to the recording of bets by the witness Anderson. It is true, however, that acquittal of a charge of violating one subdivision of Penal Code Sec. 337a does not preclude use of facts relating to acts condemned by such subdivision in a prosecution for violation of another subdivision. People v. Smith, supra. He was convicted of Count 3, that he did unlawfully and feloniously "lay, make, offer and accept" a bet or bets on or about September 17, 1952. Inspector Overstreet testified that he brought Anderson into the dining room and in appellant's presence asked Anderson if appellant was the man he had been making bets with. Anderson said "It is." Overstreet said "Did you make bets with him today?" He said, "I did". Overstreet asked him how, and Anderson said "Over the phone." Overstreet stated that he turned to appellant and said "Is that right?" and appellant remained mute. If this testimony was admissible it obviously supported a finding that appellant accepted a bet or bets on September 17, 1952. Appellant maintains, however, that Anderson is an accomplice, and that a conviction may not be had upon the uncorroborated testimony of such accomplice. If Anderson is considered an accomplice then, of course, there is insufficient evidence to convict appellant of having accepted a bet on September 17, 1952. We have only Anderson's word that the offense was even committed. Anderson said he made a telephone call transmitting the bets recorded in the service station to appellant. No one else testified that such a call was made. The records in the service station show that bets were recorded by Anderson and others. Exhibit No. 3 shows that Anderson and appellant knew each other; Exhibit No. 4 is subject to the inference that at some prior time Anderson had placed a bet with appellant, but these exhibits do not corroborate the fact that a violation of Sec. 337a(6) was committed on or about September 17, 1952.

It is true, as admitted by appellant, that the corpus delicti may be established by the testimony of an accomplice. People v. Mazzola, 99 Cal.App. 682, 279 P. 211; People v. Briley, 9 Cal.App.2d 84, 48 P.2d 734. Anderson's testimony is sufficient to establish that there was a violation of Sec. 337a(6) committed on September 17, 1952. There can be no question that Anderson was an accomplice subject to prosecution under Sec. 337a(6), the same charge of which appellant was convicted. The People argue that he was a mere conduit to the bookmaker. This in itself is an admission that he was some type of agent in bookmaking activities. The trial judge stated that it was a reasonable assumption that Anderson was engaged in bookmaking activities.

Corroboration, however, may be slight, as long as it in some degree tends to implicate the defendant. People v. Ames, 39 Cal. 403; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720. Appellant's failure to deny when questioned directly by the inspector as to the placing of bets with him by Anderson on September 17, can be interpreted as an admission, and is some corroboration. As noted, supra, the circumstances under which the alleged admission was made were not such as would compel the trial judge to consider it inadmissible. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18. Furthermore, we have the conduct of appellant in refusing to testify in his own defense. In People v. Arbaugh, 82 Cal.App.2d 971, 985, 187 P.2d 866, in considering the question of corroboration of an accomplice's testimony, it was noted that the jury might consider the fact that appellant made no attempt by his own testimony to contradict, explain or deny any of the circumstances established against him. There is sufficient evidence therefore to support the conviction under the third count.

It is conceded by the People that the case must be remanded so that a proper sentence may be imposed. Appellant was fined $2,000, and he cannot be fined more than $500 for conviction of a misdemeanor under Penal Code, Sec. 672. The maximum in this case therefore could not exceed $1,000.

In view of the foregoing the judgment must be reversed for the sole reason that the fine imposed is excessive.

Judgment reversed with directions to the trial court to reimpose sentence as provided for by law.

NOURSE, P. J., and DOOLING, J., concur.

43 Cal.2d 107

SCHWARTZ
v.
SLENDERELLA SYSTEMS OF CALIFORNIA, Inc.
L. A. 22972.

Supreme Court of California, in Bank.
June 25, 1954.
Rehearing Denied July 21, 1954.

Suit by operator of retail stores for sale of apparel for large-sized women under registered trade names to enjoin use of similar trade name in operation of reducing salons in the same area. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment adverse to plaintiff, and plaintiff appealed. The Supreme Court, Edmonds, J., held that the record supported finding that use of similar trade name was not likely to result in confusion as to source of plaintiff's products and defendant's services.

Judgment affirmed.

Carter, Schauer and Traynor, JJ., dissented.

Prior opinion 260 P.2d 256.

1. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

Under statute as amended in 1933, either an unfair or fraudulent business practice may constitute sufficient ground for injunctive relief against unfair competition in the use of a trade name. Civ.Code, § 3369.

2. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

In suit by operator of two stores for retail sale of apparel for large-sized women under registered trade names to enjoin use of similar trade name in operation of reducing salons by corporation affiliated with corporations doing business under same name in several states, finding that defendant's use of name was in good faith and without design or intent to capitalize upon plaintiff's prior use was supported by substantial evidence. Civ.Code, §§ 2466, 2468, 3369.

3. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

Unfair use of a trade name may be enjoined on ground of possibility of injury to reputation and good will of business of prior user from identification of it in minds of the public with source of second user's goods or services, even though such users are not in direct competition. Civ.Code, § 3369.

4. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

The senior appropriator may protect his trade name by injunction within the limits fixed by the likelihood of confusion of prospective purchasers. Civ.Code, § 3369.

5. Trade-Marks and Trade-Names and Unfair Competition ⚷73(1)

Whether use of a particular trade name is likely to result in confusion as to source of user's goods or services and hence entitle senior appropriator to injunctive relief is primarily a question of fact to be determined from all of the circumstances of the particular case. Civ.Code, § 3369.

6. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

In suit by operator of retail stores for sale of apparel for large-sized women under the trade name "Slenderella" to enjoin use of similar name in operation of reducing salons, evidence did not compel conclusion that quoted name had every characteristic of a novel, unique and fanciful name entitled to broad protection, in view of evidence as to prior registration and use of the same and similar names. Civ.Code, § 3369.

7. Trade-Marks and Trade-Names and Unfair Competition ⚷75

While factual instances of confusion may support a determination that confusion of the public is likely from the use of identical or similar trade names, they do not compel such conclusion as a matter of law. Civ.Code, § 3369.

8. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

In suit by operator of retail stores for sale of apparel for large-sized women under registered trade names of "Slenderella" and "Slenderella of Hollywood" to enjoin use of registered trade name "Slenderella Systems" in operation of reducing salons in the same area, record supported finding that use of similar trade name was not likely to result in confusion as to source of plaintiff's products and defendant's services. Civ. Code, § 3369.

◆

Samuel Maidman, Los Angeles, for appellant.

Newlin, Holley, Tackabury & Johnston and Hudson B. Cox, Los Angeles, for respondent.

EDMONDS, Justice.

Harry M. Schwartz sued Slenderella Systems of California, Inc., to enjoin the assertedly wrongful use of a trade name. His appeal from an adverse judgment presents for decision questions as to the sufficiency of the evidence and the findings to support the judgment.

Some of the facts were presented by stipulation. Counsel also agreed that the trial court should consider as evidence certain depositions, photographs, advertising matter, the stationery used by each of the parties, and an affidavit concerning a trademark search made by counsel for the defendant.

These facts are undisputed:

For several years, Schwartz has engaged in the retail sale of women's apparel under the trade names of "Slenderella" and "Slenderella of Hollywood." At the time this action was tried, he operated two stores in the Los Angeles area, catering primarily to larger-sized women, and specializing in large size and half-size garments. He began using the name "Slenderella of Hollywood" in 1939 when he opened his first store and filed with the clerk of Los Angeles County a certificate of doing business under that fictitious name. Civ.Code, §§ 2466, 2468. Schwartz opened his second "Slenderella" store in 1947.

The name "Slenderella" had been used previously in California by one J. P. Schwarze, who registered it in 1933 with the secretary of state for use in connection with the manufacture and sale of wheat flour. At about the same time, one Henry Semeria began using it for his business of selling women's apparel in stores located in San Francisco and Sacramento. Both of these prior uses were discontinued before Schwartz began his business.

In 1944 Schwartz registered with the secretary of state the names "Slenderella" and "Slenderella of Hollywood" for use in connection with the sale of women's apparel. Approximately 50 or 60 percent of the merchandise sold by him bears one of these names, either on the goods or their containers. By reason of his business experience, and through the care and high standards maintained by him, he has established a good reputation, and his merchandise has become known to the users and prospective purchasers of it under his trade names. He advertises his business under these names in local newspapers and by mailing cards and circulars to 17,500 customers. The total annual advertising cost is between $1,500 and $4,400.

Slenderella Systems is a California corporation affiliated with corporations doing business under the same name in New York, Maryland, the District of Columbia, Ohio, Illinois, and Michigan. The affiliated corporations are engaged in the business of operating slenderizing and weight reducing salons specializing in weight reduction, diet control and posture correction for women. The respondent maintains four salons in the Los Angeles area. It neither owns nor operates any women's dress or apparel shops, nor does it or its associates manufacture or sell any women's clothing or accessories.

Prior to December 1951, the affiliated corporations had operated under the trade name of "Silooete." In that year, one of the companies acquired by assignment the rights of Erika Schneider in a business using the name "Slenderella" as a trademark. Schneider had registered the name with the United States Patent Office in 1941 for use in connection with the manufacture and sale of sugarless candy for health purposes. Those foods were not sold in California before the respondent corporation was formed and began using them in connection with its reducing courses.

Before adopting the name "Slenderella Systems," the affiliates instituted a trademark search in each state into which it was contemplated that the business would extend. Several previous registrations of the name, both federal and state, were discovered as well as unregistered uses of it. The Schwartz registration was discovered at that time, but the health system's use of the name was in good faith and without intent to capitalize on the reputation Schwartz had built up. Since it began using the name, Slenderella Systems has advertised it in the metropolitan newspapers of Los Angeles, and by 1952, had expended in excess of $15,000 for that purpose. The respondent and its affiliated companies maintain uniformity in their general advertising throughout the several states in which they operate, their advertising being substantially the same as that used by them when they operated under the trade name "Silooete."

By reason of the similarity in names, Schwartz has received some misdirected mail and telephone calls intended for Slenderella Systems. Some of his customers have gone to the respondent's salons in the belief that Schwartz operated women's clothing stores at those locations. Other customers have stated to him or his employees that since he is in the weight reducing business they would rather first reduce their weight before purchasing large or half-size apparel from him.

Schwartz' complaint is on the theory of unfair competition. He alleged that if the respondent is permitted to carry on its business under the name "Slenderella," his customers and business associates will be misled and defrauded into believing that the two businesses are one. If he is denied an injunction, he alleged, his business will be damaged in its reputation, good will and in loss of profits.

The trial court made findings in accordance with the stated facts. It further found that the respondent's use of the trade name "Slenderella" in an unrelated and non-competitive business has not caused damage or injury to Schwartz and has not resulted in the deception or misleading of the public. Regarding the instances of confusion which had occurred, it found that "[s]uch confusion arises from the similarity of names and in the result principally of inattention and carelessness on the part of persons so confused." In its opinion, such confusion, "no doubt, has been or will be of short duration."

In attacking the judgment denying an injunction and the findings upon which it is based, Schwartz contends that the trial court has overly emphasized the defendant's good faith and the fact that the parties are engaged in non-competing businesses. On the other hand, he argues, it has given too little weight to the incidents of confusion established by the record and to the character of "Slenderella" as a fanciful and distinctive trade name.

[1] Before the amendment to section 3369 of the Civil Code in 1933, Stats.1933, p. 2482, in order to obtain injunctive relief against an asserted act of unfair competition in the use of a trade name, it was necessary to establish fraud on the part of the junior appropriator. See American Automobile Ass'n v. American Automobile Owners' Ass'n, 216 Cal. 125, 135–136, 13 P.2d 707, 82 A.L.R. 699. The statute now provides that unfair competition may include an unfair *or* fraudulent business practice, and either ground is sufficient to permit injunctive relief. McCord Co. v. Plotnick, 108 Cal.App.2d 392, 395, 239 P.2d 32; MacSweeney Enterprises v. Tarantino, 106 Cal.App.2d 504, 513–514, 235 P.2d 266; Wood v. Peffer, 55 Cal.App.2d 116, 124, 130 P.2d 220.

[2] Although Schwartz asserts that "there is an inherent lack of good faith when one appropriates the identical trade name of a well-established business," the finding of the trial court, that respondent's use of the name "was in good faith and without design or intent to capitalize upon the plaintiff's prior use of said name," is supported by substantial evidence. The record shows that, before selecting the name, the respondent instituted a nation-wide search in order to avoid use of a name that would infringe upon the rights of another person. The name was adopted after advice of counsel was obtained that no infringement would result. Furthermore, the relatively small size of Schwartz' business and the limited geographical area in which it is advertised and known, as compared with that of the respondent and its affiliates,

makes extremely unlikely the possibility that the purpose of the latter's use was to capitalize upon Schwartz' business reputation.

[3-5] Since the decision in Academy of Motion Pictures, etc. v. Benson, 15 Cal.2d 685, 104 P.2d 650, it is established, as the respondent concedes, that injunctive relief against the unfair use of a trade name may be obtained in situations other than where the parties are in direct competition. MacSweeney Enterprises v. Tarantino, supra, at 106 Cal.App.2d 513, 235 P.2d 266; Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 818, 187 P.2d 474; Winfield v. Charles, 77 Cal.App.2d 64, 70–71, 175 P.2d 69; see 40 Calif.L.Rev. 571; contra: Yellow Cab Co. of San Diego v. Sachs, 191 Cal. 238, 216 P. 33, 28 A.L.R. 105; Dunston v. Los Angeles Van etc. Co., 165 Cal. 89, 131 P. 115, and cases cited; Weatherford v. Eytchison, 90 Cal.App.2d 379, 202 P.2d 1040; Scutt v. Bassett, 86 Cal. App.2d 373, 376, 194 P.2d 781. The basis of relief in such circumstances is the possibility of injury to the reputation and good will of the business of the prior user from an identification of it in the minds of the public with the source of the second user's goods or services. The senior appropriator may protect, by injunction, his trade name "within the limits fixed by the likelihood of confusion of prospective purchasers." Restatement of Torts, § 730, comment b; MacSweeney Enterprises v. Tarantino, supra, at 106 Cal.App.2d 512–513, 235 P.2d 266; Winfield v. Charles, supra, at 77 Cal. App.2d 70–71, 175 P.2d 69. Although many factors may enter into a determination of whether the use of a specific trade name is likely to result in a confusion of source, the question is primarily one of fact to be determined from all of the circumstances of a particular case. MacSweeney Enterprises v. Tarantino, supra, 106 Cal.App.2d at page 513, 235 P.2d 266; Winfield v. Charles, supra, 77 Cal.App.2d at page 71, 175 P.2d 69; Pohl v. Anderson, 13 Cal.App. 2d 241, 242, 56 P.2d 992; see 63 C.J. Trade-Marks, Trade-Names and Unfair Competition, 414–418, § 112.

[6] Schwartz maintains that the name "Slenderella" has "every characteristic of a novel, unique and fanciful name, and certainly of the type which courts in many cases have stated will be broadly protected." He contends that to allow a junior appropriator of it to use the name will destroy its novelty and dilute its value. The evidence, however, does not compel that conclusion. The record shows that, in addition to the prior uses of it in California and the federal registration for the business now owned by the health system, there were several other state and federal registrations of the name, the earliest being made in 1925. Schwartz testified that he had heard the name used in "the trade circles" in women's wear before he decided to apply it to his own business.

The name consists of a defined word (slender) to which has been added a Latin diminutive denoting the feminine (ella). It is suggestive of the uses for which registrations have been obtained, notably health products, scientific aids to slenderizing, and wearing apparel for large-sized women. Other registrations include: slenderets, slenderoids, slendex, slendermaid, slendress, slender form, slim-u-line, slenderlines, thinderella, Cinderella, slenderize, slenderette, slimderella, slendorita, slimadonna, slenderlee, etc.

To hold that confusion of source as to his products and the respondent's services will be unlikely, Schwartz contends, is to ignore the factual instances of confusion shown by the evidence. He asserts that the trial court has negated the serious aspects of such confusion. Here the parties cater to the same class of the public, the argument continues, "and it is not difficult to perceive that both appellant and respondent are competing for the same purchasing dollar."

[7] Although factual instances of confusion may support a determination that confusion of the public is likely from the use of identical or similar trade names, they do not compel that conclusion as a matter of law. Palmer v. Gulf Publishing Co., D.C., 79 F.Supp. 731, 738; Lerner Stores Corp. v. Lerner, 9 Cir., 162 F.2d 160, 163; American Auto. Ins. Co. v. American Auto Club, 9 Cir., 184 F.2d 407, 410. To some degree, at least, the two businesses are inconsistent with one another, as indicated by the allegation of the complaint that "plain-

tiff and his business have been the subject of ridicule and derision by reason of the apparent inconsistency in having a business catering to the apparel needs of larger-sized women, while at the same time conducting a business specializing in the weight reduction of larger-sized women." Furthermore, as the trial judge stated in his memorandum opinion, much of the difficulty may be attributed to the newness of the defendant's business, and there has been no evidence of any member of the public purchasing the goods or services of either of the parties upon the basis of the reputation of the other.

[8] The situation of the parties is one from which differing conclusions reasonably may be drawn. Although a contrary determination might be supported by the evidence, the trial court has decided against the likelihood of confusion of source. When the entire record is considered, it fully supports that determination.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

No factual questions are here presented by reason of the stipulation of the parties and the findings of fact by the trial court. The stipulation was made on the assumption that all the facts were agreed to. There remained nothing for the trial court to do except apply the law to the facts, a process involving matters of law, not fact. That is the whole tenor of the reporter's transcript. For example, in discussing the stipulation defendant's counsel said: "[T]here was no great dispute between as to the facts involved in the case." This is particularly true as to the two questions discussed in the majority opinion, whether the public was confused and whether defendant acted in good faith.[1] This is further evinced by the trial court in its memorandum opinion. It may be noted that such opinion, although relied upon by the majority, was not made a part of the record in this case. A purported copy of it is attached to defendant's brief and answer to petition for hearing by this court. It appears therein that the court was not weighing evidence. Rather it misconceived the law. It thought competition was necessary (the majority concedes it is not). It said: "From the foregoing it will appear that the parties are not in competitive businesses, not even operating in the same field." Even if competition is a factor, there is competition here for both were appealing to the same segment of the public, stout women, and to cater to the wishes of that segment. Further, it is said: "It is not the use of the name that is condemned, it is the dishonesty practiced in the use of it." That is not the law as will later appear.

On the question of confusion it was stated at the trial by counsel that they offer "a stipulation as to the *facts*" (emphasis added) concerning that question. Those *facts* are: "[S]ince inception of the defendants' business in California under the trade name Slenderella, the following incidents have occurred:

"1. Employees in plaintiff's establishment have received numerous telephone calls intended for the defendant.

"2. That the said misdirected telephone calls have continued since the listing of the defendant's name in the Central Telephone Directory of Los Angeles.

"3. That many of the plaintiff's customers and prospective customers have inquired as to plaintiff's ownership or connection with defendant's establishments which require the taking of time in the explanation by the plaintiff and his employees to these inquiries.

"4. That certain of plaintiff's customers and prospective customers have gone to the defendant's locations in Hollywood and Beverly Hills believing that the plaintiff had operated women's clothing shops at the said locations.

"5. That customers and prospective customers have stated to plaintiff and his employees that since defendant is in the weight-reducing business, they would rather first reduce their weight before purchasing large or half-size apparel from the plaintiff.

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[1] The latter is not really a factor in the case as I will later point out.

"6. That the plaintiff and his employees have been asked on recurring occasions to quote prices for reducing treatments, necessitating taking of time to make explanations.

"7. That the plaintiff is considering opening a branch store in Beverly Hills upon the termination of his lease of the Hollywood store.

"8. That some mail, not including numbered street addresses, intended for the defendant's establishments, have been received by plaintiff; and, conversely, I don't think Mr. Cox would have any objection to saying there is a possibility, which we don't know of, that some of our mail may have been delivered to the defendant."

There is no escape from the proposition that those *facts* show that the public was confused and misled; that it thought plaintiff's and defendant's businesses were the same; that it thought a reducing product of or treatment by defendant had its source in plaintiff's business and plaintiff was responsible for it. There are no facts contradicting those stipulated facts. The trial court found (it had no choice in the matter or need not have found at all on the stipulated matters) similarly. It found: "That by reason of the similarity in names plaintiff has received some misdirected mail and telephone calls; certain of plaintiff's customers have gone to defendant's places of business in Hollywood and Beverly Hills in the belief that plaintiff operated women's clothing shops in said locations. That some customers and prospective customers of plaintiff's have stated to plaintiff and his employees that since he is in the weight reducing business they would rather first reduce their weight before purchasing large or half size apparel from plaintiff." Of course, insofar as this finding is not as comprehensive as the stipulation, the latter controls. The statement in the findings following the foregoing finding that "Such confusion arises from the similarity of names and is the result principally of inattention and carelessness on the part of persons so confused" is not only a conclusion of law rather than fact but is an incorrect conclusion of law. It is clear, therefore, from the stipulation of the parties that the public has been confused and misled and there is no basis whatsoever for concluding that it will not be confused in the future. That the public may be educated to the point where they will not be confused is no justification for refusing an injunction to prevent the confusion.

The law on the question of confusion clearly points to confusion in this case. As seen, the public now believes that defendant's activities are attributable to plaintiff. Any wrongful or questionable business practices of defendant will be blamed on plaintiff. These conclusions are not negatived by the suggestions in the majority opinion that the two businesses are inconsistent, that the public did not buy the product of one on the reputation of the other, and that the confusion was merely carelessness on the part of the public. Both businesses are catering to the same consuming public. The public, plaintiff's customers, did believe plaintiff was operating a reducing business and it was because of their knowing plaintiff's business and trade name that they had such belief. That is a reliance upon plaintiff's reputation.

The suggestion that the inconsistency of the two businesses is a factor is not only based upon facts contrary to the record but is also nothing more than another way of saying that there can be no actionable infringement of a trade-mark unless there is actual market competition. That is not the law. Although the law may have been to the contrary at one time it is now settled that actual market competition between the plaintiff and defendant either geographically or with respect to the character of the commodity or service sold, is not a necessary requisite to injunctive relief from use by another of one's trade name because the protection afforded is to the good will and reputation of plaintiff which can be damaged by a noncompetitor defendant using the same name. Academy of Motion Picture, etc. v. Benson, 15 Cal.2d 685, 104 P.2d 650; MacSweeney Enterprises v. Tarantino, 106 Cal.App.2d 504, 235 P.2d 266; Winfield v. Charles, 77 Cal.App.2d 64, 175 P.2d 69; Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 818, 187 P.2d 474; Wood v. Peffer, 55 Cal.App.2d 116, 123, 130 P.2d 220; California Prune etc. Ass'n v. H. R. Nicholson Co., 69 Cal.App.2d 207, 158 P.2d 764; Stork Restaurant v. Sahati, 9 Cir., 166 F.2d 348; Lady Esther, Ltd., v. Lady Esther Corset Shoppe, 317 Ill.App. 451, 46 N.E.2d 165, 148 A.L.R. 12; 40 Cal.L.Rev. 571; Derenberg, Trademark Protection, § 36; Nims, Unfair Competition and Trade-Marks (1947 ed.), §§ 275, 374; Callman, Unfair Competition and Trade-Marks (2d ed.), § 51. The broad statements and intimations to the contrary in Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 63 P. 480, 53 L.R.A. 384; Alhambra Transfer etc. Co. v. Muse, 41 Cal.App.2d 92, 106 P.2d 63; Yellow Cab Co. of San Diego v. Sachs, 191 Cal. 238, 216 P. 33, 28 A.L.R. 105; Dunston v. Los Angeles Van etc. Co., 165 Cal. 89, 131 P. 115; Scutt v. Bassett, 86 Cal.App.2d 373, 194 P.2d 781; and Weatherford v. Eytchison, 90 Cal.App.2d 379, 202 P.2d 1040, cannot be considered as correctly stating the law.

The general rules with respect to actionable confusion have been stated as follows:

"Where the public is deceived 'into believing that good will, or investment, of another, are enjoyed by or is a part of another's business, so that the ordinary public would be led to believe that, in dealing with such person, it was also dealing in some way with the other' we have an evident confusion of businesses. This, it will be seen, is a confusion with respect to source and origin alone, for, while the products of the litigants may actually differ in make, purpose and function, it is conceivable that the confusion will be such that the defendant's goods might be supposed to have come from the plaintiff, or that the business of the plaintiff might be supposed to have a connection with the business of the defendant, which sometimes is called 'confusion as to sponsorship.'"

"The effect of this type of confusion is that the defendant's goods are attributed to the plaintiff, the true owner of the infringed trade-mark; the latter is entitled to demand action to insure 'that its reputation shall be of its own making alone,' and that the quality of his product 'lies within his own control.' In such cases, the defendant, user of the infringing trademark, may not merely deprive the plaintiff of immediate trade but 'may indirectly do so by tarnishing his reputation, or it may prevent [the plaintiff] from extending his trade to the goods on which the infringer is using the mark.' The plaintiff's reputation may further be endangered in various respects, e. g., the quality of his goods may be brought into disrepute, * * *."

"While confusion of goods can only be evident where the litigants are actually in competition, confusion of business may arise between noncompetitive interests as well."

"In a suit for an injunction, as distinguished from an action for recovery of damages or profits, actual confusion need not be shown."

"*Proof of actual confusion can be ignored only when it is clear that the confusion was attributable to extraordinary circumstances or that it only occurred, and could only occur, in a single instance.* In rare cases, the extent to which the confusion can be traced, in whole or in part, to the similarity of the marks or to other considerations may be open to doubt. If, however, the plaintiff is able to produce a substantial number of witnesses to attest to actual confusion, that, of course, will indicate the degree of confusion that there really may be." (Emphasis added.) Callman, Unfair Competition and Trade-Marks (2d ed.), vol. 3, p. 1361. Proof of actual confusion requires the conclusion that confusion is probable. See Grocers Baking Co. v. Sigler, 6 Cir., 132 F.2d 498; Standard Oil Co. v. Michie, D.C., 34 F.2d 802; S. S. Kresge Co. v. Winget-Kickernick, 8 Cir., 96 F.2d 978. In the Kresge case it was said at page 987 of 96 F.2d: "While trademark infringement issues may be presented and determined on the basis of a bare comparison of the marks, yet it is evident that an entirely different situation is presented where the court has not only the marks before it but evidence of actual experience in the trade in the use thereof. Whatever the conclusion of the Judge might be upon merely a comparison of the marks, clearly *he must be governed by what he believes the evidence shows as to actual experience in the trade.* It is the view of and effect upon the purchasing public which is determinative." (Emphasis added.) In the case at bar there is no question that confusion existed in the public mind over the similarity of the name because such confusion was stipulated to. Hence the trial court "must be governed" thereby and find probable confusion and deception of the public. In addition, however, we have a coined word, "Slenderella," and the identical word is used by both plaintiff and defendant. Both appeal to the same segment of the public, stout women. The leading case of Aunt Jemima Mills Co. v. Rigney & Co., 2 Cir., 247 F. 407, certiorari denied 245 U.S. 672, 38 S.Ct. 222, 62 L.Ed. 540 is in point. There the trade-mark was used by plaintiff in the sale of flour. Defendant was using it in the sale of syrup. The court reversed the trial court's refusal of relief, stating at page 409 of 247 F.: "To use precisely the same mark, as the defendants have done, is, in our opinion, evidence of intention to make something out of it—either to get the benefit of the complainant's reputation or of its advertisement or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark. The taking being wrongful, we think the defendants have no equity to protect them against an injunction, unless they get it from a consideration now to be examined.

"It is said that even a technical trademark may be appropriated by any one in any market for goods not in competition with those of the prior user. This was the view of the court below in saying that no one wanting syrup could possibly be made to take flour. But we think the goods, though different, may be so related as to fall within the mischief which equity should prevent. Syrup and flour are both food products, and food products commonly used together. Obviously the public, or a large part of it, seeing this trade-mark on a syrup, would conclude that it was made by the complainant. Perhaps they might not do so, if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. It will enable them to get the benefit of the complainant's reputation and advertisement. These we think are property rights which should be protected in equity." These principles are in line with the legion of cases holding that in an action for an injunction actual confusion need not be established; probability is enough. See cases collected Callman, Unfair Competition and Trademarks (2d ed.) Vol. 3, pp. 1372–1373; Nims, Unfair Competition and Trade-Marks (4th ed.) Vol. 2, pp. 1049, et seq. Certainly if proof of actual confusion is not necessary then when we have a stipulation of actual confusion plus identical trade names the only conclusion tenable is that plaintiff must be given relief. Other illustrations include granting injunctions to a restaurant against a cocktail sauce business, MacSweeney Enterprises v. Tarantino, supra, 106 Cal.App.2d 504, 235 P.2d 266; by a maker of automobile carburetors and camshafts against a maker of jacks and wrenches, Winfield v. Charles, 77 Cal.App.2d 64, 175 P.2d 69; by a large and famous restaurant in New York against a small indescribable place in San Francisco, Stork Restaurant v. Sahati, supra, 166 F.2d 348.

The cases relied upon by the majority opinion are not in point. In Palmer v. Gulf Publishing Co., D.C., 79 F.Supp. 731, there was no stipulation of actual confusion nor were the names used identical. The same is true of Lerner Stores Corp. v. Lerner, 9 Cir., 162 F.2d 160, and in addition the court was dealing with persons' surnames rather than coined words. Similar comment applies to American Auto Ins. Co. v. American Auto Club, 9 Cir., 184 F.2d 407, and in addition, the names were common words and the public was not familiar with plaintiff's trade name.

Much space is devoted to an endeavor to establish that defendant did not act in bad faith—did not intend to inflict injury on plaintiff. How that is of any avail to support the judgment does not appear. The undisputed fact remains that defendant, knowing plaintiff was using the trade name "Slenderella" in his business, deliberately launched its business in the same area and used the identical name. Hence defendant was not acting with justifiable ignorance or mistake. Moreover, the factor of good or bad faith is not significant. To make it a factor would be contrary to the law that an intent to deceive or defraud is not necessary to justify an injunction. That is conceded by the majority and is clearly the law. Our statute provides that unfair competition includes "unfair or fraudulent business practice". Civ.Code, § 3369(3). See McCord Co. v. Plotnick, 108 Cal.App.2d 392, 239 P.2d 32; Wood v. Peffer, supra, 55 Cal.App.2d 116, 130 P.2d 220, which deals with a non-competitive situation; Weatherford v. Eytchison, supra, 90 Cal.App.2d 379, 202 P.2d 1040; Hoover Co. v. Groger, 12 Cal.App.2d 417, 55 P.2d 529. To argue that the judgment denying plaintiff relief is supportable because defendant did not intend to deceive, when under the law, deception is not an essential factor to the granting of such relief, is to endeavor to lift oneself by one's own boot straps.

On the record before this court plaintiff is clearly entitled to injunctive relief against defendant, and the judgment should, therefore, be reversed.

TRAYNOR, J., concurs.

SCHAUER, Justice (dissenting).

The evidence and the findings, in my view, entitle the plaintiff to injunctive relief and require reversal of the judgment.

Rehearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

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43 Cal.2d 132

PEOPLE v. ROBINSON.

Cr. 5580.

Supreme Court of California.
In Bank.
June 25, 1954.

Defendant was convicted of conspiracy with another to engage in pool selling and bookmaking and to receive, hold and forward bets on results of horse races. The Superior Court, Los Angeles County, Fred Miller, J., rendered judgment and defendant appealed. The Supreme Court, Spence, J., held that evidence was sufficient to sustain conviction.

Judgment and order denying motion for new trial affirmed.

Carter and Schaver, JJ., dissented.

Prior opinion, 266 P.2d 73.

1. Conspiracy 🔑47

A conspiracy may generally be established by circumstantial evidence alone.

2. Conspiracy 🔑47

Mere association or suspicion will not suffice to establish a conspiracy.

3. Criminal Law 🔑1160

The decision of the jury, approved by the trial court in denial of motion for new trial, will not be set aside on appeal unless there is no substantial evidence upon any hypothesis whatsoever to support the verdict.

4. Conspiracy 🔑47

In prosecution for conspiracy to engage in pool selling and bookmaking and to receive, hold and forward bets on results of horse races, evidence, including evidence that traces of fluorescent material on bills given to defendant's co-conspirator for delivery to a "big bookmaker" had been found on defendant's person, was sufficient to establish the corpus delicti and to connect defendant with the conspiracy charged. Pen.Code, § 337a.

5. Criminal Law 🔑423(2)

Where, in prosecution for conspiracy, there was prima facie proof of the existence of conspiracy, testimony concerning statements by defendant's co-conspirator in furtherance of conspiracy, although made in absence of defendant, were admissible under an exception to the hearsay rule. Code Civ. Proc. § 1870, subds. 6, 7.

6. Criminal Law ⚷680(1)

The order of proof is within a sound discretion of the trial court.

7. Criminal Law ⚷741(3), 742(1)

Where witness, in prosecution for conspiracy, testified as to statements allegedly made to him by defendant's co-conspirator, the credibility of the witness and the evidentiary value of the testimony were matters for the triers of fact.

8. Criminal Law ⚷878(3)

Normally, a verdict of acquittal on one of several counts is not deemed an acquittal of any other count. Pen.Code, § 954.

9. Conspiracy ⚷28

Charge of conspiracy to commit a crime is an accusation independent of a charge to commit the crime itself, and is based upon the criminality attaching to an unlawful agreement followed by the performance of some act in pursuance of the joint design. Pen.Code, § 182.

10. Criminal Law ⚷878(3)

Where a defendant is charged with conspiracy to commit a crime and with commission of the crime it is only when the substantive offense charged is alleged to be the only overt act in furtherance of conspiracy that an acquittal of the substantive charge operates as an acquittal of the conspiracy count, and where there are overt acts alleged in the conspiracy count in addition to those constituting the substantive offense, there may be a conviction of conspiracy and an acquittal of the substantive offense.

11. Conspiracy ⚷27

The overt acts necessary to crime of conspiracy need not in themselves be criminal in nature so long as they are done in pursuance of conspiracy, nor is it necessary that the purpose of the conspiracy be fully accomplished or that each conspirator perform some overt act.

12. Conspiracy ⚷27

To constitute crime of conspiracy, it is sufficient if one conspirator commits an overt act in carrying out the purpose of the conspiracy, for all members thereof are bound by all acts of all members done in furtherance of the agreed plot.

13. Criminal Law ⚷878(3)

Where defendant was charged with conspiring to engage in pool selling and bookmaking and to receive, hold and forward debts on horse races and also charged with bookmaking, and his connection with the conspiracy was shown and overt acts in pursuance of conspiracy by defendant's co-conspirator were proven, that defendant was acquitted on bookmaking charge did not constitute an acquittal of the conspiracy charge, even if bookmaking charge were grounded on the only overt act on defendant's part charged in the conspiracy count. Pen.Code, § 337a, subd. 3.

14. Criminal Law ⚷507(1)

Testimony by witness, in prosecution for conspiracy, of statements made by defendant's deceased co-conspirator was not "testimony of an accomplice" within statute providing that a conviction cannot be had upon the uncorroborated testimony of an accomplice. Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Testimony of an Accomplice".

15. Criminal Law ⚷779

In prosecution for conspiracy, instruction properly reciting the elements of the crime and need for evidence independent of the acts and declarations of one of the conspirators were properly adapted to the evidence.

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Samuelson & Buck and Clarence Hengel, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant and one Leon Wayne Schaefer were jointly charged in count one of an information with the crime of conspiracy to violate section 337a of the Penal Code and in count two with the violation of subdivision 3 of said section 337a (bookmaking). Schaefer died before the trial. The jury found defendant Robinson guilty on count one but not guilty on count two. Defendant appeals from the judgment of conviction entered on count one and from the order denying his motion for a new trial. As ground for reversal, he urges these points: (1) insufficiency of the evidence to support the conviction on the conspiracy charge; (2) error in the admission in evidence of the declarations of the deceased coconspirator Schaefer to a police officer; (3) inconsistency of the guilty verdict on count one with the not guilty verdict on count two; and (4) error in the court's failure to give an instruction on its own motion as to the necessity for corroboration of the testimony of an accomplice. Pen.Code, § 1111. There is no merit in these objections.

The evidence on behalf of the People consisted of the testimony of Officers Jacobsen and Hermansen of the Long Beach Police Department. It appears that Jacobsen, pursuant to information as to bookmaking activities of Schaefer, met the latter on the street in Long Beach. He told Schaefer that he was operating a "little book"; that his business was getting too large, and that he was looking for a place to "lay off" excessive bets. Schaefer said that he could handle these bets through a "big bookmaker." They agreed to meet the next day, October 23, at 2:30 p. m. Upon meeting as arranged, Jacobsen gave Schaefer $15 along with a slip of paper bearing the names of the horses running at Bay Meadows, telling Schaefer that he wanted to play $5 to win on each of the three horses. They agreed to meet the next day if Jacobsen had a "pay-off." The next day, October 24, they did meet and Schaefer gave Jacobsen $20 as winnings on the previous day's bets. Jacobsen said that he had more bets for that day, and he gave Schaefer $20 in currency (one $10 bill and ten $1 bills) along with another slip of paper bearing the names of four horses running that day. Jacobsen had recorded the serial numbers of the bills and had treated the bills with a fluorescent powder which would rub off on the hands of any one handling them and would be visible under ultraviolet light. Jacobsen then left Schaefer and proceeded to a cafe in Long Beach where defendant Robinson was employed as a bartender. Upon arrival there, Jacobsen saw Officer Hermansen with Robinson and Schaefer, and he saw money in the hands of Robinson.

Inspector Hermansen testified that he had worked with Officer Jacobsen on October 24 in preparing the list of four horses which was given to Schaefer that day; that he then followed Schaefer to the cafe, where Robinson worked behind the bar and observed Schaefer and Robinson in conversation; that he then saw Schaefer take from his left rear hip pocket and pass to Robinson what appeared to be the money and paper given him by Jacobsen, and that Robinson took the roll—the money with the paper wrapped around it—and thumbed through it; that he recognized the paper in Robinson's hands as that which Jacobsen had torn from his notebook; that he then moved to arrest Robinson but due to the presence of several patrons at the bar and the fact that Hermansen also stopped to detain a person leaving the telephone booth, Robinson was out of Hermansen's sight for a few seconds; that when arrested, Robinson was searched and a roll of bills was disclosed but none was a marked one, and the slip of paper, or betting marker, containing the names of the horses could not be found. Hermansen went to his car to get the ultraviolet machine, leaving Jacobsen, who had meanwhile arrived at the bar with Robinson. When Hermansen returned, he saw a glass with some money in it before Robinson who was sitting at a cocktail table. Jacobsen stated that he saw Robinson place the money in the glass. The money was examined and found to contain, in part, the bills with the fluorescent powder on them and bearing the recorded serial numbers. Traces of the fluorescent powder were found on the hands of both Schaefer and Robinson and on the material near Schaefer's left rear pocket. An "O" sheet (a paper on which were recorded the names of bettors, the amounts to be paid to and collected from them, together with the total "book" made for that day) was found on Robinson's person. The "O" sheet had the name "Leo" written on it, and Schaefer's first name was "Leon."

Robinson testified in his own behalf. He admitted that he had received money from Schaefer on the day in question but claimed that he had not received it for bookmaking purposes. He explained his possession of the "O" sheet by stating that he had picked it up from the floor. He claimed that he did not know what an "O" sheet was, despite the admission of a prior conviction of bookmaking and former work as a bookmaker for several years. Robinson denied having had any conversation that day with Schaefer concerning the placement of bets on the four horses or horse-racing. He maintained at the trial, as he had in conversation with the officers following his arrest, that there was no marker or slip of paper around the money when Schaefer gave it to him.

[1-3] Upon this record appellant Robinson unavailingly argues that the evidence is insufficient to sustain the conviction on the conspiracy count. A conspiracy can generally be established only by circumstantial evidence. It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design. People v. Kulwin, 102 Cal.App.2d 104, 110, 226 P.2d 672. While mere association or suspicion will not suffice to establish a conspiracy, 11 Cal.Jur. 2d 252, § 30; Dong Haw v. Superior Court, 81 Cal.App.2d 153, 158, 183 P.2d 724, here more than that was shown by the evidence to warrant the jury's inference that a plan and agreement existed between appellant and Schaefer to carry on a bookmaking enterprise, and that the acts performed by them were in accordance with and in furtherance of their unlawful plan and agreement. People v. Sica, 112 Cal. App.2d 574, 581, 247 P.2d 72. The decision of the jury, which has been approved by the trial judge in the denial of a motion for a new trial, will not be set aside on appeal unless there is no substantial evidence upon any hypothesis whatsoever to support the verdict of the jury and the conclusion of the trial court. People v. Yant, 26 Cal.App.2d 725, 737, 80 P.2d 506.

[4] Here it appears that after Schaefer had accepted the fluorescent-powdered $20 on October 24 from Officer Jacobsen, he went directly to the cafe where appellant worked, and delivered the marked money to appellant. There was evidence that at the time of such delivery, this money was wrapped in a white slip of paper, the betting marker, containing the names of horses upon which the bets were placed for that day. When appellant was arrested and his hands examined, they were found to contain the powder which had been placed on the marked currency. Appellant attempted to rid himself of these bills but was prevented by the arresting officers. The betting marker was apparently disposed of, although it was seen in appellant's hands after Schaefer had given it to him. Except for appellant and Schaefer, other persons in the cafe did not have the iridescent powder on their hands. When questioned by the officers concerning the money, appellant gave conflicting and ambiguous answers and then in the face of these contradictory responses, stated, "Neither one is right, it doesn't matter anyway." Finally, on appellant's person was found the "O" sheet, on which were recorded the names of the persons who had bet on the horses, the amounts to be paid such bettors, the amounts collected, and the amount the "book" made that day. This evidence was sufficient to establish the corpus delicti, and to connect appellant with the conspiracy charged against him. People v. Griffin, 98 Cal.App.2d 1, 46-47, 219 P.2d 519.

[5-7] There was no error in admitting into evidence the declarations and statements made by the co-conspirator Schaefer outside the presence of appellant. Since there was prima facie proof of the existence of a conspiracy, testimony concerning Schaefer's statements in furtherance of the conspiracy, though made in the absence of appellant, was admissible as an exception to the hearsay rule. Code Civ.Proc. § 1870(6, 7); People v. Collier, 111 Cal.App. 215, 240, 295 P. 898; People v. Curtis, 106 Cal.App.2d 321, 325-326, 235 P.2d 51. Ap-

pellant recognizes that the order of proof is within the sound discretion of the trial court, People v. Ferlin, 203 Cal. 587, 599, 265 P. 230; People v. Griffin, supra, 98 Cal.App.2d 1, 47–48, 219 P.2d 519, and he does not challenge the procedure in this regard. It is true that Schaefer died before the trial and the statements allegedly made by him to Officer Jacobsen were related to the jury by the latter. While such evidence pertaining to statements of a deceased person is said " 'to be in its nature the weakest and most unsatisfactory.' " Smellie v. Southern Pacific Co., 212 Cal. 540, 560, 299 P. 529, 537, nevertheless the credibility of the witness narrating such statements and their evidentiary value were matters for the triers of fact to determine. Khoury v. Barham, 85 Cal.App.2d 202, 211, 192 P.2d 823.

[8–10] There is no merit to appellant's contention that since the jury acquitted him on count two, which charged the violation of Penal Code, section 337a, subdivision 3 (bookmaking), the verdict finding him guilty of conspiracy to violate that code section was inconsistent and cannot be sustained. Normally a verdict of acquittal of one of several counts is not deemed an acquittal of any other count. Pen.Code, § 954. The conspiracy count is an independent accusation, Pen.Code, §§ 182, 184; People v. Martin, 114 Cal.App. 392, 396, 300 P. 130, based upon the criminality attaching to an unlawful agreement followed by the performance of some act in pursuance of the joint design. People v. George, 74 Cal.App. 440, 450 et seq., 241 P. 97. It is only when the substantive offense charged is alleged to be the only overt act in furtherance of the conspiracy that an acquittal of the substantive offense operates as an acquittal of the conspiracy count based solely thereon. Thus, where the conspiracy count alleged as the only overt acts the specifically described crimes set forth in the other counts, and defendant was found not guilty of any of these specific crimes, there could be no conviction of the alleged conspiracy because no overt acts had been proved. Oliver v. Superior Court, 92 Cal.App. 94, 96–97, 267 P. 764; accord In re Johnston, 3 Cal.2d 32, 35–36, 43 P.2d 541. But where there are overt acts alleged in the conspiracy count in addition to those constituting the substantive offense, there may be a conviction of conspiracy and an acquittal of the substantive offense. Such a conviction and acquittal have been held not to be inconsistent. People v. Guerrero, 22 Cal.2d 183, 188, 137 P.2d 21; People v. Darnell, 97 Cal.App.2d 630, 635–636, 218 P.2d 172; People v. McNamara, 103 Cal.App.2d 729, 736–738, 230 P.2d 411.

Here the first count of the information charged appellant and Schaefer with conspiracy "to engage in pool selling and bookmaking, and to receive, hold and forward bets and wagers upon the result and purported result of contests of skill, speed and power of endurance of men and beasts, to wit, horse races." Five overt acts in pursuance of the conspiracy are then alleged: (1) That Schaefer accepted a bet from Jacobsen on October 23, 1952; (2) That Schaefer met Jacobsen on October 24, 1952, by prearranged appointment; (3) That on said October 24, Schaefer accepted four bets from Jacobsen, totaling $20; (4) That Schaefer on said October 24 took the $20 given him by Jacobsen, together with a betting marker, to a certain bar in Long Beach, and (5) "That pursuant to said conspiracy and to accomplish its objects and purposes, the said defendant, Leon Wayne Schaefer, on or about the 24th day of October, 1952, in the County of Los Angeles, handed said bet and betting marker to the said defendant, William Clyde Robinson, who accepted said money and betting marker and had a conversation with the said Leon Wayne Schaefer." Count two of the information charged as "a different offense of the same class of crimes and offenses as the charge set forth in Count I," that Robinson and Schaefer violated subdivision 3 of section 337a of the Penal Code in that on October 24, 1952, they did "* * * receive, hold and forward, and purport and pretend to receive, hold and forward, certain moneys, lawful money of the United States, and the equivalent and memorandum thereof in writing, staked, pledged, bet and wagered * * *" upon the outcome of a horse race.

[11–13] Appellant argues the inconsistency of the two verdicts on this basis: count one, the conspiracy count, charged only one overt act against him, the fifth, relating to his alleged taking of money and a betting marker from Schaefer; count two, the bookmaking count, likewise charged him with taking "certain moneys * * * and memorandum thereof in writing * * * pledged, bet and wagered" upon the result of a horse race; the jury having found him not guilty on count two of taking money or a memorandum of bets upon horse races, such acquittal operated to acquit him of the only overt act charged against him in the conspiracy count; and therefore the two verdicts are in irreconcilable conflict. This argument is untenable. The undisputed evidence of the four overt acts committed by Schaefer would be sufficient to sustain the conspiracy conviction against appellant, once the latter's alleged connection with the conspiracy was shown. The overt acts need not be in themselves criminal in nature so long as they are done in pursuance of the conspiracy. People v. George, supra, 74 Cal.App. 440, 451, 458, 241 P. 97; People v. Stevens, 78 Cal.App. 395, 405, 248 P. 696; People v. Gilbert, 26 Cal.App.2d 1, 23, 78 P.2d 770; People v. Gordon, 71 Cal.App.2d 606, 628, 163 P. 2d 110; People v. Ragone, 84 Cal.App.2d 476, 480, 191 P.2d 126. Nor is it necessary that the purpose of the conspiracy be fully accomplished, People v. Klinkenberg, 90 Cal.App.2d 608, 635, 204 P.2d 47, 613; People v. Darnell, supra, 97 Cal.App.2d 630, 635–636, 218 P.2d 172, or that each conspirator perform some overt act. It is sufficient if one conspirator commits an overt act in carrying out the purpose of the conspiracy, for all the members thereof "are bound by all acts of all members done in furtherance of the agreed plot." People v. Sica, supra, 112 Cal.App.2d 574, 581, 247 P.2d 72, 76; see, also, People v. Shurtleff, 113 Cal.App. 739, 741–742, 299 P. 92; People v. Pierce, 110 Cal.App.2d 598, 610, 243 P.2d 585; People v. Shaw, 115 Cal. App.2d 597, 601, 252 P.2d 670. In view of the evidence that Schaefer committed the first four alleged overt acts pursuant to the conspiracy, which overt acts were additional to the acts alleged against appellant in count two, it cannot be said that the verdict of guilty on count one is inconsistent with the verdict of not guilty on count two. Pen.Code, § 954; People v. Gilbert, supra, 26 Cal.App.2d 1, 22–23, 78 P.2d 770; People v. Yant, supra, 26 Cal. App.2d 725, 731–732, 80 P.2d 506; People v. McNamara, supra, 103 Cal.App.2d 729, 737–738, 230 P.2d 411; People v. Shaw, supra, 115 Cal.App.2d 597, 602, 252 P.2d 670. It therefore becomes unnecessary to determine whether the fifth alleged overt act in count one was the same act as that alleged against appellant in count two.

[14] There finally remains appellant's contention that the trial court should have given on its own motion, and despite appellant's failure to so request, an instruction as to the necessity for corroboration of an accomplice's testimony. People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367; People v. Buffum, 40 Cal.2d 709, 724, 256 P.2d 317; People v. Katcher, 97 Cal.App.2d 209, 216, 217 P.2d 757; People v. Ramirez, 113 Cal.App.2d 842, 856, 249 P.2d 307. Appellant's position is not sustained by the record. As stated in Penal Code, section 1111: "A conviction cannot be had upon the *testimony* of an accomplice unless it be corroborated * * *. An accomplice is * * * defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Emphasis added.) Here no accomplice testified. Schaefer, the alleged accomplice, died before the trial. Officer Jacobsen was not an accomplice. 8 Cal.Jr. sec. 254, p. 175; 14 Am.Jur. sec. 113, p. 843; People v. Heusers, 58 Cal.App. 103, 104, 207 P. 908; People v. Spaulding, 81 Cal.App. 615, 617, 254 P. 614; People v. Kennedy, 66 Cal.App.2d 522, 524, 152 P.2d 513; see also Annotation, 119 A.L.R. 689. Officer Jacobsen's testimony as to the acts and declarations of the alleged co-conspirator was not therefore the testimony of an accomplice, and corroboration was not required.

[15] The primary reason for the requirement of corroboration was stated by

this court in People v. Wallin, 32 Cal.2d 803, 808, 197 P.2d 734, 737, as follows: "The statutory requirement of corroboration is based primarily upon the fact that experience has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity. People v. Coffey, 161 Cal. 433, 438, 119 P. 901, 39 L.R.A.,N.S., 704." No such reason exists here. The officer's testimony was directed to the acts and statements of Schaefer, one of the co-conspirators, which acts were performed and which statements were uttered in pursuance of the conspiracy and as part of the *res gestae.* Such testimony was not directed to any subsequent extrajudicial admissions or confessions which would be admissible only against the co-conspirator making such admissions or confessions; and this fact sufficiently distinguishes the case of People v. Crain, 102 Cal.App.2d 566, 581, 228 P.2d 307, upon which appellant relies. Moreover, the court did give appellant's instructions properly reciting the elements of the crime of conspiracy and the need for evidence independent of the acts and declarations of one of the conspirators in order for criminal responsibility to attach to the other conspirator. In these circumstances, the instructions on the conspiracy count were properly adapted to the evidence in the case and are not open to appellant's objections.

The judgment and the order denying the motion for a new trial are affirmed.

SHENK, Acting C. J., EDMONDS and TRAYNOR, JJ., and BRAY, Justice pro tem., concur.

CARTER, Justice.

I dissent.

There is insufficient evidence to support the conviction. There is no evidence to establish that appellant Robinson agreed or planned with Schaefer to violate the bookmaking laws, Pen.Code, § 337a, except the inference that might arise from evidence that Schaefer handed the money he had received from the officer and a betting paper to Robinson. The jury, however, found that Robinson did not violate the bookmaking law, that is, he did not accept bets from Schaefer which the latter had received from the officer. Appellant was found not guilty of bookmaking. It is fundamental in conspiracy that the "Conspirators must have entered into a corrupt agreement to accomplish a common unlawful design. The agreement may have been positively entered into or it may be the result of a tacit, mutual understanding. It is not necessary that the parties should meet together and enter into an explicit or formal, or elaborate and detailed, written agreement to commit the crime. Nor is it necessary that the criminal enterprise in its inception contemplate a particular crime as against a particular person or as between particular persons. It is only necessary that each conspirator adopt a common design with the knowledge and consent of the others. And the agreement may result from the actions of the defendants in carrying out a common purpose to achieve an unlawful end." (11 Cal.Jur.2d Conspiracy, § 13.)

In the instant case the only connection of appellant with the betting was his alleged acceptance of bets from Schaefer. Schaefer accepted bets from the officer. He then went to the cafe where appellant worked and talked to appellant. Thus far there is no basis for an inference of an agreement. There is evidence that Schaefer then handed the money received from the officer together with a bet notation to appellant and the latter accepted them. Assuming from that that we may infer appellant and Schaefer had a prior agreement or made one at that time for appellant to accept bets from Schaefer and hence one of the elements of a conspiracy, *such actions* on appellant's part, if they occurred, would constitute a violation of section 337a of the Penal Code—the acceptance of bets on a horse race. But the jury found appellant did not accept bets, did not violate section 337a. Thus he did not accept the money or a betting record from Schaefer. Any inference of an agreement is therefore negated.

The majority opinion purports to escape the effect of the jury finding appellant not guilty of violating section 337a, by holding that there were some overt acts which did not involve appellant's asserted activities in the cafe. That is beside the point. Assuming that there was evidence of overt acts, it was still necessary to establish an agreement, and the acquittal of appellant of accepting bets embraced facts which eliminated him from any agreement with Schaefer.

I do not believe there was a lack of corroboration. Officer Jacobsen, not the accomplice Schaefer, was testifying. He testified to the actions and statements of Schaefer *while the conspiracy—the crime—was being committed,* not as to statements made by him later after the crime was complete. Hence it is the same as any observer who sees the crime committed and testifies about it. His observation may include statements as well as actions of the criminal where both are relevant, and in a conspiracy case, conversations are relevant parts of the offense. Hence it is not a case of an accomplice's testimony or testimony of extra-judicial admissions by the accomplice which were not a part of the crime.

Because there was no proof connecting defendant with a conspiracy, I would reverse the judgment.

SCHAUER, J., concurs.

43 Cal.2d 143

PEOPLE v. ROBINSON.

Cr. 5579.

Supreme Court of California.
In Bank.
June 25, 1954.

Defendant pleaded guilty of receiving, holding, and forwarding moneys to be bet on results of horse races, and from an order of the Superior Court of Los Angeles County, Fred Miller, J., revoking probation granted defendant, he appealed. The Supreme Court, Spence, J., held that where probation was granted on condition that defendant not engage in gambling activities, defendant's conviction of conspiracy to violate gambling statute was sufficient to warrant revocation of probation although conviction was not final pending appeal.

Judgment affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, 266 P.2d 78.

1. Criminal Law ⚷1023(3)

Upon entry of judgment following an order revoking probation, the revocation order is merely an intermediate order reviewable only on appeal from the judgment. Pen.Code, § 1237, subd. 3.

2. Criminal Law ⚷1081

A notice of appeal will be liberally construed to permit a hearing on the merits and avoid a dismissal because of some technical defect or irregularity. Rules on Appeal, rule 31.

3. Criminal Law ⚷1081

Where defendant's probation was revoked and judgment entered, and an attempted appeal was timely taken from the order of revocation, although appeal should have been from the judgment, and state suffered no prejudice by reason of the improper designation, notice of appeal would be construed as sufficient to constitute an appeal from the judgment and case would be reviewed on its merits. Rules on Appeal, rule 31; Pen.Code, § 1237, subd. 3.

4. Criminal Law ⚷982

Where defendant who had pleaded guilty to charge of bookmaking and had been placed on probation on condition that he not engage in gambling activities, was subsequently convicted of conspiracy to violate a gambling statute, the subsequent conviction was sufficient to justify revocation of probation and rendition of judgment on his earlier plea of guilty. Pen.Code, §§ 337a, subd. 3, 1237, subds. 1, 3.

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Andrew H. McConnell, Samuelson & Buck and Clarence Hengel, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

In September, 1951, defendant pleaded guilty to a charge of violating Penal Code, section 337a, subdivision 3 (bookmaking), and applied for probation. On November 5, 1951, upon arraignment for judgment, proceedings were suspended and defendant was placed on "probation for a period of two years under the following conditions: Defendant must serve thirty days of his probationary period in the County Jail, with good time allowed, if earned; must not engage in gambling activities; and must obey all rules and regulations of the Probation Department." On May 7, 1953, the court found that defendant had violated the terms of his probation, which was thereupon revoked, and judgment was pronounced, whereby defendant was sentenced to the county jail for the term of three months. Defendant appeals from the "order revoking probation."

[1] Preliminarily, the propriety of defendant's designation of his appeal as an appeal from the "order" rather than the "judgment" must be considered. At the time probation was granted in November, 1951, as well as later when it was revoked and sentence was pronounced, Penal Code section 1237, as amended in 1951, authorized an appeal by a defendant: "1. From a final judgment of conviction; *an order granting probation shall be deemed to be a final judgment within the meaning of this section;* 2. * * * 3. From any order made after judgment, affecting the substantial rights of the party." (Emphasis added.) Prior to the 1951 amendment adding the italicized clause, an order granting probation did not constitute a "final judgment of conviction" from which an appeal might be taken. In re Phillips, 17 Cal.2d 55, 63–64, 109 P.2d 344, 132 A.L.R. 644; People v. Leach, 90 Cal.App.2d 667, 671, 203 P.2d 544. While under the 1951 amendment an order granting probation is expressly designated a "final judgment" for the purpose of appeal, People v. Haeussler, 41 Cal.2d 252, 254, 260 P.2d 8; People v. Brown, 114 Cal.App.2d 52, 53, 249 P.2d 595; People v. Sumner, 117 Cal.App.2d 40, 254 P.2d 598, a subsequent order revoking probation does not thereby become an "order made after judgment, affecting the substantial rights of the party" and so appealable. Pen.Code, § 1237, subd. 3. To hold otherwise would give the 1951 amendment greater scope than its language would reasonably support in its limited extension of a defendant's right to appeal from a theretofore non-appealable order. 3 Cal. Jur.2d § 86, p. 536. Rather, it would appear that upon entry of judgment in a case *following* the order revoking probation, the latter order does not gain any added stature by reason of the 1951 amendment because made after the order granting probation but it remains, as before, an intermediate order reviewable on appeal from the judgment. People v. Boyce, 99 Cal.App.2d 439, 442, 221 P.2d 1011. Of course, an order revoking probation made *after* entry of judgment is appealable within the express terms of subdivision 3, section 1237, of the Penal Code. People v. Martin, 58 Cal.App. 2d 677, 678, 137 P.2d 468.

[2, 3] However, a notice of appeal will be liberally construed to permit a hearing on the merits and avoid a dismissal because of some technical defect or irregularity. People v. Guerrero, 22 Cal.2d 183, 185, 137 P.2d 21; Rules on Appeal, Rule 31, 36 Cal. 2d 26. Here the judgment, after preliminarily declaring that "probation heretofore granted is revoked," continues with the terms of punishment imposed on defendant. In other words, the revocation of probation and the pronouncement of judgment were practically one act. In taking his appeal from such adjudication, defendant improperly designated the objectionable ruling as the "order revoking probation" rather than the judgment, of which the order was an integral part. Under the circumstances, where the attempted appeal was timely taken (being filed on the same day that the judgment was pronounced) and respondent has suffered no prejudice by reason of the improper designation, the notice of appeal should be construed as sufficient to constitute an appeal from the "judgment," as authorized and intended. The notice was so considered by the trial judge, who ordered the clerk's and reporter's transcripts prepared and they are in the record before us. Accordingly, in the interest of justice, the merits of defendant's appeal will be reviewed. People v. Hawthorne, 63 Cal.App. 2d 262, 264, 146 P.2d 517; People v. Aresen, 91 Cal.App.2d 26, 28, 204 P.2d 389, 957;

see, also, Collins v. City & County of San Francisco, 112 Cal.App.2d 719, 722–723, 247 P.2d 362.

[4] The record reveals that at the time of revocation of defendant's probation, a hearing was had wherein it appeared that defendant had been found guilty of a conspiracy to violate section 337a of the Penal Code (committed October 24, 1952). The appeal from such judgment of conviction has this day been decided and the judgment has been affirmed. People v. Robinson, Cal. Sup., 271 P.2d 865. Manifestly, such conviction, though not then final pending appeal, was sufficient to warrant the trial court's conclusion that defendant was engaged in criminal practices in violation of the terms of his probation, which was thereupon revoked. Under all the circumstances there is no basis for disturbing the judgment entered against defendant. People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16; People v. Silverman, 33 Cal.App.2d 1, 5, 92 P.2d 507.

The judgment is affirmed.

SHENK, Acting C. J., EDMONDS and TRAYNOR, JJ., and BRAY, Justice pro tem., concur.

CARTER, Justice.

I dissent.

Assuming that defendant has a valid appeal from the order revoking probation, I would reverse the order as I do not believe a valid order revoking probation can be predicated upon a judgment of conviction which has not become final. If such a procedure is permitted, a defendant who has been admitted to probation could have his probation revoked upon the entry of a judgment against him in another criminal proceeding even though the latter judgment might be void and subject to collateral attack. It may be true that the court could have based its order revoking probation upon the evidence produced at the trial in which the judgment of conviction was obtained, but that is quite a different matter than basing the order revoking probation upon the judgment of conviction which has not become final. For the foregoing reason I would reverse the order revoking probation and the judgment which was pronounced against defendant following the entry of the order revoking probation.

SCHAUER, J., concurs.

126 Cal.App.2d 274

PEOPLE v. LOPEZ.

Cr. 5135.

District Court of Appeal, Second District,
Division 3, California.
June 28, 1954.

Defendant was convicted of receiving stolen property. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence supported implied finding that the goods received by defendant were received with knowledge that they had been stolen, and sustained conviction.

Judgment affirmed.

1. Receiving Stolen Goods ⊂⇒8(3, 4)

Evidence supported implied finding that goods received by defendant were received with knowledge that such goods had been stolen, and sustained conviction for receiving stolen property. Pen.Code, § 496, subd. 3.

2. Receiving Stolen Goods ⊂⇒8(4)

Possession of stolen property, accompanied by no explanation, or an unsatisfactory explanation, of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. Pen. Code, § 496, subd. 3.

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Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Wilbur B. Thayer, Deputy Attys. Gen., for respondent.

SHINN, Presiding Justice.

By an information filed by the District Attorney of Los Angeles County, defendant was charged with one count of burglary and five counts of receiving stolen property. The crimes set forth in the six counts of the information were alleged to have been committed on various dates between October 15, 1951 and March 30, 1953. Count I alleged that defendant burglarized a market and stole an adding machine; count II alleged that he had received a stolen adding machine knowing that it was stolen; counts III, IV and V respectively alleged that defendant had received stolen billfolds, a wrist watch, and three dozen eggs, knowing them to be stolen; count VI alleged that defendant had received a stolen pen, knowing it to be stolen. Defendant waived jury trial, and upon trial before the court was found guilty on counts II, III, IV and V and not guilty on counts I and VI. He appeals from the judgment, which placed him on probation, urging insufficiency of the evidence.

[1] Section 496 of the Penal Code describes the offense of receiving stolen property as the buying or receiving of personal property which was stolen or obtained through theft or extortion with the knowledge that the property was so obtained, either for gain, or to prevent the owner from recovering his property.

The items specified in counts III, IV and V were allegedly stolen by boys, who sold the things they had stolen to defendant at his beer parlor. Two boys, aged 14 and 15 years, testified that they stole six wallets or billfolds from a leather goods shop, and sold five of them to defendant for $4. The same two boys testified that they broke into a house which was identified as the residence of one Larry Kachaturian. One of the boys testified that while there he stole a wrist watch which he gave to defendant. This witness and Kachaturian testified that a watch found on the premises of defendant and introduced into evidence resembled the watch which was removed from Kachaturian's house. Another boy, aged 10, testified that he and two other boys broke into a poultry store; that he stole two dozen eggs and that one of his companions also stole two dozen eggs; that he and his companion gave the eggs to one of the brothers of the witness, and that he saw this brother give the eggs to defendant in exchange for some coins. The brother, who was 13 years old, testified that he received three dozen eggs from the two boys, and that he sold them to defendant for $1.50. There was other evidence tending to prove that the wallets had been stolen and evidence that the poultry store had been burglarized at the time the boys allegedly stole the eggs.

Defendant denied that he received wallets or eggs from the witnesses. His explanation for his possession of the watch was that the boy did come to his beer parlor and offered to sell the watch to him, that he declined to buy it, and that while he was engaged in serving a customer the boy disappeared, leaving the watch on the table.

Although the ages of the boys and the fact that they had committed thefts required that their testimony be subjected to the closest scrutiny, the question of their credibility appears to have been of major concern to the trial judge. The argument now made that the court should have believed the testimony of the defendant cannot prevail. We are bound by the implied finding that defendant received the stolen articles. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

The next question as to counts III, IV and V is whether the evidence justified the implied finding that the defendant knew that the goods were stolen. Section 496, subd. 3 of the Penal Code reads in part as follows: "Any person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, from any person under the age of 18 years shall be presumed to have bought or received such property knowing it to have been so stolen or obtained, unless such property is sold by such minor at a fixed place of business carried on by the minor or his employer. This presumption may, however, be rebutted by proof."

The quoted portion of the statute was applicable. Each of the boys testified as to each sale that defendant did not make any inquiry as to how the merchandise had come into the boy's possession or why he desired to sell it. Defendant introduced no evidence other than his own testimony to rebut the presumption. Moreover, the wallets still bore price tags and were sold for only a fraction of their retail value. The watch was either given to defendant or left with him after he refused to buy it. These additional circumstances cast suspicion on defendant's honesty. The evidence was ample to sustain the implied finding that defendant knew when he received the various items of merchandise that they had been stolen.

The next question is whether the evidence sustains the conviction of the crime of receiving a stolen adding machine, as specified in count II. The owner of the adding machine testified that his market was broken into on July 14, 1952, and that his adding machine was missing. An adding machine was found in defendant's home on April 21, 1953, slightly more than nine months later. This machine had the same serial number as the serial number on the bill of sale which the owner had received when he purchased the machine.

There remains the question whether the evidence sustains the implied finding that defendant knew that the machine had been stolen. At the time an investigating policeman found the adding machine in defendant's home he asked defendant how he had obtained it, and defendant replied that he had purchased it for $15 in a second hand store some time in 1950. Defendant was then informed that the machine had been stolen on July 14, 1952. He then stated that in July, 1952 a man named Jim had sold him the machine on the street for $15. On the trial defendant testified that Jim came to his beer parlor and borrowed $15, leaving the machine as a pledge, that this incident occurred only three or four months before the police questioned him, and that Jim had patronized the beer parlor about four times before borrowing the $15 and leaving the machine. When on cross-examination he was asked why he had first told the story that he had purchased the machine in a second hand store in 1950, he explained that when the police inquired about the machine he feared that it had been stolen and that he invented the story in order to protect Jim from possible trouble, although he knew that in doing so he might cast suspicion on himself.

[2] These conflicting and unsatisfactory accounts of his acquisition of the adding machine brought the case within the rule that possession of stolen property, accompanied by no explanation, or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen. People v. Jacobs, 73 Cal.App. 334, 339–344, 238 P. 770; People v. Boyden, 116 Cal.App.2d 278, 288, 253 P.2d 773; People v. Reed, 58 Cal.App. 7, 207 P. 1025.

The fact that some nine months elapsed between the time the adding machine was stolen and the time when it was found in defendant's possession weakened the inference of defendant's guilty knowledge. It could have passed through several hands after the thief had disposed of it. Notwithstanding the lapse of time the conflicting stories told by defendant cast doubt upon his motives and could not be disregarded as a suspicious circumstance. But the explanations did not stand alone. The testimony of the boys was sufficient to prove that defendant would buy or receive stolen property when he had the opportunity, and when this evidence is considered with defendant's own statements and testimony there was, in our opinion, sufficient to justify the inference that regardless of the time when he received the adding machine or the circumstances of its receipt, defendant had knowledge that it had been stolen. People v. Ingles, 117 Cal.App. 22, 27, 3 P.2d 341; People v. Robinson, 107 Cal.App. 211, 224, 290 P. 470; People v. Cox, 117 Cal.App. 254, 257–258, 3 P.2d 581; People v. Juehling, 10 Cal.App.2d 527, 52 P. 2d 520.

The judgment is affirmed.

PARKER WOOD, J., concurs.

McKEON v. GIUSTO.*

No. 16052.

District Court of Appeal, First District, Division 2, California.

June 23, 1954.

Rehearing Denied July 23, 1954.

Hearing Granted Aug. 19, 1954.

Action for moneys allegedly due for services rendered defendant, a general contractor, pursuant to oral extension of written contract for one year for a stated salary plus a sum which, when added to the salary, would equal 30% of net profits on jobs completed, although written contract provided that if plaintiff remained in employ of defendant following termination of contract he should receive only the stated salary plus such additional amounts as should be agreed upon in writing. From adverse judgment of Superior Court, city and county of San Francisco, Frank T. Deasy, J., the defendant appealed. The District Court of Appeal, Kaufman, J., held that evidence supported finding that oral agreement entered into following termination of written contract was a valid and binding agreement and plaintiff was entitled to percentage of profits on projects completed during employment under the oral agreement.

Judgment reversed with directions.

1. Contracts ⚷236

Parties are as free to alter a contract as they are to make it.

2. Appeal and Error ⚷171(1)

A plaintiff cannot shift to a new theory on appeal.

3. Master and Servant ⚷80(3)

In action for moneys allegedly due for services rendered pursuant to oral extension of written contract for one year providing for a stated salary plus a sum which, when added to the salary, would equal 30 per cent of the net profits, defendant was not estopped from asserting that he did not incur liability over and above the stated salary in the following year because no additional amount was agreed to in writing as provided for in the written contract when plaintiff's and defendant's testimony conflicted as to extension.

4. Master and Servant ⚷80(10)

In action for money allegedly due for services rendered pursuant to oral extension of a written contract for one year providing for a stated salary plus a sum which, when added to the salary, would equal 30 per cent of the net profits on jobs completed, although written contract provided that if plaintiff remained in defendant's employ thereafter it would be at the same salary plus only such additional amounts as agreed upon in writing, evidence sustained finding that an oral agreement had been entered into between plaintiff and defendant for continuance of employment on the same basis.

5. Master and Servant ⚷70(4)

Although written contract, which provided for salary plus a sum which, when added to the salary would equal 30 per cent of net profits from jobs completed, provided that if plaintiff remained in defendant's employ after termination of the written contract salary would be same plus only such additional amounts as agreed upon in writing, oral agreement extending original contract on same terms was valid and plaintiff was entitled to recover a percentage on jobs completed thereunder.

W. Burleigh Pattee, Bruce M. Casey, Jr., and Chickering & Gregory, San Francisco, for appellant.

Joseph C. Haughey, Toland C. McGettigan, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal by defendant, from a judgment in favor of plaintiff in the sum of $14,396.28 and costs rendered by the trial court on the first count of plaintiff's complaint. Judgment on the second and third counts thereof were in favor of defendant. No appeal was taken by plaintiff from the judgment on the latter two causes of action.

In the first cause of action respondent Edward McKeon, a civil engineer, sought recovery for moneys allegedly due him for services performed by him in defendant's general contracting business. The first count of the complaint alleged the execution by appellant and respondent of a contract in writing dated April 11, 1951, but effective as of January 1, 1951, under which appellant, Benedict Giusto, agreed to employ respondent as an estimator and office manager in appellant's general contracting business for a period of one year at a salary of $100 per week, together with a sum which, when added to said salary, would equal 30% of the net profits derived from such business as general contractor during the year, including net profits on all jobs completed during the year 1951 but on which full payment might not have been made during said year. The contract contained the following paragraph:

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* Vacated 280 P.2d 782.

"IV. It is agreed that in event you continue in my employ after December 31, 1951, it shall be at a salary of One Hundred Dollars ($100) per week, plus only such amounts as may hereafter mutually be agreed upon in writing."

It was further alleged that following the expiration of the term of said written agreement, appellant orally agreed to extend said agreement and to continue plaintiff in his employment "upon the same terms, conditions and rate of compensation specified and set forth in Paragraphs 1, 2 and 3 of said agreement * * * and contrary to and in modification of the provisions of Paragraph 4 of said agreement of employment."

The complaint alleged rendition of work, labor and services by respondent pursuant to their agreement up to and including February 29, 1952, when, it was alleged, appellant without cause wrongfully discharged respondent; that respondent was ready and willing to continue to perform the agreement but was prevented therefrom by appellant. Respondent admitted payment received by him from appellant in the amount of $5700 for the period ending December 31, 1951, and admitted receipt of $1,400 pursuant to the agreement as extended and modified. It was alleged that there were profits owing to respondent for the period ending December 31, 1951, and for the extended period in 1952, which respondent was unable to determine because of his inability to examine appellant's books. An accounting was asked of all profits realized by appellant from his general contracting business for the period during which respondent was employed.

It is appellant's contention that the sole question to be decided on this appeal is whether there was sufficient evidence to sustain the trial court's finding that the employment contract between appellant and respondent had been modified and the term extended beyond December 31, 1951.

Appellant was also a graduate civil engineer, who had held various engineering positions until 1945 when he went into the business of general contractor. He had never in his career prepared any plans or specifications or made any designs for structures bearing his stamp as a civil engineer. He had, however, made rough sketches. From 1945 until April 1950, appellant operated the business with a partner, Mr. Rademan, and after that continued as sole owner. Mr. Rademan and respondent were friends, and appellant and Rademan engaged respondent on several occasions to prepare plans and designs for projects which had been contracted for.

Appellant in May 1950 learned that respondent wished to make a change from the firm by which he was employed and where he was receiving between $6,000 and $7,000 per year salary. Respondent became associated with and entered appellant's employ in August, 1950, upon an oral understanding that respondent would receive $100 per week together with an amount which when added to his salary would equal 30% of appellant's net profits from the business. It was understood by both parties that this agreement was to be reduced to writing but this was not done until April 11, 1951. The agreement was back dated to January 1, 1951. Appellant's attorney drew up the agreement, and it provided that profits were to be computed on a cash basis, but this was conceded to be an error, and it was noted later on the instrument by both parties "Calculated as per books, i. e., accrued not cash basis."

Respondent continued to draw his salary of $100 per week, and performed services as required, including designing and preparation of plans for various structures. In the early part of 1951 appellant caused to be issued a brochure describing his activities in the general contracting field, and his specialization in commercial construction. E. F. McKeon was described as general manager and estimator for the firm, and his experience in varied construction fields was emphasized, and numerous important construction projects were listed, including the Parkmerced Apartment Towers, in which it was stated he had had a part in the structural design thereof.

Appellant was hospitalized in September 1951 for a heart ailment. There were then two large projects under way, a radiological laboratory for the United States Navy at Hunter's point, the contract for which was awarded in 1951 with completion date scheduled for February 7, 1952, and an apartment house known as the Simon Apartments. Respondent stated that at appellant's request he assumed full responsibility for these projects.

Respondent testified that in December 1951, he approached appellant in regard to the matter of his continued employment and his right to share in the profits since it was obvious that projects then in construction would not be completed in 1951. He said that he discussed the matter with appellant because he wished to clarify the "completed jobs", because he could see the Navy job was running over into 1952, also the motel job and the Simon Apartments. *Appellant told him that he would renew the contract, and that he would take the matter up with the lawyer, and for respondent not to worry about it, that he would get his share of these jobs.* Appellant admitted that respondent had discussed the matter with him in December but stated that he had said that he wouldn't agree to any renewal at that time, that he wanted to wait for the audit.

It is admitted that respondent performed all services required of him, and received $5700 in 1951 consisting of $5200 salary for 52 weeks and $500 additional paid in September 1951.

From December 31, 1951 until he left appellant's employ, respondent continued to render services principally in connection with the Navy job, the Flamingo Motel and the Simon Apartments. No accounting of the profits for 1951 had yet been rendered by appellant. Respondent estimated that the Navy job was about 90% completed at the end of 1951. A progress payment of about $90,000 had been received in December 1951.

Respondent again approached appellant on or about January 15, 1952, concerning the matter of reducing the contract to writing as he had promised in December, and the obtaining of an audit. Respondent pointed out that he had been there a year and a half and had not yet obtained anything out of the percentage arrangement. He then asked for an advance of $500 out of the Navy job, because he knew that was a good one. Appellant told him to have the bookkeeper draw a check for that amount. Appellant promised that he would get after the matter of the contract again with his lawyers and have it drawn up.

About the middle of February appellant came to respondent and told him that "this percentage arrangement is not working out for you and it is not working out for me." He told McKeon, "I would like to change the set-up and possibly put you on a salary basis and a bonus arrangement or something more definite." He then pointed out that the Navy contract was subject to the Renegotiation Act of 1951, 50 U.S.C.A.Appendix, §§ 1191, 1211 et seq., and that it was possible that the government might come back a year later and recapture excess profits. Respondent replied that he would at least be allowed to keep a 10% profit, that he could distribute on that basis, and put the remainder in escrow, but appellant objected to tying up his funds as he needed them in the business. Respondent then asked him to find out much he had coming from the jobs that were on the books, as he didn't want to enter into any more agreements until he knew what he had coming. He informed appellant that the Navy job was coming in close to 20%, and the 20% of $320,000 would be around $60,000, that 10% profit would be $32,000 and respondent's 30% would be in the neighborhood of $10,000. Appellant said he would talk it over with his lawyer and the auditor and see what respondent had coming.

Approximately one week later appellant told respondent that he had been talking to his lawyers and that it was not going to work out. He thought the best thing to do was to offer respondent a cash settlement and terminate the arrangements. He said he would give him $4,000 to which respondent replied that he supposed he would deduct the $1400 that he had already drawn [in 1952] and that he "would be left with peanuts for all my work." Respondent refused to accept the $4,000. McKeon left on February 29, as he couldn't get the accounting, or the written contract, and he had to get out and get another job.

On March 4, 1952, he attended a conference at appellant's office with appellant and his auditor present. A document entitled "Calculation of Amount Due Edward F. McKeon" was handed to respondent which showed a balance owing to respondent of only $123.64. Respondent said that when the auditor handed it to him he said "It isn't very much but the big one is coming up." McKeon said, "What do you mean the big one?" to which the auditor answered, "The Navy Job." At this conference a letter was produced by the auditor which appellant snatched from respondent's hands before he had finished reading it. This letter admitted in evidence was written to appellant by the auditor on March 3, 1952, and stated that appellant had no legal obligation to pay respondent a bonus on the two large jobs in progress at the end of the year, "although you [appellant] have stated that it is your intention to do so, because you feel that there is a moral obligation on your part to do so."

Following this incident, appellant and respondent left the office, and appellant offered to write respondent a check for $6,000, which he did not accept.

Appellant's auditor, Thomas McGuire, stated that prior to March 3, 1952, appellant told McGuire that it appeared that he and McKeon were not going to get together for 1952, but that he wanted to pay a bonus of some kind to him, that they had both hoped that this was going to be a very profitable association, they were very friendly as individuals, but that from the information he had received from his attorneys, if the contract were not renewed in writing it would not be necessary for him to pay any bonus on jobs incomplete on the date that the contract concluded.

At the conclusion of the trial, after the trial court had granted respondent an accounting, appellant in order to save expense gave respondent's accountant access to his books and records. A stipulation was entered into covering the periods from August 7, 1950, through December 31, 1950; from January 1, 1951, through December 1951; and from January 1952, through February 29, 1952. It was agreed that nothing was owing for the first period. The net profits for the second period, January 1, 1951, to December 31, 1951 were $21,108.79; the net profit for the three projects begun in 1951 but completed after December 1951 were $50,545.47. From January 1, 1951 until February 29, 1952, respondent had received $6,100 in salary, and advances totalling $1000.

The trial court found that it was true that following the expiration of the written agreement of employment of April 11, 1951, "said plaintiff and defendant, * * * on or about the 14th day of January, 1952, orally agreed that said agreement would be extended from and after January 1, 1952, and that plaintiff would continue in the employment of said defendant, and said defendant would continue to employ plaintiff upon the same terms and at the same rate of compensation specified and set forth in Paragraphs 1, 2 and 3 of said written agreement * * * and contrary to and in modification and abandonment of the provisions of Paragraph 4 of said agreement of employment, and for such period of time as would be required to bring to completion those certain hereinafter described projects which were entered upon by defendant prior to December 31, 1951, but which were not completed on said date, and the court further finds that said defendant * * * did * * * repeatedly thereafter represent, state to, and advise plaintiff that he * * * would cause the terms of said agreement as orally modified and extended to be reduced to writing and the plaintiff remained in said defendant's employ on and after December 31, 1951, pursuant to the terms, conditions and promises of the oral modification of said written agreement and in consideration thereof and in the belief and upon the understanding and representations of defendant that said oral agreement would be immediately placed in writing."

Appellant contends that the terms of the contract were clear and unambiguous, hence parol evidence was inadmissible to explain its terms. Paragraph 2 providing that in computing net profits "the amount due on all jobs which have been fully completed during 1951, but on which full payment may not have been made during said year" certainly requires no further explanation. And Paragraph IV provided that if respondent continued in appellant's employ after the expiration date of December 31, 1951, it should be at a salary of $100 per week plus only such amounts as should be agreed to in writing. As far as 1951 is concerned, the contract is certainly unambiguous, but the controversy between the parties is not concerned with the manner of computing profits for 1951, but with the profits on projects which ran over into 1952, and which constitute the major part of the judgment here given for respondent. It is appellant's position that as to 1952, the contract is equally clear. It provides only for $100 per week salary, and nothing else unless it is agreed to in writing. However, it was the position of the trial judge that the phrase "plus only such amounts, if any, as may hereafter mutually be agreed upon in writing" contemplated something additional to the $100 per week and called for further evidence of the circumstances and conduct of the parties.

Appellant argues that even if the evidence were properly admissible, all of it taken at its face value shows only that the parties were attempting to agree on some new employment contract and not that any agreement was reached. Appellant cites Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037, to the effect that where it is a part of the understanding of the parties that the terms of their compact are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become binding. See, also Columbia Pictures Corp. v. DeToth, 87 Cal.App. 2d 620, 629, 197 P.2d 580.

The situation, here, was of course different from that where parties are entering into an agreement for the first time. Here there had been a course of dealing between the parties since 1950. It is to be noted that when respondent went to work with appellant in 1950 it was understood that the arrangement for 30% of the net profits less salary was to be evidenced in writing, but the parties worked together for about eight months before the writing of April 11, 1951, was finally drawn up.

Respondent contends that if all inferences most favorable to respondent are drawn from the evidence, the finding of the trial court that the contract was modified and extended to cover the projects underway but not completed in 1951, is supported.

In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

[1] It is respondent's position that the terms of the contract were definite and certain insofar as 1951 was concerned, but were thereafter subject to alteration and change by agreement of the parties. Parties are as free to alter a contract as they are to make it. Opdyke & Butler v. Silver, 111 Cal.App. 2d 912, 916, 245 P.2d 306; Bavin & Burch Co. v. Bard, 81 Cal.App. 722, 255 P. 200. There is direct testimony of respondent that appellant agreed that he would receive his share of the profits on the jobs underway at the end of 1951 but which could not be completed in that year. The parties, respondent says, obviously had the right to modify the terms of this written agreement by parol. If appellant did not believe himself bound for anything but the $100 per week in 1952, why did he offer respondent $6,000 in settlement when only a few hundred dollars was owing respondent for 1951 profits? As the accountant had told respondent, "the big one" was coming up in 1952, the profit of $39,730.92 on the nearly completed Navy job.

In Empire Steel Building Co. v. Harvey Machine Co., 122 Cal.App.2d 411, 265 P.2d 32, 34, it is said that in the absence of statutory requirement, an oral agreement reached by the parties is binding unless it is clear that the parties intend that it is not to be effective until reduced to writing, and it was noted that in the case of two former buildings constructed for Harvey by

Empire, "work had been commenced several days before the contract was put in writing." It was there held that it was not error to admit evidence of two prior building contracts between plaintiff and defendant. Such evidence was held to have been properly admissible *to show the practice of the parties in commencing work before previous oral contracts had been reduced to writing.* There appellant conceded that evidence of prior dealings between the parties was admissible to illustrate the transactions in question.

The trial court made a finding that "the oral agreement entered into by and between plaintiff and defendant * * * on or about January 14, 1952, altering, amending and modifying the provisions of paragraph (4) of said written agreement as hereinabove found, was thereafter executed by both of said parties and was a valid and binding agreement."

Appellant contends that this finding is not supported by the evidence. The court gave judgment for the profit from the Navy job, the Simon Apartments and the Motel project. Finding XVI recites that final payment for the Navy job had not been made at the conclusion of the trial. There is testimony, however, to the effect that the work on this project was completed in February. The court also found that the job for constructing the Simon Apartment House was completed in February 1952, and that final payment was received in April 1952. The completion date, but not the final payment date, is of importance, since the original contract provided that net profits were to be computed on jobs completed during the year, even though final payment had not been received. Finding XVI also recites that the Motel job was not completed until September, 1952.

Since an alteration or modification of a written contract is involved, appellant maintains that Sec. 1698 of the Civil Code applies. That section provides that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." It is obvious that the motel job was not completed on February 29, 1952, when appellant's and respondent's association ended. In D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946, it was held that where there was consideration for an oral modification of a written contract, it need not be fully executed by both parties to comply with Sec. 1698, Civil Code; it is sufficient if full performance has been rendered by the party relying on the oral agreement. Respondent also relies on this case in support of his position. It appears that as to the Navy job and the Simon Apartments project full performance was rendered by respondent since there is evidence to support a finding that work was completed on them in February of 1952. There is no evidence to support the finding that the agreement had been executed in regard to the motel project which was not completed until September, 1952.

[2, 3] Respondent contends also that appellant is now estopped from asserting that he did not incur liability over and above $100 per week because no additional amount was agreed to in writing. As appellant notes, however, the trial court has made no finding on waiver or estoppel, and no estoppel was pleaded by respondent. Respondent cannot shift to a new theory on appeal. Graddon v. Knight, 99 Cal.App. 2d 700, 704–705, 222 P.2d 329. In A. Farnell Blair Co. v. Hollywood State Bank, 102 Cal.App.2d 418, 227 P.2d 529, 538, it is said that "Unless the several elements of estoppel are established by unconflicting evidence or by findings of a trial court the rule cannot be applied on appeal." In the instant case, appellant's testimony conflicts with respondent's as to the extension of the 1951 arrangement into 1952. See, also, Bruner v. Van's Markets, 103 Cal. App.2d 135, 142, 229 P.2d 56.

[4, 5] We are satisfied that the findings of the trial court are supported by the evidence on the theory of an executed oral modification of paragraph (4) of the contract in respect to the profits from the Navy and Simon Apartment House projects.

The finding of the trial court with respect to the motel project does not find support in the evidence in that no executed oral agreement was proved with respect to that job. The evidence discloses that the motel job was not completed until September 1952; respondent was employed in part of an office manager and quit his job with appellant in February of 1952, hence with respect to the motel job full performance on the part of respondent was lacking and the oral agreement in so far as it covered the motel job was not executed.

Judgment reversed with directions to the trial court to modify, amend and recalculate the amount of the judgment in accordance with the views herein set forth, and then enter said judgment as amended and modified.

NOURSE, P. J., and DOOLING, J., concur.

LONG et al.

v.

CALIFORNIA-WESTERN STATES LIFE INS. CO. *

Civ. 19755.

District Court of Appeal, Second District, Division 3, California.

June 24, 1954.

Rehearing Denied July 14, 1954.

Hearing Granted Aug. 19, 1954.

Action on three life policies issued by defendant. The Superior Court, San Luis Obispo County, Henry G. Jorgensen, J., assigned, entered judgment from which the plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that admission of evidence of threat of suicide by insured made three years before his death, even if error, did not constitute reversible error, in view of record showing that decisive issue was place of entrance into head of insured of bullet which caused his death.

Judgments and orders affirmed.

1. Evidence ⇨581

In action on three life policies, where in payment of two and double indemnity on third was resisted on theory that insured had committed suicide, record warranted conclusion that testimony of two witnesses, given at former trial and read because of their absence, was not prejudicial to plaintiff, with result that reading of such testimony was not error on ground of insufficiency of showing that either witness was out of the jurisdiction. Code Civ.Proc. § 1870, subd. 8.

2. Insurance ⇨659(2)

Where payment of life policies is resisted on ground that insured committed suicide, the question of remoteness of a threat by insured of suicide is not for the jury, but it is duty of court to exclude offered evidence if the lapse of time or change of circumstances has precluded the threat from bearing any reasonable relation to the issue of suicide, with the question of remoteness being decided on the facts of the particular case.

3. Evidence ⇨145

The reason for excluding evidence upon ground of remoteness is that it would not logically tend to prove a fact in issue, and should therefore be removed from consideration by court or jury.

4. Appeal and Error ⇨1052(7)

In action on there life policies, wherein payment of two and double indemnity on third was resisted on theory that insured had committed suicide, admission of evidence as to a threat of suicide made by the insured some three years before his death, even if error because of remoteness, did not constitute reversible error in view of the other evidence in the record making the decisive issue as to suicide the place of entry of bullet in head of insured.

5. Witnesses ⇨280

In action on three life policies, wherein payment of two and double indemnity on third was resisted on theory that insured had committed suicide, limitation of cross-examination of witness of defendant by sustaining objection to question whether witness had stated in conversation with plaintiff that witness was of opinion that insured had not committed suicide, did not constitute error.

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* Subsequent opinion 279 P.2d 43.

6. Evidence ⚷557

Experiments which can be made without special knowledge or training and which are largely based upon speculation are not a proper subject of expert testimony.

7. Evidence ⚷557

In action on life policies, wherein payment of two and double indemnity on third was resisted on theory that insured had committed suicide, and plaintiff contended that death by shooting had resulted when insured tripped, rejection of testimony of a ballistics expert as to tripping and falling tests made by him to determine how he could produce wounds such as those inflicted upon insured, did not constitute error, since tests were not proper subject for expert testimony.

8. Insurance ⚷669(11, 12)

In action on life policies wherein payment of two and double indemnity on third was resisted on theory that insured had committed suicide, it was not error to instruct jury as to pertinent provisions of the insurance contracts and that if jury found by preponderance of evidence, and was satisfied from evidence that insured committed suicide, they must find for defendant.

9. Appeal and Error ⚷1078(1)

Grounds of appeal not mentioned in briefs would be deemed to have been abandoned by appellants.

◆

T. R. Claflin, Bakersfield, Renetzky & Davis, San Luis Obispo, for appellants.

A. H. Brazil, San Luis Obispo, for respondent.

SHINN, Presiding Justice.

Clarence R. Long, who departed this life July 7, 1949 held three life insurance policies issued by California-Western States Life Insurance Company. One of the policies was issued May 2, 1941 and provided for payment of double indemnity if death resulted from an accident. The other policies were issued January 22, 1948, had a two year incontestable clause, and for that period did not insure against self-destruction. The company paid the primary amount of the 1941 policy but refused payment of double indemnity under that policy and any payment under the 1948 policies, contending that Mr. Long had taken his own life. This action on the policies is by the surviving wife and children. They appeal from a judgment on verdict in favor of defendant.

Upon a former trial verdict and judgment were in favor of plaintiffs; a new trial was granted, plaintiffs appealed and we affirmed the order, holding only that there was evidence which would have justified a verdict for defendant. Long v. California-Western States Life Ins. Co., 111 Cal.App.2d 254, 244 P.2d 488.

It is contended that the court erred in the following particulars: (1) In permitting the reading of the testimony of Katherine Ross and John Ross given in the former trial; (2) in admitting evidence of a threat of suicide by Mr. Long made three years before his death; (3) in refusing to admit evidence of prior accidents suffered by deceased; (4) in limiting the cross-examination of defendant's witness, Charles Long; (5) in refusing expert testimony of a ballistics expert and (6) in instructing the jury.

Mr. Long was a successful rancher in San Luis Obispo County. He was a robust man, in good health. He had two daughters by a former wife and two sons by plaintiff (now Pearl K. Schinbine), to whom he had been married eleven years. The evening before his death Mr. and Mrs. Long and the two boys had dinner at a restaurant with a Mr. Augustus and his son. It was a pleasant occasion, with some moderate drinking, and the Longs departed for home about 1 a. m. First Mrs. Long drove, but upon Mr. Long's request she surrendered the driving to him and he drove well. Mr. Long had arranged to meet Mr. Augustus the following morning at 7:30, having promised Mr. Augustus' son a ride on a harvester. When the Longs arrived home the girls, who lived with them, were in bed. Mr. Long went to bed. Mrs. Long put the boys to bed and went into the bedroom of herself and Mr. Long. Mr. Long desired to have sexual relations, which Mrs. Long refused. She took some bedding and went into the living room to sleep on a couch. The dogs barked. Mr. Long arose and went into the living room, some words were spoken, to be mentioned later. Mr. Long went outside, a shot was heard, Mrs. Long arose and went outside. She found Mr. Long lying in the front yard, barefoot and undressed except for shorts and undershirt. The girls ran out and called the farm hand, Ford. Mr. Long was lying face down. They turned him over; his hands were under his chest; he held his Luger pistol in his right hand. He was dead. Dr. Bossert, a physician who was called to the ranch early on the morning of the death testified that he found one bullet hole in the forehead and one above the right ear; that there were what appeared to be powder marks around the wound in the forehead. Martin Kuehl, a mortician, testified that he observed a bullet hole in the forehead and another in the location of the right ear. The one in the forehead had a darkened area around it, toward the center, and the surrounding tissue was slightly speckled, having the appearance of powder marks.

Mr. Pearl Long Schinbine (she had married Mr. Schinbine four months after the death of Mr. Long), testified as follows: On returning from the restaurant in the early morning of June 7th she put the boys to bed, went into the bedroom, Mr. Long wanted to have intercourse, she refused, he said she was a hell of a wife, she replied she thought she was a good wife, she went into the living room with bed clothing and the alarm clock, some time later Mr. Long came into the room, said something about bothering her, went out and shortly afterwards she heard the shot. She ran out, Jo Ann, a daughter, came out and went for Ford; Mrs. Long saw the wound in the temple and could think of nothing except that Mr. Long had shot himself. She cried out "Oh, Busty, why did you do this to me." Thereafter, she gave expression to exclamations which indicated that she believed he had committed suicide and stated that he had "no rhyme or reason" for doing so.

It was the theory of plaintiffs that Mr. Long stumbled over a chair or tripped on a string and fell and that the bullet entered his forehead. Several witnesses testified that after the shooting they found a chair overturned in the vicinity of where he fell and a string fastened to a post and the leg of a chair, and there was testimony that one of the small boys had put the string there. Other witnesses testified they saw no string.

Two physicians, Doctors Hall and Huntington, called by defendant, testified that with autopsy surgeon Dr. Newbarr they had examined the body, which had been exhumed three and a half years after death; that it was their opinion that the bullet had entered in front of the right ear although if there were powder marks on the forehead they would indicate that the point of entrance was the forehead wound. Dr. Hall testified that the forehead wound measured 1 x ⅝ inches; was in the midline of the forehead, 2 inches below the top of the head, and 1¾ inches above the ridge above the eye. The other wound measured 9/16 x 5/16 inches. It was 4 inches below the top of the head, 1¾ inches above the opening of the ear and 1½ inches in front of it. Dr. Hall expressed the opinion that the entrance hole caused by a bullet would be smaller than the exit hole. Dr. Huntington testified that in the forehead wound a piece of bone appeared to have been driven outward into the subcutaneous tissue. To the best of his recollection, and as shown by his notes, this wound was beveled outward, the outside being wider than the inside, and there was some bone missing. The bones at the temporal wound gave the impression of being bent inward. There were numerous fractures of the skull, a "burst effect." The right temporal region was shattered. He expressed the opinion that the point of entrance was the wound in front of the ear. At the time of the autopsy the hair in the region of the temporal wound came off at touch and the doctors made no examination of it for burning or charring.

Mr. Uhde, a ballistics expert of the Los Angeles Police Department, testified on behalf of plaintiffs. He had made tests with decedent's gun for powder marks. The pieces of blotting paper used were introduced in evidence. With the gun one inch away there is a deposit of soot and outside of that a shadow ring almost an inch and a half in diameter; 2 inches away a sooting and some tatooing (powder marks); 3 inches away less sooting and more tatooing;

6 inches away very little sooting and considerable tatooing; 12 inches away no sooting and just a little tatooing. A question was asked whether the witness had made tests relating to powder marks and whether the presence of powder marks at a wound would indicate it was an entrance wound. Defendant's objection was sustained upon the ground that the results of the autopsy had not been shown.

Defendant produced a Mr. Harper, who testified that he was an expert in physics "one of the branches of science dealing with mechanics and the properties of matter." He had made a study of the properties of firearms. He testified that the gun in question had a normal 7 pound pull; when cocked it would not discharge when struck with a heavy mallet; it would not fire unless the safety was released; when a bullet passes through the skull bone the hole is beveled—the exit side is larger than the entrance side. He also gave it as his opinion that when the gun is fired, in contact with the head, there is no speckling or powder pattern; in this situation the entrance wound will frequently be larger than the exit, due to the entrance of the gasses into the fracture. Very frequently you will find excessive fracturing at the site of an entrance wound of contact, where it is backed up by bone. If the muzzle is several inches from the head you may have simple fracturing there, but nothing extensive. The witness also gave it as his opinion that if the forehead wound was larger than the exit wound because it was a contact wound there would have been no speckling; if there was speckling there would have been no contact at the time of the explosion. If there was speckling the gun could have been 2 or more inches away—not more than 24 inches; it is rather rare to have the entrance hole larger than the bullet. If the bone at the temporal wound was driven inward and the bone at the forehead wound was beveled outward, with some bone missing, it would indicate that the temporal wound was the point of entrance. When a person falls the normal movement is to throw down the hands to break the fall. In his cross-examination he testified that if a gun was in the hand it might possibly turn over if it hit the ground; the butt being square, it might not rock or turn away; the finger would have a tendency to press upon the trigger.

[1] Error is assigned in the overruling of plaintiffs' objection to the reading of the testimony of Katherine Ross and that of Don Ross given at the first trial. The ground of the objection was that there was insufficient showing that either Mr. or Mrs. Ross was out of the jurisdiction. Code Civ. Proc. § 1870, subd. 8. Mr. Brazil, attorney for defendant testified that a subpoena for the witnesses had been returned by the constable unserved, and that he had been informed by an attorney in Paso Robles that Mrs. Ross was living in Santa Cruz, California, and Mr. Ross in The Dalles, Oregon. Defendant does not defend the ruling as it related to the testimony of Mrs. Ross, claiming only the objection was waived. The record does not bear out this claim. Upon the other hand plaintiffs do not set out any of the testimony of Mrs. Ross nor attempt to show that it was harmful. We have read her testimony. She testified that she was called to the Long residence the morning of Mr. Long's death; she did not remember Mrs. Long mentioning the string tied to the chair; that as nearly as she could remember Mrs. Long said that Mr. Long had said the night before that he would not bother her any more and she thought he meant that he was going back to bed. She also testified that she, Mrs. Ross, after a discussion with Mrs. Long, was able to arrange for the local newspaper to report Mr. Long's death as an accident. If it be granted that Mrs. Ross was not shown to have been out of the jurisdiction or unable to testify in person, we find no reason for holding that the ruling resulted in prejudice to plaintiffs' case. The explanation of Mrs. Long as to her understanding of the statement of Mr. Long about bothering her or not bothering her was not at all unfavorable to plaintiffs.

Mr. Ross testified that Mrs. Long told him and Deputy Sheriff Calvert that Mr. Long said "All right, that's the last time I'll bother you", and that she thought he meant that he was going back to bed. He also testified that shortly before the first trial he asked Mrs. Long what she thought of her prospects of winning and that she said she thought she would win if he, Ross, did not do her too much damage. There was no explanation as to what she meant nor any intimation that she asked Ross to favor her in his testimony. The objection to the reading of the testimony of Mr. Ross was technical. In the absence of any suggestion that the information as to the absence of Mr. Ross was unreliable there was no abuse of discretion in overruling the objection.

As previously stated, it was plaintiffs' theory that Mr. Long suffered the forehead wound when he fell. Defendant's theory was that the bullet entered near the right ear, which, of course, would have been more consistent with suicide than with an accident. As mentioned above, two disinterested witnesses testified to the presence of powder marks at the forehead wound and to a dark surrounding area, both of which would unmistakably identify this wound as the point of entrance. The most potent evidence tending to prove suicide was that given by the witnesses who made an examination of the body some three years after burial. At the first trial, in the absence of such evidence, a jury decided against the suicide theory, and, as previously mentioned, the court granted defendant a new trial. Doctors Hall and Huntington, who were of the opinion that the bullet had entered the temple, made only a superficial examination. They merely looked at the wounds and measured them on the exterior. The court had ordered exhumation of the body on defendant's motion but had limited the examination to the exterior of the body. Both doctors testified that they had court authority to make only a superficial examination, which may account for their failure to be more thorough. They made no examination of the temporal wound for powder marks or scorching of the hair, or what remained of it. While they did not notice powder marks at the forehead wound it does not appear that they looked carefully. There was no attempt made at chemical analysis for the purpose of ascertaining whether powder had entered either wound, nor was there evidence whether powder marks would have been discoverable after such a length of time. The body was badly decomposed and moldy. Although the doctors described what they saw they made no microscopic examination and took no measurements to ascertain to a certainty whether the bone was beveled at either wound. They did not examine the temporal wound to determine whether bone was missing, nor did they determine whether bone fragments had been driven into either wound. They are not subject to criticism for the incomplete and unscientific examination which they made. They believed they were limited by the court order. It may be that the autopsy surgeon, Dr. Newbarr, made a more thorough examination, but he was not called as a witness and his report was not in evidence.

In the cross-examination of Mrs. Schinbine she was asked whether after the funeral she had not told Mr. Long's sister, Edith, that Mr. Long said he was going to kill himself, which she denied. She said she could not recall having made that statement to Edith because she did not remember Mr. Long ever having threatened to kill himself. The court asked "You say you never heard your husband ever say he was going to commit suicide at any time?" and she answered "I never did." Questioned further whether Mr. Long had threatened suicide some three years before, Mrs. Schinbine recounted an incident when Mr. Long had traded a truck for an army ambulance, a transaction which drove her to tears. The court questioned "Well, did he say anything about committing suicide then?" and she answered "No." Upon further cross-examination she testified she did not remember an occasion when Mr. Long waved a gun around. She denied that he attempted to take his life or that she abused him or called him stupid; also testified that his brother George did not take a gun from him. She was asked whether Mr. Long had threatened suicide on more than one occasion and denied that he had. George Long, one of decedent's brothers, testified over plaintiffs' objection that in 1946, late at night, at the Clarence Long home in Bakersfield, Clarence came out of the house with his wife; they seemed to be having an argument, Clarence had a revolver in his hand; he talked of committing suicide, he was very drunk; George got the gun from him and put him to bed. In overruling plaintiffs' objection the court said, in part: "But it's certainly admissible on the question of the state of mind, and to show the state of mind of this man on this evening, to show his disposition and the attitude of the parties toward each other. Its remoteness is a question for the jury." Defendant does not undertake to defend the ruling upon that ground. The evidence was not introduced, defendant says, to prove Mr. Long's disposition, or state of mind, but only to impeach the testimony of Mrs. Schinbine that there had been no serious quarrels and that her husband had not threatened suicide. This explanation is not borne out by the record. Before the testimony as to the threatened suicide was introduced defendant made an offer of proof that Mr. and Mrs. Long had quarreled over an exchange of motor vehicles Mr. Long had made at that time; he "attempted to commit suicide", and that George Long took a gun away from him. Had it been the intention of defendant to prove merely that there had been a serious quarrel in 1946, which is now claimed to have been the purpose, the offer of proof would have been limited accordingly and the testimony would have been confined to that fact. The avowed purpose was to prove the threat of suicide, which defendant's counsel in his offer of proof designated an attempt at suicide. No question is raised as to the evidence that was introduced respecting the previous alleged quarrel itself, apart from the claimed threat of suicide.

Evidence of threats of suicide by the deceased has been held admissible in prosecutions for murder, People v. Wilson, 14 Cal. App. 515, 112 P. 579; People v. Selby, 198 Cal. 426, 245 P. 426; People v. Tugwell, 28 Cal.App. 348, 152 P. 740; it has been received as a part of the *res gestae* in a suit on an insurance policy where the declaration was made at the time of the disappearance of the deceased, Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 P. 348, and has been denied admission in an action on an insurance policy where the alleged declarations were made an indefinite number of days before the death. Jenkin v. Pacific etc. Ins. Co., 131 Cal. 121, 63 P. 180.

[2-4] Plaintiffs rely upon the Jenkin case and the well reasoned case of Hale v. Life Indemnity & Investment Co., 65 Minn. 548, 68 N.W. 182. In the former case it was not shown when the threats were made and the court held the alleged statements to be hearsay and inadmissible as against the beneficiary and her assignee. In the latter case evidence of threats of suicide made two years before the death was rejected and the ruling was upheld. The court stated, 68 N.W. at page 183: "The declarations must, in order to be admissible in evidence, bear a reasonably close relation, in point of time, to the alleged act. The reason for the rule suggests and enforces the necessity of this relation between the declaration of the party, and the doing of the alleged act by him. They must be so near in point of time as to justify a reasonable probability, in connection with the other evidence in the case, that the party in fact carried his declared intention into execution." In the leading case of Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961, 24 L.R.A. 235, a murder case, which held it was reversible error to exclude evidence of a threat of the deceased to drown herself because of her pregnancy the court emphasized the fact that the threat was made the day before her death by drowning. The court stated, 31 N.E. at page 962: "When evidence of declarations of any person is offered for the purpose of showing the state of mind or intention of that person at the time the declarations were made, the declarations undoubtedly 'may be so remote in point of time, or so altered in import by subsequent change in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge.'" The Trefethen case was cited with approval in People v. Tugwell, 28 Cal. App. 348, 152 P. 740, supra. The court also approved the holding in People v. Wilson, 14 Cal.App. 515, 112 P. 579, supra, that in a prosecution for murder the court should be liberal in receiving evidence that "might in any way aid the jury in determining who caused the death of the deceased." The

reasoning of these cases implies that in a prosecution for murder the court should not exclude evidence of threats of suicide by the deceased upon the ground of remoteness. Upon the other hand extensive research has not disclosed a case in which a single threat of suicide has been given in evidence where the threat was made several years before death and the conditions which induced it were not shown to be of a continuing nature, or to have had existence at or about the time of the death. We do not subscribe to the statement of the trial court that the question of remoteness was for the jury. It is unquestionably the duty of the court to exclude offered evidence of acts or declarations so removed by lapse of time or by change of circumstances as to bear no reasonable relation to a fact in issue, but this is a question for decision on the facts of the particular case. If it were an important question in the present case much authority could be cited to the proposition that the remoteness of the claimed suicide incident would have been a sound reason for rejecting the questioned testimony of George Long. The Jenkin case would be one such authority. But the argument of remoteness urged by plaintiffs for rejection of the testimony tends to defeat their contention that the evidence was prejudicial. The reason for excluding evidence upon the ground of remoteness is that it would not logically tend to prove a fact in issue, and should therefore be removed from consideration by the court or jury. If it is erroneously admitted it does not, of course, follow from the mere fact of its remoteness that the jury may not be improperly influenced by it. However, in the present case, we are satisfied that there is no reason to believe that the verdict of the jury was influenced by the evidence of the threat of suicide made three years before Mr. Long's death. Being convinced that the evidence was not harmful to plaintiffs to an extent that would warrant a reversal of the judgment we refrain from deciding whether its admission was error. The vague exclamations of Mr. Long respecting suicide were allegedly made following a violent quarrel with his wife and while he was very drunk. There was no evidence that he attempted suicide or that George had any difficulty in obtaining possession of the gun and putting Clarence to bed. There was no evidence that Mr. Long was under the influence of liquor on the night of his death. The evidence was to the contrary. The argument which took place seems to have been of trivial importance. Some three years had elapsed, during which there had been no threat of suicide. The impulse evidenced by the former statement and the circumstances which induced it had not reoccurred. The threat, if it was a threat, was no more than an impulsive one made without any attempt to put it into execution. Mr. Long was shown to have been in good health, of jovial disposition and prosperous. There was much evidence that he and Mrs. Long led a happy married life, and slight evidence to the contrary. There was evidence that Mr. Long had made plans for the following day. This evidence, of course, did not eliminate the possibility that upon slight, or no provocation, and upon sudden impulse, he took his own life.

There are even more forceful reasons for our holding that the alleged threat of suicide could not have influenced the verdict. The potent evidence which determined whether Mr. Long's death was suicidal or accidental consisted of the physical conditions which were described by the witnesses, namely the location and appearance of the two bullet holes. The only evidence that the point of entrance of the bullet was in the forehead consisted of the testimony of Dr. Bossert that there was speckling resembling powder marks around the wound and the testimony of Mr. Kuehl that there was such speckling, and also a dark area around the wound. If this condition existed there could be no doubt that the bullet entered the forehead. Nor could there be much doubt that such a wound was received when Mr. Long fell. It would be unreasonable to believe that a right-handed man would intentionally fire a shot into his forehead that would emerge above and in front of the right ear. It would be next to impossible. There was no difference of opinion on that point. Diametrically opposed to the evidence as to the existence of powder marks on the forehead was the evidence of Doctors Hall and Huntington which we have related. If the bone structure at the wound in the temple was pressed inward and beveled as described, if there was bone missing at the forehead wound, which was the larger, and a piece of bone forced outward, and if the bone there was beveled so that the outer surface was larger than the inner, the wound in the temple was undoubtedly the point of entrance of the bullet. Moreover, there was evidence that the forehead wound would have been larger than the other only in case the gun was held in contact with the forehead, and the surrounding surface would not have been powder marked. These conflicting conditions described by the witnesses were irreconcilable. The issue was sharply defined. All other circumstances were of comparatively slight importance and but remotely corroborative of the evidence of the physical facts. The jury was compelled to find that there were or were not powder marks on the forehead, and that there were or were not the beveling of bone and the other conditions described by Doctors Hall and Huntington. A finding of the existence of powder marks on the forehead would have been conclusive, under the theories of the parties, and would have resulted in a verdict for plaintiffs. The contrary verdict inevitably means that the jury found there were no powder marks. The verdict was therefore necessarily based upon the physical evidence which tended to establish the wound in the temple as the point of entrance. We think it will be clear from our discussion that all the other evidence in the case would have been of no substantial assistance to the jury in determining whether the bullet entered the forehead or at the temple. This was the entire case. The verdict necessarily implies that in the minds of the jurors the evidence relating to the condition of the head given by the doctors, and the fact that the forehead wound was larger than the other, outweighed the evidence of the existence of a darkened area and powder marks on the forehead. In resolving this conflict any evidence of a previous threat of suicide would have been irrelevant, and could not with any reason have been taken into account by the jurors.

[5] We find no error in the limitation of the cross-examination of defendant's witness Charles Long, consisting of sustaining defendant's objection to a question whether in a conversation with Mrs. Long he had not expressed the opinion that Mr. Long had not committed suicide.

[6, 7] The witness Uhde, previously mentioned, was recalled by plaintiffs. He was questioned whether he had made tests by tripping and falling to determine how he could produce wounds such as those inflicted upon Mr. Long. Defendant objected, one ground of the objection being that the tests were not conducted on the Long ranch. The objection was sustained, apparently upon the ground that it was not a proper subject of expert testimony. Plaintiffs offered to prove that the witness "* * * conducted 30 to 45 tests of tripping and falling, and that the tests demonstrate that the entrance wound of the bullet would be in the forehead, and the exit wound would be in the temple * * *." It was stipulated that plaintiffs' offer of proof was sufficient. The court ruled against any testimony "regarding experiments where he tripped." The ruling was not erroneous. Experiments which can be made without special knowledge or training and which are largely based upon speculation are not a proper subject of expert testimony. If the purpose was to prove that the witness in tripping and falling 30 to 45 times with a loaded gun in his hand and his finger upon the trigger would have been more likely to shoot himself in the forehead than above the ear his opinion to that effect would have been mere speculation and no evidence whatever as to the manner in which Mr. Long met his death. As previously mentioned, Mr. Harper testified on cross-examination that a man holding a pistol might fall so that it would strike the ground butt first and remain pointed toward him; the fall would have a tendency to press the finger on the trigger. We think nothing more than this could have been developed

through the witness Uhde, and that the testimony as to his experiments in falling was properly excluded. It was not error to exclude evidence that Mr. Long had had previous accidents through carelessness in handling a gun. There were no facts in evidence which indicated that the gun was discharged as a result of his carelessness in handling it.

[8] It was not error to instruct the jury as to the pertinent provisions of the insurance contracts and that if the jury found "by a preponderance of the evidence", and was satisfied from the evidence that Mr. Long committed suicide, they must find for the defendant.

Although, as we have pointed out, there was a failure to employ the available scientific methods of examination for the discovery of conditions which would have determined with certainty at which point the bullet entered, that failure was not due to any error of the court at the trial. There was a great deal of evidence which was of trivial importance as compared with the conflicting evidence respecting the conditions of the bullet holes. Plaintiffs' case was lost because the jury was not convinced there were powder marks and a darkened area around the wound in the forehead. There were no rulings of the court which could have influenced the jury in weighing the reliability of the testimony that such marks existed and the opposing evidence. There is no reason for holding that the judgment amounts to a miscarriage of justice.

[9] The appeal was taken also from an order denying plaintiffs' motion to strike the judgment and enter a new judgment and from an order taxing costs. Appellants do not mention these grounds of appeal in their briefs and they will be deemed to have been abandoned.

The judgment and the orders appealed from are affirmed.

WOOD, J., concurs.

LIPPMAN
v.
SEARS ROEBUCK & CO. *
Civ. 19983.

District Court of Appeal, Second District,
Division 1, California.
June 28, 1954.

Hearing Granted Aug. 26, 1954.

Action on lease calling for base rental plus percentage of annual sales as rental. The Superior Court of Los Angeles County, Jesse J. Frampton, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Mosk, J. pro tem, held, inter alia, that when lease purported to be complete upon its face, admission of evidence regarding negotiations between the parties leading up to execution of the lease, was violative of the parol evidence rule, but in any event, lease was not violated when lessee used premises for storage purposes, in accordance with an authorization contained in the lease.

Judgment reversed.

1. Contracts ⟹143

In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, and not to insert what has been omitted, or to omit what has been inserted.

2. Evidence ⟹397(2)

Where an agreement purports on its face to be a complete expression of the whole agreement of the parties, parol evidence ordinarily cannot be admitted to add another term, even though the writing contains nothing on the particular matter to which the parol evidence is directed. Code Civ.Proc. § 1858.

3. Evidence ⟹397(1)

Where a written instrument on its face bears an ambiguity or uncertainty, then testimony may be permitted to relate the circumstances under which the document was executed, in order to enable the trier of fact to ascertain the intent of the parties at the moment of the meeting of the minds.

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* Vacated 280 P.2d 775.

4. Appeal and Error 🔑842(1)

In construing a contract, the question as to whether an uncertainty or ambiguity exists is one of law, and the lower court's finding on such issue is not binding on appeal.

5. Evidence 🔑384

The parol evidence rule is not a rule of evidence, but declares that certain kinds of fact are legally ineffective in the substantive law, and thus the admission of parol is not discretionary with the trial court.

6. Contracts 🔑143

Courts cannot, under the guise of construction or explanation, give a meaning to an instrument which is not found therein, but is based entirely upon direct evidence of intention independent of the instrument.

7. Landlord and Tenant 🔑37

An implication from a lease cannot rest solely upon an inference to be drawn from the facts surrounding the execution of the lease, but must have a basis in the lease itself.

8. Evidence 🔑393(1)

In action by lessor against lessee on written lease for rental due, evidence as to negotiations by the parties leading up to the execution of the lease was violative of the parol evidence rule, and its admission constituted error.

9. Landlord and Tenant 🔑134(2)

Where words used in a lease are merely descriptive of the character of the premises, although indicating a particular use, such words of description cannot ordinarily be construed as restrictions upon the lessee in his use of the property.

10. Contracts 🔑309(1)

The doctrine of "commercial frustration" with reference to a contract depends upon unanticipated circumstances or fortuitous, frustrating events rendering performance either impossible or extremely impracticable, and it does not extend to the deliberate creation of the circumstances by one of the contracting parties.

11. Landlord and Tenant 🔑134(1)

Generally, and apart from the question of liability for waste, a tenant is under no obligation, in absence of specific provision in lease therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that premises would be used for particular purpose to which they seemed to be adapted.

12. Landlord and Tenant 🔑110(1)

Failure to utilize the leased premises for all of the uses enumerated in the lease may not alone be construed to be an abandonment, but there must be an intention to abandon and the external act by which the intention is carried into effect.

13. Landlord and Tenant 🔑134(2)

Where doubt exists as to the meaning of lease restrictions on the use of property, such provisions are to be resolved in favor of the lessee and against the lessor, and where the restrictions relate to a commercial enterprise, the doubt must be resolved against the restrictions and in favor of the free exercise of the commercial enterprise.

14. Landlord and Tenant 🔑134(2)

Where uses authorized by lease were "for the sale and storage of general merchandise and for servicing automobiles, automobile tires, batteries and accessories", the utilization by the lessee of the premises for storage of merchandise, and the discontinuance of selling efforts, did not constitute a violation of the lease, even though the rental called for was a base plus percentage of annual sales.

15. Landlord and Tenant 🔑200.3

Where lease called for base rental and annual percentage of sales of merchandise on the premises, and premises were subsequently used for storage purposes only, and no expert testimony was offered as to adequacy of the base rental, adequacy was to be determined on the basis of intent of the parties, consisting of both the lessee and the lessor, and not merely the intent of the lessor.

16. Landlord and Tenant 🔑231(6)

In action on lease calling for base rental and percentage of annual sales authorized storage use as well as use of premises for merchandising, record warranted conclusion that the parties to the lease considered the stipulated minimum base rent to be in itself substantial, fair and adequate.

17. Contracts ⚿152

When a person takes part in a bilateral act such as a contract, he must accept a common standard, and cannot claim to enforce his individual standard of meaning as to the language employed in the agreement.

18. Landlord and Tenant ⚿37

A court cannot rewrite the provisions of a lease merely because one of the parties obtains and takes an advantage thereby, but remedy is available if lease is procured under material misrepresentations.

◆

John J. Wheeler, John J. McCue, Lewis Watnick, John L. Wheeler, Los Angeles, for appellant.

Mark L. Herron, Fred Horowitz, Alvin F. Howard, Los Angeles, for respondent.

MOSK, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff landlord against the defendant tenant for rental due pursuant to a lease.

The lease in question was executed by Lazard Lippman as lessor and Sears, Roebuck & Co., a New York corporation, as lessee, on December 13, 1940, to run from January 1, 1941 to December 31, 1950. It provided for a monthly rental in the sum of $285 plus 2½ per cent of the appellant company's annual sales of the first $163,200 in excess of $136,800, and 2 per cent of the remainder.

The lease further provided that the premises were "to be occupied for the sale and storage of general merchandise and for servicing automobiles, automobile tires, batteries and accessories." In the event the tenant assigned the lease or sublet all of the premises the monthly rent was to be equal to the average monthly rent paid during the preceding twelve months. In the event of abandonment of the premises the tenant was to pay the difference between the rent collected by the landlord upon reletting and the rent reserved.

The complaint alleged that the appellant ceased doing business on the premises on January 1, 1950, that the average rental for the preceding twelve months was $20,424.82, that only $3,400.08 was paid, leaving a balance due of $17,024.74.

The trial court found that the appellant ceased to occupy the premises for sales on November 1, 1949, that the sum of $3,420 was paid, leaving a balance due the respondent of $17,004.82.

It is significant that the respondent sued entirely in reliance upon the provisions of the lease. Neither reformation of the lease nor other equitable relief was sought.

Over objection of appellant, testimony was permitted regarding negotiations between the parties leading up to execution of the lease. Despite our ultimate conclusion that this evidence was inadmissible, we shall review it briefly.

In 1940 the appellant corporation (hereinafter sometimes referred to as Sears) was operating a store in a building owned by a Mrs. Russell in the city of San Fernando. The lease between appellant and Mrs. Russell called for a flat rental of $285 per month and in 1940 the lease had eight more years to run.

During that year the building was substantially destroyed by fire and since Mrs. Russell was not insured, she was either unable or unwilling to rebuild the structure. Shortly thereafter Samuel Edward Jones, for many years in charge of Sears' property department for the Pacific Coast, called respondent to his office and suggested that it might be profitable for him to purchase this property, construct a building and lease it to Sears. At this time respondent was leasing a building to Sears in El Centro and apparently their relationship was mutually satisfactory.

Pursuant to that suggestion respondent conducted negotiations with Mrs. Russell and ascertained costs for reconstructing the store. He testified he subsequently indicated to Jones that to undertake the proposition he would need a rental of $800 a month. There were further conversations relative to the amount of the rental, during which Jones stated the company would not pay that amount but would agree to a minimum guarantee of $285 against a percentage of sales. Mail order sales were to be excluded from the computation.

Thereafter plans and specifications for the building were prepared in Chicago by the construction department of Sears. The building was completed November 1, 1940, and Sears immediately occupied the premises with a retail store. The parties did not enter into the written lease until December 13, 1940; it was to become effective January 1, 1941, and to run until the end of 1950.

Respondent testified he paid $38,000 for the land and the building in its damaged condition, that it cost $8,000 to tear down and remove the structure and debris, that his cost of rebuilding, not including any sum for his own services as a contractor, was $29,255.82. Thus, excluding any consideration of respondent's time, overhead, interest and taxes during construction, he expended $75,255.82.

In 1945, Russell A. Veach, Jones' successor at Sears, requested the use of four lots which respondent had acquired near the San Fernando store. He declined to pay any rent therefor, maintaining that the use of the lots for parking facilities would increase the sales in the store and consequently the percentage return to respondent. The latter acquiesced.

During January of each year respondent received a statement showing the prior year's net sales made on the premises. For the calendar year preceding the one involved herein, Sears, under the terms of the lease, paid to respondent the minimum rental payment of $3,420 and additional rent in the sum of $17,424.82, upon net sales of $981,440.92.

On November 1, 1949, Sears ceased to transact sales on the leased premises and began business operations a block away from the premises involved herein. During the remaining fourteen months of the term Sears used the premises for the storage of general merchandise and during that period paid rent at the rate of $285 per month.

Upon expiration of the lease on December 31, 1950, Sears continued to occupy and use the premises for the storage of merchandise pursuant to a later agreement. During this period the agreed rental was $300 per month.

After discussions for the subsequent occupancy had been concluded, Veach requested of his staff preparation of a letter memorandum for respondent's signature. When prepared, this document contained language which could be construed to be a release by respondent of all claims he might have under the lease of December 13, 1940. Upon assurance of Veach that this letter, dated January 2, 1951, did not refer to rental claims under the prior lease but merely to eliminating the possibility of a percentage claim during the holdover period, the respondent signed the instrument.

Apparently this letter of January 2, 1951, was not produced at the trial for the purpose of urging seriously a waiver of any rights by respondent, but merely to indicate conduct of the parties.

The trial court found that the minimum monthly rental of $285 "was intended to be and was, in fact, a nominal rental and was not a substantial or adequate minimum rental." The court further found that the lease provided "In the event the defendant did not occupy said premises for the sale of general merchandise but used said premises for the storage of merchandise, it was to pay plaintiff a monthly rental equal to the average monthly rental it had paid for the twelve months immediately preceding the month in which it ceased to use said premises for the sale of merchandise."

The court further found that the letter of January 2, 1951, was not a complete satisfaction of the existing controversies between the parties.

The appellant has assigned as error each of the foregoing findings on the ground that they are not supported by the evidence and are contrary to law.

[1, 2] The trial court, over objection of appellant, permitted parol evidence to disclose negotiations precedent to the execution of the written lease. In this it fell into unfortunate error. For in the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. Code Civ.Proc. § 1858.

Morgan v. Green, 86 Cal.App. 216, at page 222, 260 P. 596, at page 598, succinctly relates the principle: "The rule is found in section 1856, Code of Civil Procedure, which declares that when the terms of an agreement have been reduced to writing it is presumed to embrace all the terms agreed upon. The decisions are all in harmony with the section of the Code running from Harrison v. McCormick, 89 Cal. 327, 330, 26 P. 830, 23 Am.St.Rep. 469, to Thoroman v. David, 199 Cal. 386, 390, 249 P. 513. We cannot improve upon the language of Thompson v. Libby, 34 Minn. [374,] 377, 26 N.W. 1, quoted in the Harrison Case and approved in the later decisions:

" 'If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.'

"Upon the theory first advanced by respondents that the evidence was admissible because the writing did not include all the terms agreed upon—the rule is uniform that evidence of such collateral agreements is admissible only when the circumstances attending the execution of the writing show that the parties did not intend it to be a complete and final statement of the whole transaction. 10 Cal.Juris. p. 927. The lease here does not come within this exception. It appears upon the face to be a complete statement of the undertakings of the respective parties without any uncertainty as to their respective legal obligations within the rule of Harrison v. McCormick, supra. Gardiner v. McDonogh, 147 Cal. 313, 319, 81 P. 964, and Germain Fruit Co. v. [J. K.] Armsby Co., 153 Cal. 585, 595, 96 P. 319."

[3] Of course, no rule is inviolately exempt from exception, and in this the parol evidence rule is itself no exception. Where the instrument on its face bears an ambiguity or uncertainty, then testimony may be permitted to relate the circumstances under which the document was executed. The purpose is to enable the trier of fact to fathom the intent of the parties, not at the present time, but at the moment of the meeting of the minds.

There are numerous cases illustrative of the foregoing, among them: Fleuti v. Appledorn, 86 Cal.App. 209, 260 P. 601; Petroleum Midway Co., Ltd. v. Moynier, 205 Cal. 733, 272 P. 740; Pierce v. Walter, 129 Cal.App. 228, 18 P.2d 345; Johnston v. Courtial, 216 Cal. 506, 14 P.2d 771.

A few jurisdictions permit parol evidence to indicate the intended use of premises when the lease is silent on the subject, Chamberlain v. Brown, 141 Iowa 540, 120 N.W. 334; Surface v. Brock, 142 Kan. 805, 51 P.2d 1005; Asa G. Candler, Inc., v. Georgia Theater Co., 148 Ga. 188, 96 S.E. 226, L.R.A.1918F, 389.

But the vast majority hold that where the lease does not restrict the use of the premises, it may not be shown that there was an oral understanding of restriction. Morgan v. Green, supra; Wetzler v. Patterson, 73 Cal.App. 527, 538, 238 P. 1077; Harrison v. Howe, 109 Mich. 476, 67 N.W. 527; Snead v. Tietjen, 3 Ariz. 195, 24 P. 324; Rickard v. Dana, 74 Vt. 74, 52 A. 113; Van Liew v. Mally, 198 Iowa 347, 197 N.W. 299; Fuller v. Caraway, 97 Okl. 110, 221 P. 79; Barnett v. Clark, 225 Mass. 185, 114 N.E. 317; Rockwell v. Eiler's Music House, 67 Wash. 478, 122 P. 12, 39 L.R.A., N.S., 894; Colonial Operating Corp. v. Hannan Sales & Service, 265 App.Div. 411, 39 N.Y.S.2d 217.

[4] On this appeal we are not prevented from inquiring into the propriety of the admission of parol. For it is well settled in construing a contract, the question as to whether an uncertainty or ambiguity exists is one of law, and the lower court's finding

on this issue is not binding on appeal. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13.

[5] The admission of parol is not discretionary with the trial court. For the parol evidence rule is in no sense a rule of evidence; it does not concern a probative mental process, but declares that certain kinds of fact are legally ineffective in the substantive law. Wigmore on Evidence, 3d Ed. § 2400.

In the instant case, respondent has called to our attention no ambiguous or uncertain language in the lease, and we have found none. What he has proposed is to provide omitted terms relating to the use and occupancy required of appellant, and rental to be exacted from it in the event of a breach.

Hoffman v. Seidman, 101 N.J.L. 106, 127 A. 199, at page 200, presents a markedly analogous situation, revealed in the following quotation: "the written lease was complete on its face, and oral testimony, either to contradict it or to supply terms with respect to which the writing was silent (as the testimony offered would have done), will not be permitted, in the absence of fraud or illegality. (Cases cited.)

"But the defendant argues that the phrase, 'nor use or permit any part thereof to be used for any other purpose than a dwelling and a hardware and paint store,' is ambiguous. We think it is not. We think it perfectly clear that the whole purpose of that clause was to exclude any other use, but to permit the uses mentioned, not necessarily conjunctively, but either of them or both, and at such times as the tenant sees fit to so use them, and that he was under no obligation to use the premises at all, or at any time to reside there, or at any time to keep a store there. The language used is restrictive, not mandatory. * * * Of course, it does not follow, because the parties used the conjunctive instead of the disjunctive, that they thereby rendered their lease ambiguous, and opened the door to oral testimony. When, as here, the meaning of the language of the lease is plain and unambiguous when read in connection with the context, parol evidence as to its meaning is not admissible."

[6] The words of caution expressed in Payne v. Commercial Nat. Bank, 177 Cal. 68, 72, 169 P. 1007, 1008, L.R.A.1918C, 328, must be heeded: "no authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that in the admission of extrinsic evidence the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, and not what was intended to be written."

[7] An implication cannot rest solely upon an inference to be drawn from the facts surrounding the execution of the lease. It must have a basis in the lease itself. Stockton Dry Goods Co. v. Girsh, 36 Cal.2d 677, 680, 227 P.2d 1, 22 A.L.R.2d 1460.

[8] By all of the foregoing tests, admission of parol evidence was erroneous in this case. That alone would suffice for a reversal of the judgment. Nevertheless several other issues earnestly raised by counsel merit our review.

As stated heretofore, the lease provided the premises were "to be occupied for the sale and storage of general merchandise and for servicing automobiles, automobile tires, batteries and accessories".

Although the specified uses are in the conjunctive, appellant maintains, first, that such provisions are permissive rather than restrictive, and that any lawful business may be conducted on the premises; or second, any one of the named uses, not necessarily all, would satisfy the requirement of occupancy.

On the other hand, the trial court found that the lease provided for Sears to use the premises for sales, or if it did not, then to pay a rental based on previous sales. We have searched the lease in vain for any such specific provision. Nevertheless, argues respondent in effect, even if one cannot put his finger on a numbered page and line of the lease, this is implied in the terms.

[9] Where words used in a lease are merely descriptive of the character of the premises, although indicating a particular use, the great weight of authority is to the effect that such words of description cannot be construed as restrictions upon the lessee in his use of the property. 148 A.L.R. 585. Security Trust, etc., Bank v. Claussen, 44 Cal.App. 735, 737, 187 P. 140, 141, goes even farther and holds "Defendant was not limited in the use thereof to conducting [the named] business, but might carry on any lawful business therein".

[10] Appellant has called our attention to the doctrine of "commercial frustration", enunciated in Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47, but that is not particularly helpful to its position. That rule depends upon unanticipated circumstances or fortuitous, frustrating events rendering performance either impossible or extremely impracticable. It cannot be extended to embrace deliberate creation of the circumstances by one of the contracting parties.

There are cases in many jurisdictions holding that where a particular use is specified, any other use may be enjoined. Weinkrantz v. Southwestern Life Ins. Co., Tex.Civ.App., 264 S.W. 550; Davis v. Des Moines & Ft. D. R. Co., 155 Iowa 51, 135 N.W. 356; Grinnell Bros. v. Asiuliewicz, 241 Mich. 186, 216 N.W. 388; Collins v. Truman, 223 Mo.App. 186, 14 S.W.2d 526.

However, 148 A.L.R. p. 591, notes that: "* * * there is an evident tendency against drawing too fine a line of distinction between the exact business enterprise specified and certain closely related uses which appear to be sanctioned by custom."

Though counsel has made a valiant effort to distinguish the case of Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 113 P.2d 878, it contains a set of facts not unlike the instant case, and it would appear to establish the controlling California rule. There was a term lease, providing for a minimum guaranteed rental plus a percentage of sales. The lessee vacated the premises and began operations in a new location approximately two months prior to expiration of the lease. Although the lease was silent on the subject, the trial court found an implied covenant requiring the lessee to remain in business on the premises. This judgment was reversed (hearing denied by the Supreme Court), the court succinctly concluding, 45 Cal.App.2d at page 149, 113 P.2d at page 882: "Summarized, therefore, the rules deducible from the foregoing authorities controlling the exercise of judicial authority to insert implied covenants may be stated as follows: (1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract. Keeping in mind the above rules, we find nothing in the language employed in either the original lease or the modification, nor in any of the circumstances attending the execution thereof, to support the conclusion that there was an implied covenant requiring defendant to remain in business in the demised premises until the expiration of the term. An examination of the amendatory agreement shows that its terms are clear, definite, and unambigous; that it was skillfully drawn, and executed only after full discussion and mature deliberation. * * *

"Nor is there anything in the nature of the transaction to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties, nor can it be supported on the grounds of legal necessity. On the contrary, as defendant argues, it would seem that the covenant to pay the minimum rental was inserted in the lease as a substitute for an express covenant requiring the continuous operation of the demised premises; that when the rental reserved in a lease is based upon a percentage of the gross receipts of the business, with a substantial adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease."

To the same effect is Foley v. Euless, 214 Cal. 506, 6 P.2d 956.

Sharpe v. Arabian American Oil Co., 111 Cal.App.2d 99, 244 P.2d 83, holds that if the parties have omitted from the agreement something that was so clearly a part of their understanding that the agreement would be unworkable without it, the missing stipulation will be implied as a part of the agreement. But, cautioned the court, 111 Cal.App.2d at page 102, 244 P.2d at page 85: "Nothing may be added by way of implication except that which is necessary to carry out the intentions of the parties, as derived from the agreement itself and not merely from the circumstances under which it was made."

The court in Cousins also cited the case of Jenkins v. Rose's 5, 10 and 25¢ Stores, 213 N.C. 606, 197 S.E. 174, which maintained that "Whether the defendant operated a store in the building or whether it operated one successfully was no concern of the plaintiffs unless and until there were sales made on the premises in excess of $48,000.00 during the rental year. If the defendant operated at a loss it must continue to pay the $200.00 per month. * * * 'it seems that the tenant is under no obligation, in the absence of specific provision therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that they would be used for the particular purpose to which they seemed to be adapted or constructed.' "

[11] Apart from the question of liability for waste, it seems that the tenant is under no obligation, in the absence of specific provision therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that they would be used for the particular purpose to which they seemed to be adapted or constructed. Goldberg v. Pearl, 306 Ill. 436, 138 N.E. 141. Moore v. Guardian Trust Co., 173 Mo. 218, 73 S.W. 143, 150.

In McCormick v. Stephany, 57 N.J.Eq. 257, 41 A. 840, 842, the court held, "The covenant is to be construed according to its terms, which are clear. They prohibit a different use, but they do not compel a continued use for the purpose named." So, also in Henry Rahr's Sons Co. v. Buckley, 159 Wis. 589, 150 N.W. 994, it was found that interruption in the use is not a breach of a covenant for a particular use where the premises are not put to other uses in the interim.

Decided to the contrary because of the waste and disrepair caused by abandonment of the premises was Asling v. McAllister-Fitzgerald Lumber Co., 120 Kan. 455, 244 P. 16, 20, 46 A.L.R. 1127. But the dissent in that case noted "If a tenant desires to keep buildings unemployed for the purpose for which they were erected, and to which they are adapted, that is his use of them. That use is a lawful use, and he is under no obligation to employ them in any other manner, in the absence of a covenant to do so inserted in the lease."

In many respects the factual situation, particularly with reference to the construction of a building, is comparable in Branhill Realty Co., v. Montgomery Ward & Co., 2 Cir., 60 F.2d 922, 923. The court held that "The plans and specifications of the proposed building also indicated that the premises the defendant proposed to lease were adapted for retail store purposes. All this goes only to corroborate the admitted intent of the defendant to make such use of the premises. But it did not bind itself so to do." The lease there provided for commercial purposes, etc., or any lawful purpose. The court said, 60 F.2d at page 923, it was not obligated to use the premises for a chain store, but "Either use would have satisfied its obligation under the proposed lease." To the same effect is Grace v. Croninger, 12 Cal.App.2d 603, 55 P.2d 940.

[12] Failure to utilize the premises for all of the uses enumerated in the lease may not be construed to be an abandonment. The primary elements of abandonment are the intention to abandon and the external act by which the intention is carried into effect. Pickens v. Johnson, 107 Cal.App.2d 778, 238 P.2d 40. An abandonment cannot be inferred unless non-use by the lessee is coupled with clearly shown intent to re-

linquish all rights in the premises. Swigert v. Stafford, 85 Cal.App.2d 469, 472, 193 P.2d 106. Adoption of one of several permitted uses is not consistent with an intent to relinquish all rights in the premises.

[13] The foregoing line of cases is buttressed by two general rules, both of which lend support to the appellant. The first is that where doubt exists as to the meaning of lease restrictions on the use of property, such provisions are to be resolved in favor of the lessee and against the lessor. Mutual Paper Co. v. Hoague-Sprague Corporation, 297 Mass. 294, 8 N.E.2d 802, 806; Otting v. Gradsky, 294 Ky. 779, 172 S.W.2d 554, 556, 148 A.L.R. 580. The second is that where doubt exists, it must be resolved against the restrictions and in favor of the free exercise of commercial enterprise. 148 A.L.R. at p. 588.

[14] Pursuant to the weight of authority, we conclude that the appellant was permitted to select any one or more of the several stated uses, or it could refrain from any of the uses, but it could not engage in any other or different use not enumerated. Since storage of merchandise, the purpose to which appellant devoted the premises, was described in the lease as an authorized use, appellant did not violate the terms of the lease.

Respondent has seized upon the words "with a substantial, adequate minimum", in Cousins and introduced evidence for the purpose of establishing that the sum of $285 was not substantial or adequate. The trial court found it was not, basing its finding primarily on a basis of return on investment.

[15] There are numerous objective standards which might be applied in ascertaining what is substantial and adequate. Since no expert testimony was offered on this subject, however, the significant element in this instance must be the intent of the parties. It is not the intent merely of the lessor that governs, but the combined intent of the lessor and the lessee. Marlin v. Robinson, 123 Cal.App. 373, 375, 11 P.2d 70.

Since adequacy became an issue, appellant offered in evidence the lease between appellant and respondent's predecessors. This offer was improperly rejected by the court. If not remote in time, prior rental for the same business at the same location would be some indication of present adequacy, the weight to be accorded such testimony being a matter for the trier of fact. The prior lease, running from February 1, 1939, to February 1, 1949, provided for rental at $285 per month with no additional percentage. That this was significant is indicated in the testimony of respondent's witness Jones, who admitted the minimum guarantee figure was obtained from the previous lease. Respondent points out that Jones testified "the sum arrived at of a minimum guarantee was a nominal sum to take care of fixed expenses, and that the profit on his investment would be arrived at through a percentage of sales."

There is nothing implicit in that testimony requiring a conclusion that the guaranteed rental was inadequate or insubstantial. "Fixed expenses" may be relatively substantial and in this instance, when they correspond exactly to the entire previous rental at the same location and are within $15 of the subsequent rental for the extended occupancy, they are in fact substantial. Nor is that minimum figure rendered less adequate because it may not include profit. Certainly there can be no assurance of profit to every investor or landlord. Indeed, that landlord who is contractually provided against loss, as the respondent herein, is in a fortunate economic position.

As stated in Brawley v. Crosby, etc., Foundation, Inc., 73 Cal.App.2d 103, 112, 166 P.2d 392, 397: "If the amount of the minimum royalties was not adequate, respondents should have so determined in their own minds before signing the contract, but having signed it, they must live up to the agreement. The law does not weigh the quantum of the consideration."

Masciotra v. Harlow, 105 Cal.App.2d 376, 233 P.2d 586, is another case in point. The court there specifically found, 105 Cal. App.2d 378, 233 P.2d at page 589, no implied covenant exists in percentage lease rentals "that lessee would, during the term of the lease, so conduct his business on plaintiff's premises as to make it mutually profitable to both parties".

[16] It must be concluded that the parties considered the stipulated minimum rent to be in itself substantial, fair and adequate.

Respondent discusses at length the terms of the lease with relation to subletting, and its effect on the parties. There was no subletting here. We fail to see any analogy between merely changing the nature of business oparations under the same management, and subletting the premises to an independent tenant. That the parties specifically protected the lessor in the eventuality of subletting does not supply by inference similar provisions under these incomparable circumstances.

In the instant case, there is nothing in the agreement itself that prohibits the lessee from using the premises merely for storing merchandise, nor is there anything specifying any different rental rate if it does so. If the lessor desired to protect himself against this possible change in circumstances, it was his duty to so stipulate in the contract, just as he did in the event of possible abandonment or sublease. Security Trust, etc., Bank v. Claussen, supra.

[17] When a person takes part in a bilateral act, a transaction in which other persons share, he must accept a common standard. He cannot claim to enforce his individual standard of meaning. Wigmore on Evidence, 3d Ed., § 2466. That common standard is the language employed in the instrument reduced to writing. The parties, having dealt on a basis of equality in its negotiation, are bound by its terms.

[18] Sears may have been somewhat shrewd and opportunistic in taking advantage of an omission in the provisions of the lease. But that conduct does not justify a court in rewriting the contract in a suit brought in reliance upon the instrument itself. As stated in Asling 244 P. at page 20, "If the lease were procured under material representations which have not been fulfilled, the law provides a remedy, but the remedy is not to manufacture out of whole cloth a covenant, and place it as a patch upon the lease." It should be noted that in colloquy with counsel, the learned trial judge suggested alternative remedies, but counsel failed to respond to an offered opportunity to amend his pleadings.

We conclude that under terms of the lease, appellant was not indebted to the respondent.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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NELSON v. MARKS et al.

Civ. 8345.

District Court of Appeal, Third District, California.

June 25, 1954.

Buyer of used tractor brought action against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor. The Superior Court of Stanislaus County, B. C. Hawkins, J., entered judgment adverse to seller, and seller appealed. The District Court of Appeal, Schottky, J., held that evidence sustained verdict for buyer.

Judgment affirmed.

1. Fraud ⚷58(2, 3, 4)

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, it was sufficient if evidence showed that seller made material representation regarding condition of tractor, that representation was false, that seller knew that it was untrue or did not have sufficient knowledge to warrant a belief that it was true, that representation was made with intention of inducing buyer to buy tractor, and that buyer believed representation and completed purchase in reliance thereon, suffering damage thereby.

2. Fraud ⚷58(1)

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, evidence sustained verdict for buyer.

3. Fraud ⚷23

Where buyer does not make an independent investigation or examination of property purchased, and falsity of representations by seller is not apparent from inspection of property, and seller has a superior knowledge or buyer is not competent to judge the facts without expert assistance, buyer is not precluded from relying on representations because of the fact that he makes an independent investigation or examination of the property.

4. Fraud ⚷57

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, evidence of the price paid by the seller for the tractor was a proper indicium of value for purpose of determining amount of damage suffered by the buyer. Civ.Code, § 3343.

5. Fraud ⚷62

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, evidence that tractor would have been worth at least $6,000 that buyer paid seller for it if representations of seller as to condition of tractor had been true, and that it was necessary for buyer to expend nearly $4,500 to put tractor in condition it was represented to be by seller, sustained verdict for buyer for $2,500. Civ.Code, § 3343.

6. Trial ⚷255(14)

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, court should have given instructions as to measure of damages, even though no instructions on damages were offered by counsel. Civ.Code, § 3343.

7. Appeal and Error ⚷216(1)

Where seller made no request for giving of instructions on measure of damages in action by buyer to recover damages for alleged fraudulent representations by seller as to condition of tractor sold by seller to buyer, seller could not complain on appeal because of failure of trial court to instruct on measure of damages. Civ.Code, § 3343.

8. Limitation of Actions ⚷100(6)

Where alleged fraudulent representations made by seller of used tractor to buyer were made in January 1947, but buyer did not discover defects and imperfections in tractor until after September 10, 1947, buyer's action against seller on September 5, 1950 to recover damages for alleged fraudulent representations was not barred by statute providing that an action for fraud must be brought within three years after discovery of facts constituting the fraud. Code Civ.Proc. § 338, subd. 4.

9. Trial ⚷255(14)

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, defense of laches was not available to seller, since the action was one at law.

10. Trial ⚷207

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, court did not err in admitting, as part of buyer's case, buyer's deposition, which had been taken by seller, without instructing jury that testimony therein could not be weighed against presumption of honesty and fair dealing on part of seller, since his deposition could be considered in determining the issues of the case though seller was not bound thereby. Code Civ.Proc. §§ 2022, 2055.

11. Trial ⚷296(2)

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, wherein instructions distinguishing between representations of fact and of opinion were given, giving of instruction which made no distinction between representations of fact and opinion was harmless.

12. Trial ⚿267(3)

In action by buyer of used tractor against seller to recover damages for alleged fraudulent representations by seller as to condition of tractor, wherein jury was fully, correctly and fairly instructed regarding presumption against fraud and in favor of fair dealing, court did not err in modifying seller's requested instruction that the presumption is always against fraud, "a presumption approximating in strength to that of innocence of crime," and it should not be deemed overcome, even prima facie, on any intangible or shadowy showing, by striking out the quoted phrase.

13. Trial ⚿260(1)

It is not error for court to refuse to give a requested instruction, if the full charge correctly states the substance of the law applicable to the facts involved in the case.

◆

Dinkelspiel & Dinkelspiel, San Francisco, for appellants.

Alfred Nelson, Piedmont, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against Howard E. Marks, Frank B. Marks, Sr., Frank B. Marks, Jr., and Roger Paul to recover damages for fraudulent representations, alleged to have been made by defendant Howard E. Marks and his agent, defendant Paul, in connection with the sale of a tractor purchased by plaintiff. Defendants filed an answer denying the material allegations of the complaint and also setting up defenses of laches and the statute of limitations. The case was tried by a jury and during the trial the action was dismissed as to defendants Frank B. Marks, Sr., and Frank B. Marks, Jr. The jury returned a verdict awarding damages in the sum of $2,500 against defendant Howard E. Marks, but found in favor of defendant Paul. Judgment was entered accordingly, and following the denial of his motion for a new trial defendant Howard E. Marks filed this appeal from said judgment.

Appellant makes four major contentions: (1) that the evidence is insufficient to support the verdict and judgment; (2) that the action is barred by the statute of limitations; (3) that the trial court committed prejudicial error in admitting respondent's deposition into evidence; and (4) that the trial court committed prejudicial error in giving certain instructions and in refusing to give another.

Appellant's first contention is that the evidence is insufficient to establish a cause of action for fraud and deceit. He states that the respondent had the burden of proving all of the elements necessary to support the judgment and cites the case of Hobart v. Hobart Estate Co., 26 Cal.2d 412 at page 422, 159 P.2d 958 at page 964, where the court said:

> "In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby. In determining the sufficiency of the evidence to meet these requirements we must, in view of the verdict, resolve all conflicts in plaintiff's favor and draw all permissible inferences necessary to support the judgment."

It appears from the record that respondent is a practicing attorney who also conducted some farming operations in the vicinity of Tracy, California. During the latter part of 1946, he wanted to purchase a used tractor, a heavy one, and he asked Roger Paul to be on the lookout for one. Paul was a mechanic and operated a repair shop near Tracy. Respondent had "a lot of confidence" in Paul and thought that he was a mechanic with extraordinary ability.

Appellant resided in Tracy and operated a small ranch nearby. He also was engaged in the quarry business. Appellant and his brother owned a D7 Caterpillar tractor, with a Le Tourneau power control unit, A-frame and bulldozer blade, and in December, 1946, appellant took the tractor to

Paul's shop to have the engine overhauled. Respondent first saw the tractor while it was in the shop. The engine had been taken out of the tractor and disassembled. Paul told respondent that the tractor was for sale and referred him to appellant. This was in December of 1946 or January of 1947. A few days later respondent went to see appellant about the tractor and they reached an agreement regarding the purchase and sale of the tractor and equipment in about ten days, after further negoations. This agreement was not reduced to writing. The selling price of the tractor and equipment was $6,000, which respondent paid over a period of months, making the last payment in August, 1947, and taking delivery of the tractor and equipment at that time. Respondent was also then given a bill of sale. During the negotiations for the purchase and sale, the tractor remained in Paul's shop.

There was a sharp conflict in the evidence as to what representations were made to respondent regarding the condition of the tractor. Respondent testified that during the negotiations:

(a) He asked appellant about the rear end of the tractor, including the transmission, final drives "and all that sort of thing," and that appellant told him that he had no cause to worry or be concerned about the transmission "or any of those things" because the transmission, steering clutches, final drives and the whole rear end had recently been checked over, overhauled and found to be in perfectly good condition and in good running order, and that when the engine was overhauled, the engine and all the rest of it would be in perfect shape;

(b) Appellant said that he had had the rear end of the "thing" all overhauled for his own use and had intended using it himself and was having the engine overhauled now, that he had an order for a new D7 Caterpillar and no use for two of them, but that if the new one was not forthcoming he was going to keep the old one and "use it right along," and that the machine "absolutely was for all practical purposes as good as new at the time and that is of that type and age";

(c) Appellant said "this tractor will go, you needn't worry about that";

(d) Appellant said that some of the top rollers were not in good shape and that he was renewing them (respondent admits that some new top rollers were furnished), and that when asked about the bottom rollers appellant said that they were all right and did not need renewing;

(e) Appellant said that he had been having some trouble with the engine, but that he was having it completely overhauled and when it was finished it would be in first-class condition;

(f) Appellant told him "flatly the thing [tractor] was in good shape";

(g) Appellant said that he was having the engine overhauled, and when asked how the transmission, final drive and rear end rollers were, appellant answered "that has been gone over recently; that is tiptop"; and

(h) Appellant said that the engine was the only thing that needed overhauling, that the rest "was practically perfect."

Respondent also testified that he told appellant about his need for a large tractor and the difficulty of getting a new engine at that time, and that if this engine were completely overhauled and in good shape he (respondent) did not mind its being old.

Appellant testified that he simply told respondent that the tractor was a "used working tractor," that to his (appellant's) knowledge "it was a working tractor," that he had used it personally on his ranch, land planing, and that the motor was using oil to the point where he felt that it should be reconditioned and that that was the reason it was in the repair shop. He denied that he made any other representations regarding the condition of the tractor. When asked whether respondent had said anything about Paul inspecting the tractor, appellant answered: "The only thing that was brought up was that Paul was working on the motor, that the tractor was available to look at, and to satisfy himself at the shop where the tractor was. It was free and clear there to stand all the inspection that he wanted to make on the tractor."

Respondent knew that he was getting an old machine. However, he testified that he did not make a careful inspection of any part of it because he was relying on what appellant told him concerning "the thing" and he felt justified in relying on that because he saw no reason to do otherwise and because it was corroborated by his old acquaintance, Mr. Paul. He admitted that he told appellant he would rely, to a large extent, on Paul's judgment concerning the condition of the tractor, but said he did not tell appellant that he was relying exclusively on what Paul said. And, although he testified that he was relying primarily on Paul's representation, which "was backed up by" appellant, and was relying on Paul for the final word, he also testified:

> "* * * when I did purchase the tractor from Mr. Marks I did rely implicitly and whole-heartedly in his assurance that that tractor, in every respect, was in good repair and that it had totally been overhauled, and the reliance, the complete reliance that I had his word at that time, as I told him, was because I trusted him and his word was corroborated by Mr. Paul, and I frankly told Mr. Marks at the time that I was entrusting him and placing that reliance on his word to a great extent because his worker, Mr. Paul, was a person in whom I had unlimited confidence with respect to the condition of tractor, and it was on that basis that I bought it and paid him $6,000.00 in money."

And

> "* * * Yes, I was relying on Mr. Howard Marks because Mr. Paul had given his judgment that the thing was in tip-top shape. That corroborated what Mr. Marks had said, and if I had met Mr. Marks the very first time, unconnected from Mr. Paul, I may not have placed as much reliance upon Mr. Marks, that is true."

According to respondent, Paul told him that he (Paul) had not personally gone through any parts of the tractor other than the engine, but that appellant had told him (Paul) "that the rear end and all those things, transmission and drives and steering clutches, so on, were in first-class condition." In this regard the evidence shows that most of the working parts of the tractor were enclosed by heavy castings and that it took two or three men to remove some of them. Appellant's counsel stipulated that the transmission gears cannot be seen unless the deck is removed, and that none of the mechanism in the final drives can be seen without removal of the housing which covers it.

Respondent took delivery of the tractor in August, 1947, and used it for about a day and a half that month, and a little bit in early September. On about September 10, 1947, he started using the tractor for heavy work. Just prior to this, he had had some trouble with the clutch bearing, but thought that his operator might have been at fault. He had this repaired and on September 12th he had trouble with the starting motor drive which he said "wasn't a terrible serious thing, but it is annoying." He had this repaired too, and the record shows a series of repairs thereafter, some of them major, as follows: Steering clutch repaired, October, 1947; transmission replaced, November, 1947; valve tappets checked and cracked head repaired, December, 1947; right final drive fixed, December, 1947; engine overhauled and final drives repaired, May-June, 1948; steering clutches repaired, December, 1948; steering clutches again repaired, summer, 1949; and cracked cylinder head replaced, June, 1951. Harty, a mechanic who helped to replace the transmission in November, 1947, testified that in his opinion the tractor was then in the later stages of being worn out, and that it was in pretty rough shape and had received a lot of use. He also testified that the transmission was in bad shape and needed replacing, which was done, and that this wear was something that did not develop quickly, but took a considerable time. Another mechanic, Parlet, who worked on the tractor while the motor was being overhauled and the final drives repaired, in May-June, 1948, testified that the rails and swing frame (the part connected to the rollers and on which the tractor sits) had been welded several times and was crooked, and that he suggested that they be taken out and junked. However, the rails broke down at least six times while respondent had the machine, and some of this welding may have been done then.

Paul testified that he completely overhauled the engine in January, 1947, and he tried the tractor out and it worked properly. He also testified that he had the cylinder heads off and did not notice anything wrong with them. Appellant testified that he used the tractor after Paul returned it and that it worked properly. The mechanic who repaired the clutch bearing in September, 1947, testified that he took the deck off the tractor and did not notice anything wrong with the working parts and, further, that he ran the tractor, after making the repairs, and he noticed nothing unusual about it. He also stated that the trouble with the clutch bearing was lack of lubrication. There is other testimony, however, that defects in the transmission probably would not be noticed because the gears are covered with a heavy film of lubricating oil, and Harty, who worked on the tractor at least half a dozen times, testified that it was always well lubricated. Respondent testified that the tractor was lubricated regularly and in accordance with Paul's instructions. He also testified that the tractor engine used excessive amounts of oil until he had the engine overhauled in May-June of 1948. Harty was asked whether, when he first saw the tractor in 1947 or 1948, he made any estimate of what it would "reasonably cost" to put the tractor in shape so that it could go out and work like a tractor should work, to which he replied that he and his partner had talked about it "extensively" and had decided that they could not do it for less than four or five thousand dollars and still guarantee their work.

[1] As stated in Hobart v. Hobart Estate Co., supra, it is sufficient if the evidence shows that appellant made a material representation regarding the condition of the tractor, that the representation was false and appellant knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true, that the representation was made with the intention of inducing respondent to purchase the tractor, and that respondent believed the representations and completed the purchase in reliance thereon, suffering damage thereby.

[2, 3] As hereinbefore pointed out, there is testimony that appellant made certain representations to respondent regarding the condition of the tractor, including statements that the transmission, steering clutches, final drives and whole rear end had recently been checked, overhauled and found to be in perfectly good condition, and that the engine was the only thing that needed overhauling. These were material representations of fact—material because of the age of the tractor—and were not mere expressions of opinion based on engine repairs then being made (as appellant would have us believe). Their falsity may be inferred from the nature and extent of the repairs which were found to be necessary after respondent took delivery of the tractor, and appellant must have known that they were untrue since he had had the tractor for more than a year and had been using it. It is significant that he did not attempt to show where, when or by whom the rear end was overhauled, although he took the stand as a witness. These representations were made during the negotiations between the parties and it is a fair inference that they were intended to induce respondent to make the purchase. As to the question of reliance, the evidence is not quite so strong, but respondent did testify, unequivocally, that he relied on appellant's representations and told appellant so, even though he sought and obtained confirmation from Paul. There is no showing in the evidence that respondent made any examination of the transmission, steering clutches or other working parts in the rear end of the tractor, or even that he could have done so, they being enclosed by heavy castings which could not be removed by one man. The applicable rule, where the buyer does make an independent investigation or examination of the property, is that he is not thereby precluded from relying on representations where the falsity thereof is not

apparent from an inspection, where the person making the representations has a superior knowledge, or where the buyer relying thereon is not competent to judge the facts without expert assistance. Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935.

Appellant contends also that the judgment for $2,500 damages is unsupported by the evidence. Appellant cites section 3343 of the Civil Code, which, so far as applicable here, reads as follows:

> "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction."

Appellant argues that there was no evidence "to show that the actual value of the tractor when it was purchased was any different from the purchase price paid."

[4, 5] There is evidence in the record that appellant and his brother paid approximately $9,100 for the tractor and a used scraper in July, 1945, and that the value of the scraper was about $1,500. This is some evidence that the tractor would have been of the value of at least the $6,000 that respondent paid appellant for it if the representations of appellant as to its condition had been true. As stated in Eatwell v. Beck, 41 Cal.2d 128 at page 134, 257 P.2d 643 at page 647: "Evidence of 'sales of the *identical* property in question, whether realty or personalty' is also a proper indicium of value." While there appears to have been no specific statement by any witness as to the value of the tractor in the condition it was found to be in by respondent after the purchase, yet there was testimony that it was necessary for respondent to expend nearly $4,500 to put it in the condition it was represented to be in by appellant. There was also evidence of damage to respondent for loss of use of the tractor during the making of the repairs. This evidence is certainly sufficient to show that the verdict awarding respondent damages in the sum of $2,500 was well within the amount that could have been awarded for the difference between the value of the tractor as its condition was represented to be by appellant and the condition that it was actually proved to be in and "any additional damage arising from the particular transaction" as provided in section 3343 of the Civil Code.

[6, 7] As pointed out by appellant, no instruction was given by the court as to the measure of damages nor was any such instruction offered by either appellant or respondent. The record is voluminous, the trial occupying three days, and appears to have been fought out and presented to the jury on whether or not there had been misrepresentations as to the condition of the tractor. While appellant does not urge the failure of the court to instruct on the measure of damages as reversible error, we believe that the court should have given such instructions even though none were offered by counsel. However, as stated in Perry v. City of San Diego, 80 Cal.App.2d 166 at page 171, 181 P.2d 98 at page 102 (hearing denied):

> "It is a rule generally recognized in California that a party may not complain of the failure of the trial court to instruct on a subject in the absence of that party's request to give a proposed instruction thereon. McFate v. Zuckerman, 130 Cal.App. 172, 19 P.2d 532; Bramble v. McEwan, 40 Cal.App.2d 400, 104 P.2d 1054; Peckham v. Warner Bros. Pictures, supra [42 Cal.App.2d 187, 108 P.2d 699]. In Ellis v. Tone, 58 Cal. 289, it was held that it was not reversible error to fail to give an instruction on the measure of damages where none had been requested."

[8] Appellant next contends that respondent's action is barred by subdivision 4 of section 338 of the Code of Civil Procedure which provides that an action for fraud must be brought within three years after discovery of the facts constituting the fraud. This contention is without merit. Respondent's complaint alleges that he did not discover the defects and imperfections in the tractor until after September 10,

1947; that prior to that time the tractor functioned efficiently in the work in which it was used; and that it was not until many months later, after repeated breakdowns and recurrent repairs, that the full extent of the imperfections became apparent to respondent. These allegations are supported by the evidence, and inasmuch as the action was commenced on September 5, 1950, it was filed within the three year period.

[9] Likewise without merit is appellant's contention that respondent's action was barred as a matter of law because of laches. The instant action is one at law in which the defense of laches is not available. Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935; Brownrigg v. DeFrees, 196 Cal. 534, 539, 238 P. 714.

[10] There is no merit in appellant's next contention that the court erred in admitting respondent's deposition, which had been taken by appellant, as a part of respondent's case without instructing the jury that the testimony therein could not be weighed against the presumption of honesty and fair dealing on the part of appellant. While the deposition had been taken under section 2055 of the Code of Civil Procedure and appellant was not bound thereby, it was, of course, as stated in Smellie v. Southern Pacific Co., 212 Cal. 540 at page 559, 299 P. 529 at page 537, "evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury." Section 2022 of the Code of Civil Procedure provides that depositions may be read in evidence by either party, and the deposition of a party is admissible even though such party is present at the trial. Ahern v. Superior Court In and For Los Angeles County, 112 Cal.App.2d 27, 31, 245 P.2d 568.

Appellant also complains of the following instructions, given at the instance of respondent:

> "If a seller actually knows the condition of a tractor he is selling, or if he represents to the buyer that he does know the condition of the tractor he is selling, and the buyer is uninformed and is known to the seller to be uninformed concerning the tractor and to the knowledge of the seller the buyer relies upon representations of the seller concerning the tractor, the seller will be held accountable for statements he makes concerning the tractor although an imperfect examination of the machine had been made by the buyer if expert knowledge were necessary to understand the true condition of the tractor and the buyer was persuaded by representations of the seller or the seller's agent from making a complete examination of the tractor."
>
> "When there is an intent to deceive and the statement does mislead an intending purchaser, whether a seller or his agent acting in the scope of his employment misrepresenting a material fact knew it to be false or made the assertion without knowing whether it was true or false is immaterial. In such instance if a party asserts that is true which he does not know to be true it is a false representation. One intending simply to state his belief or opinion should state it in that precise form so as to inform the purchaser of the true grounds upon which the statement is made. One stating a material fact to be true in general terms without qualification is presumed to make the statement upon his own knowledge or at his peril and must make good his assertion."
>
> "The mere fact, if it be a fact, that the plaintiff in this action had seen the tractor under consideration prior to its purchase does not preclude him from relying upon representations concerning the tractor the truth of which would have been discoverable only by a person who was an expert in examining such machinery."
>
> "You may consider whether the plaintiff was put upon inquiry or whether he was lulled into reliance upon any representations made at the time of the sale as to the condition of the tractor; whether he made an

> independent investigation or examination of the tractor or had independent knowledge thereof."

[11] Appellant contends that the first two of these instructions are erroneous on the ground that they make no distinction between representations of fact and of opinion. An identical contention was made in Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471, and the court there said that the error, if any, was harmless where the omission was supplied by other instructions. In the case at bar, the distinction between representations of fact and of opinion was fully covered by other instructions, particularly by appellant's requested instructions Nos. 1, 6 and 7, which were given.

Appellant concedes that the third instruction above "might not have misled the jury" if it stood alone, but contends that when considered with the first and fourth of these instructions it is highly probable that the jury was misled into excusing respondent from making the reasonable investigation which he was bound to make under the circumstances, and, further, that it would permit the jury to find for respondent if he had been "lulled into reliance," whether or not he made an investigation or had independent knowledge of the condition of the tractor. The jury was fully instructed regarding respondent's duty to make an investigation and the consequences thereof. These instructions were given at the request of appellant and exceed the requirements imposed upon the buyer as set out in Bagdasarian v. Gragnon, supra, 31 Cal.2d at page 748, 192 P.2d 935.

Appellant's final contention is that the trial court committed error in modifying one of appellant's requested instructions by striking out the statement that the presumption against fraud is "a presumption approximating in strength to that of innocence of crime." The instruction in question was as follows:

> "You are instructed that fraud should not be charged lightly. It is a serious impugnation of the integrity of the defendants, and when asserted must be proved beyond a mere peradventure. The presumption is always against fraud, and it should not be deemed overcome, even prima facie, upon any intangible or shadowy showing."

[12, 13] There is no merit in this contention as the record shows that the jury was fully, correctly and fairly instructed regarding the presumption against fraud and in favor of fair dealing. It is not error for the court to refuse to give a requested instruction if the full charge correctly states the substance of the law applicable to the facts involved in the case. Horrell v. Santa Fe Tank & Tower Co., 117 Cal.App.2d 114, 120–121, 254 P.2d 893.

The judgment is affirmed.

VAN DYKE, P. J., concurs.

In re POISL'S ESTATE.*

POISL v. FERGUSON et al.

Civ. 20253.

District Court of Appeal, Second District, Division 2, California.

June 16, 1954.

Hearing Granted Aug. 10, 1954.

Will contest. The Superior Court, Los Angeles County, Newcomb Condee, J., entered judgment upholding validity of the will, and widow appealed. The District Court of Appeal, Moore, P. J., held that where decedent had executed a will including a provision for a woman under her maiden name prior to decedent's marriage to the woman, decedent thereby had provided for his spouse in his will even though no mention was made of prospective marriage, and the will was valid under statute providing that if a person marries after making a will, and spouse survives the maker, the will is revoked as to the spouse unless spouse is provided for in the will.

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* Vacated 280 P.2d 789.

Judgment affirmed.

1. Wills 🔑191

Where decedent had executed a will including a provision for a woman under her maiden name prior to decedent's marriage to the woman, decedent thereby had provided for his spouse in his will even though no mention was made of prospective marriage and the will was valid under statute providing that if a person marries after making a will, and spouse survives the maker, the will is revoked as to the spouse unless spouse is provided for in the will. Probate Code, § 70.

2. Wills 🔑296

In will contest, receipt of evidence showing that devisee named in will executed prior to decedent's marriage was one and the same as decedent's widow was proper. Probate Code, § 70.

◆

V. P. Lucas, Los Angeles, for appellant.

Michael Q. Gaynes, Beverly Hills, Thomas W. Hughes, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeal by the widow from a judgment upholding the validity of a will made by the deceased husband, Joseph C. Poisl, in his lifetime whereby, prior to his marriage, he made testamentary provision for her. He had known her for thirty years. At the time of the marriage they were an elderly couple. No issue resulted from the union. All the estate was decedent's separate property.

The will, properly executed on December 10, 1950, contained the following provision: "To Emmy Blackburn, also known as Emma Blackburn, now residing at 113 Lanewood Avenue, Alhambra, California, my residential property located in The City of San Diego, California, including all personal property in and upon said premises."

Based upon abundant undisputed evidence, the court found that on July 18, 1951, decedent married Emma Blackburn; that Emma Blackburn and Emma Poisl, the widow of decedent, are the same person; Joseph C. Poisl made provision for appellant in his last will and testament; they remained husband and wife until decedent's death, June 16, 1952. Such findings require an affirmance of the judgment.

Section 70 [1] of the Probate Code provides that "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse * * * unless the spouse is provided for in the will * * *." Appellant contends that the will was revoked because it did not devise to her as his wife. She argues that the reference to her merely as Emma Blackburn, a single person and not specifically as his wife is sufficient to justify a judgment revoking the will. Such is not the law.

The bequest to her of the San Diego property is a provision for her "in the will." Such provisions are encouraged in order to "'secure a specific moral influence upon the testamentary act,—the moral influence of having before the mind a contingent event so momentous as marriage * * *, and so deserving of consideration in framing a testamentary scheme.'" In re Estate of Duke, 41 Cal.2d 509, 513, 261 P.2d 235, 238. A reference in the will to appellant as his spouse is not essential to its validity. She was his choice of devisees to have his San Diego home and preferred to bequeath it rather than to make a gift *inter vivos.* She was provided for "in his will" and that is sufficient compliance to validate the instrument. In Estate of Duke, supra, the surviving spouse married the testatrix one year after she had made her will. She made provision for her future husband by "intentionally and with full knowledge" omitting to provide for "any person or persons who may, after the date of this will, become my heir or heirs by reason of marriage or otherwise." Construing the will in the light of section 70 of the Probate Code, the court held the testatrix clearly stated an intention not to provide for a class of persons including the new husband and that such provision validated the will.

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[1] The antecedents of section 70 are sections 1299 and 1300 of the Civil Code prior to the adoption of the Probate Code in 1931. The only substantial change of section 1299 is the substitution of the word "spouse" for the word "wife" and for "husband" in section 1300.

[1] In re Estate of Appenfelder, 99 Cal.App. 330, 278 P. 473, 476, the testator had by his will given part of his estate to his former wife, one eighth of the remainder to his "niece" whom he married twenty months after the date of his last codicil. His surviving widow undertook to revoke his will on the ground that no provision had been made for her as his prospective wife. But the court concluded that if after making any will, the testator shall marry and the wife shall be living at the time of the testator's death, such will shall be deemed revoked unless she has been provided for in the will. Provision for her under her maiden name will be sufficient to avoid the revocation of his will. If the legislature had intended to require the testator to say that he was contemplating marriage to one of his devisees, it would have been a "simple process for it to have inserted a phrase to that effect". Similar facts and a same holding are found in Re Estate of Brannon, 111 Cal.App. 38, 295 P. 83. From such decisions no doubt is left that the will is valid if it has provided for the spouse as an individual even though no testamentary mention has been made of the prospective marriage.

Appellant has cited some authorities in support of her thesis that not having been named in the will as his future wife, the instrument is invalid. In re Estate of Axcelrod, 23 Cal.2d 761, 767, 147 P.2d 1; Corker v. Corker, 87 Cal. 643, 25 P. 922, and Sanders v. Simcich, 65 Cal. 50, 52, 2 P. 741. They are not pertinent. In Re Estate of Axcelrod, there was no mention of the wife except in a clause of disinheritance. Corker v. Corker involved a property settlement agreement. The action was brought by Mr. Corker's executor. The court observed on page 650 of 87 Cal., on page 924 of 25 P. that the instrument "partakes more of the nature of a deed of separation than of a marriage contract. It does not purport to make any 'provision' for the wife". The case is not in point.

[2] There was no error in receiving evidence of the identity of Emma Blackburn as Emma Poisl. In re Estate of Kurtz, 190 Cal. 146, 149, 210 P. 959; In re Estate of Duke, supra. In the Appenfelder decision, supra, the court said, 99 Cal.App. at page 336, 278 P. at page 476, "We do not understand that the testimony was received either for the purpose of construing the will or of rebutting the presumption of revocation. It related solely to the identity of the appellant whose name was identical with that in the will, and whose name was actually in the will."

Judgment affirmed.

McCOMB and FOX, JJ., concur.

126 Cal.App.2d 238

VAN DYKE
v.
VAN DYKE.

Civ. 20021.

District Court of Appeal, Second District,
Division 1, California.
June 24, 1954.

Divorce action, wherein wife having been granted divorce and having remarried, husband sought reduction of payments to children. The Superior Court, Los Angeles, County, Arnold Praeger, J., dismissed order to show cause and husband appealed. The District Court of Appeal, Drapeau, J., held that where amount which divorce decree ordered to be paid for support of minor child was a part of property settlement, it could not be reduced.

Order affirmed.

1. Evidence 🔑450(5)

Where documents, incorporated in interlocutory divorce judgment, constituted a clear and unambiguous contract of property settlement, extrinsic evidence was not admissible, in husband's proceeding to reduce payments to minor children after wife's remarriage, to show that the contract was one for alimony or for children's support.

2. Divorce ⚿309

Amount which divorce decree ordered to be paid for support for minor children could not be reduced where it was part of property settlement.

3. Divorce ⚿309

Even though amount payable for child's support is fixed by property settlement approved by divorce decree, court may grant an increase if the child's welfare requires it.

Martin & Martin, Los Angeles, for appellant.

William K. Young, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff filed her complaint for divorce against defendant on February 15, 1949. On March 7th of that year, they entered into a property settlement agreement. The preamble of that document recites their "desire to make provision for the custody, care and support of their two minor children and to settle the rights and claims of each in and to the community property * * * and separate property" of husband; and rights of inheritance.

By its terms each party released the other "from any and all rights, claims, demands and obligations of every kind and nature for past and future support and maintenance, alimony pendente lite, permanent alimony and from all other rights, claims, demands and obligations of every kind and character arising out of or by virtue of the marital relations of the parties." Plaintiff wife was given custody of the two children, and it was agreed that the community personal property be mutually divided or sold.

Paragraph Sixth of said property settlement reads in part as follows:

"It is understood that in full payment and satisfaction of the interests and rights of the first party (wife) in and to the community property, and in consideration of the assumption by her of the support and maintenance of the two minor children of the parties while in her custody and during the period the income payments hereinafter referred to are received by her, the second party (husband) has heretofore executed and delivered to first party an assignment executed by his mother and sister and himself of certain income from a trust established by E. H. Moulton, together with a further assignment to first party of three-fourths (¾) of the income payable to second party and accruing during his lifetime from the same trust and after March 7, 1949, for the period of the life of first party, except during the period when she may be married, and to a person other than second party; otherwise, and after her death, the same shall be paid to the present children of the parties hereto or the survivor of them * * *"

On the same day, defendant husband assigned to plaintiff wife, three-fourths of his beneficial interest in the Moulton trust.

Thereafter, on April 4, 1949, an interlocutory judgment of divorce was granted to plaintiff in which the custody of the children was awarded to her. That decree confirmed and approved the property settlement "the same having been received in evidence herein marked Exhibit 'A' and made a part hereof by reference." The executory provisions of the agreement were adopted as a part of the decree and the parties instructed and ordered to carry out all of its terms and conditions. In addition, defendant husband was ordered to perform specifically certain of its terms respecting (1) the transmittal of that portion of the trust income assigned by him to plaintiff; (2) completion of the assignment by him to plaintiff of ¾ths of the income payable to him under the Moulton trust; (3) sale or division of the household effects; and (4) execution of a will in favor of the two children.

Final judgment of divorce was filed April 11, 1950. This provided that "wherein said interlocutory judgment makes any provision for the custody and support of children or for the performance by defendant of the acts therein set forth, said provision be and the same is hereby made binding on the parties affected thereby, the same as if herein set forth in full, and that wherein said interlocutory judgment relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof * * *"

Thereafter plaintiff remarried and, pursuant to the property settlement, the three-fourths beneficial interest in the trust became payable to the two minor children.

The instant proceeding was initiated on August 14, 1952, by defendant Henry S. van Dyke on an order to show cause for modification of child support, i. e., why the payments to said children should not be reduced consistent with changed circumstances.

Both parties submitted written points and authorities in support of their respective contentions.

Upon hearing, the trial court denied the order to show cause re modification and referred the case to a court commissioner for findings of fact. In their oral arguments before the commissioner, counsel for appellant stated: "So we ask of this court an opportunity to show by evidence the nature of the property involved, that it was separate property and that it could not be a property settlement agreement for that reason; that the community property has never been divided or settled between these parties * * * and that although drawn to be a property settlement agreement superficially, actually from the intention of the parties and their property rights at the time, it could not have been anything else but a provision to support the children * * * And the law is clear in the latter instance this is always modifiable on changed circumstances."

To this the court commissioner replied: "I think the court is bound to follow the language of the documents in the file that have been recognized by the court previously and have been incorporated in the interlocutory judgment. For two reasons, I am not going to hear any evidence on the modification, and grant the motion of Mr. Young for dismissal: First, that the property settlement agreement appears to be in complete settlement of property rights and not for alimony and support; and second, there is no order in the interlocutory judgment or final judgment for the support of minor children, and I cannot see that there is anything before the court to modify."

The findings of fact of the commissioner recite that the interlocutory and final judgments of divorce "are silent as to any amounts to be paid for the support of the minor children, the custody of whom was awarded to the plaintiff and still remains with the plaintiff. No change in circumstances concerning the custody of the minor children. The property settlement agreement, which was incorporated by reference in the interlocutory judgment appears to be in complete settlement of the property rights of the parties and does not contain any provisions for alimony or support. Motion of plaintiff that no evidence be taken and that the Order to Show Cause re Modification be dismissed should be granted because of the above facts."

From the order dismissing the proceeding, defendant appeals.

[1] Appellant here asserts that a determination of what type of provision (property settlement or child support) is incorporated in the agreement "depends upon the circumstances surrounding the making of the agreement * * * and it is the failure of the trial court to take the offered proof with respect to such circumstances that is the basis for this appeal."

In support of his contention, appellant cites Pearman v. Pearman, 104 Cal.App.2d 250, 253, 231 P.2d 101, 103, where it is stated:

"No single factor can be relied upon in any given case to determine whether monthly payments are in the nature of property or alimony. *The agreement must be taken as a whole and consideration given as to the circumstances under which it was made and the nature and value of the property being divided and its relation to the amount of the periodic payments.* Puckett v. Puckett, 21 Cal.2d 833, 841–2, 136 P.2d 1." (Emphasis added.)

However, an examination of the phraseology of the Puckett case, reveals that the Supreme Court there stated [21 Cal.2d 833, 136 P.2d 5]:

"The essential issue to be determined is whether or not the agreement was a property settlement agreement, and the monthly payments ordered by the decree in effect and essence, a phase of the property settlement rather than merely alimony. It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree of divorce. Considerable confusion and uncertainty could be avoided in that fashion. The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject. *An analysis of the agreement and the divorce decrees* here in question in the light of the principles applicable thereto, leads to the conclusion that the monthly payments ordered were an inseparable part of a property settlement agreement, and therefore they may not be modified." (Emphasis added.) See, also, Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873.

And in Hamilton v. Hamilton, 94 Cal. App.2d 293, 297, 210 P.2d 750, 752, where the principal contention was that "the court erred in sustaining respondent's objection to her [appellant's] offer of proof that the support money provided in the agreement was alimony and not made in lieu of a division of the property,"—the court held 94 Cal.App. at page 298, 210 P.2d at page 753:

"When a property settlement agreement is presented for approval in a divorce action and it is not clear whether payments therein provided are part of the division of property or are in the nature of alimony, the court should receive evidence and clearly and concisely make its determination in the decree of divorce. When the decree of divorce approves the agreement and incorporates it as a part of the decree and orders the payment of money as provided in the agreement but does not clearly determine whether such payments are part of the division of property or in the nature of alimony *then in any subsequent proceeding the question is to be determined from the decree, including the agreement as a part thereof, and the intention of the parties as expressed therein.* Of course, if the agreement is ambiguous the court should receive extrinsic evidence in aid of its interpretation as in other cases, but the agreement here considered is not ambiguous. If it appears that it was the intention of the parties to definitely, fully and permanently adjust and settle their property rights, and the provision for support and maintenance constitutes an integral and important element in the amicable adjustment of the property rights of the parties, the court is without power to thereafter modify the decree. Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Miller v. Superior Court [of Los Angeles], 9 Cal.2d 733, 72 P.2d 868; Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540; Holloway v. Holloway, 79 Cal.App.2d 44, 46, 179 P.2d 22; Kohl v. Kohl, 66 Cal.App. 2d 535, 541, 152 P.2d 494; Rich v. Rich, 44 Cal.App.2d 526, 112 P.2d 780; Wallace v. Wallace, 136 Cal.App. 488, 29 P.2d 314; 3 Cal.Jur. Ten-Yr. Supp., Community Property, sec. 155 [p.], 677; Annotations: 166 A.L.R. 675; 109 A.L.R. 1068; 58 A.L.R. 639. * * *

"In view of what has been said, the court properly sustained objections to the introduction of evidence for the purpose of showing that the payments were alimony and not in lieu of a division of property. Hollaway v. Holloway, 79 Cal.App.2d 44, 47, 179 P.2d 22." (Emphasis added.)

Likewise here. The contract is clear and unambiguous and can be interpreted without the aid of extrinsic evidence. Therefore, the court very properly rejected the evidence offered to explain it.

An examination of the property settlement discloses a comprehensive arrangement for the complete disposition of the property rights of the parties thereto. Custody of the minor children was given to respondent, subject to rights of reasonable visitation in appellant. By the express terms of paragraph "Sixth", hereinbefore quoted, appellant assigned his beneficial interest in the Moulton trust to respondent

"In consideration of the assumption by her of the support and maintenance of the two minor children * * * while in her custody and during the period the income payments * * * are received by her." And in the event of respondent's remarriage or death, such assigned income "shall be paid to the present children of the parties hereto or to the survivor of them."

[2, 3] The following language in Puckett v. Puckett, supra, 21 Cal.2d 833, 843, 136 P.2d 1, 6, appears particularly pertinent:

"Insofar as the motion was predicated upon the ground that the minor child did not require the amount ordered to be paid for her support, suffice it to say that by reason of the foregoing rules, the amount could not be reduced because it was a part of a property settlement. The only contingency in the agreement contemplating a reduction was the remarriage of plaintiff, in which event the parties were to mutually agree upon an amount for the child's support. In the event of failure to so agree the court could fix the amount. That contingency has not arisen. For the reasons heretofore discussed, the amount payable for the child's support could be changed by the court at any time insofar as the child is concerned, having in mind its welfare. In brief, the payments ordered to be made are not subject to reduction, but they might be increased by the court if the child's welfare requires it, and that without regard to what the liabilities of the parties may be, and their rights *inter se* under the agreement."

The District Court of Appeal in Streeter v. Streeter, 67 Cal.App.2d 138, 144, 153 P.2d 441, 444, stated as follows:

"Irrespective of the facts and of judicial views expressed in some of the cases cited in the last paragraph, we accept without reservation the rule stated in the Puckett decision as applicable to the facts of that case to the effect that a decree based upon an unqualified property settlement, made a part of the order of the court, directing payments in installments for an unlimited period may not be modified except in a particular affecting a child's welfare. The amount to be paid may be increased but not reduced."

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.

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126 Cal.App.2d 232

PEOPLE v. MacARTHUR et al.

Cr. 3011.

District Court of Appeal, First District, Division 1, California.

June 24, 1954.

Rehearing Denied July 9, 1954.

Hearing Denied July 22, 1954.

Defendant was convicted of the unlawful possession of heroin. The Superior Court, Alameda County, James R. Agee, J., entered judgment, and from such judgment of conviction and order denying a new trial, defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence justified implied finding that defendant was in constructive joint possession of heroin found in apartment in vanity box owned by woman who occupied apartment with defendant and that such evidence was sufficient to support conviction.

Order and judgment affirmed.

1. Poisons ⇨9

In prosecution for unlawful possession of heroin, found in apartment in vanity box owned by woman who occupied apartment with defendant, evidence supported implied findings that defendant knew of presence of heroin in vanity box, exercised or had the right to exercise dominion and control over it and was therefore in constructive joint possession of heroin. Health and Safety Code, § 11500.

2. Criminal Law ⇨1159(6)

It is not the function of reviewing Court to pass on the weight of the evidence, and if circumstances reasonably justify verdict, opinion of reviewing court that such circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

3. Poisons ⚷9

Evidence that defendant was in constructive joint possession of heroin found in vanity box owned by woman who occupied apartment with defendant was sufficient to sustain conviction of unlawful possession of heroin. Health and Safety Code, § 11500.

4. Criminal Law ⚷338(7)
Poisons ⚷9

In prosecution for unlawful possession of heroin found in apartment in vanity box owned by woman who occupied apartment with defendant, evidence that a few minutes before heroin was found in vanity box defendant had sold a large quantity of heroin to narcotics officer was admissible to show that defendant knew of presence of heroin in vanity box and that it probably belonged to him, and such evidence, including circumstances of and photographs taken during transaction involving such sale, was not so inflammatory as to be prejudicial to defendant. Health and Safety Code, § 11500.

5. Poisons ⚷9

In prosecution for unlawful possession of heroin found in apartment in vanity box owned by woman who occupied apartment with defendant, it was necessary for state to prove that defendant knew of presence of heroin found in vanity box. Health and and Safety Code, § 11500.

6. Criminal Law ⚷338(1)

The general test of "relevancy" is whether evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Relevancy".

7. Criminal Law
⚷369(2), 370, 371(1, 12), 372(1)

Evidence of other acts of a similar nature, when not too remote, is admissible to prove a material fact or to show motive, scheme, plan or system, or guilty knowledge and intent.

◆

Benjamin F. Marlowe, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, Robert H. McCreary, Asst. Dist. Atty., Oakland, for respondent.

PETERS, Presiding Justice.

Roy E. MacArthur and Racquel Gatica were charged with two violations of section 11500 of the Health and Safety Code, the first count charging the unlawful possession of heroin on April 22, 1953, and the second, the unlawful possession of marihuana on the same date. The defendants were tried together. MacArthur, the sole appellant, was found guilty on the heroin count and not guilty on the marihuana count. He appeals from the judgment of conviction, and from the order denying his motion for a new trial. The basic question presented is whether there is any substantial evidence to support the finding that appellant possessed the heroin as charged in count one. Appellant also challenges the admissibility of certain evidence.

On April 22, 1953, and for some time prior thereto, MacArthur and Racquel Gatica were and had been living together in an apartment in Oakland. About noon of that day a group of city and state enforcement officers, in the company of MacArthur, who earlier that same day had been arrested for the sale to a state narcotic officer of a large quantity of heroin, entered the apartment. Racquel was then present. The enforcement officers conducted a search, and found in the kitchen on a shelf, a small locked vanity box. Racquel admitted then and on the trial that the box was hers. The key to the box was found on a table in the living room of the apartment. When opened, it was found that the box contained, among other things, a rubber finger stall containing a white powder later determined to be 5½ grains of heroin, an eye dropper, two hypodermic needles, several used and unused matches, some Kleenex stained with what appeared to be blood, a bent discolored spoon, and some fine wires. All this paraphernalia was identified as articles customarily employed by users to inject heroin. Racquel then and at the trial denied all knowledge of these articles, professing complete ignorance as to how they got into her vanity box. It is the possession of this heroin that forms the charge upon which MacArthur was convicted. At the trial he denied knowledge of the contents of the box, and denied that he ever had possession of, or ever exercised any control over, the box, or its contents.

There were several other articles in the box, including a necktie that MacArthur admitted at the trial was "probably" his. A necktie is frequently employed by a narcotic user to tie the arm while administering the heroin by means of a hypodermic needle. Although when the box was first opened by the officers the necktie and the other articles were removed therefrom and then replaced, no other narcotic was then discovered. But several days later in the state narcotic laboratory in San Francisco, the box having been in police custody in the interim, when the necktie was lifted out of the box one marihuana cigarette fell out of the tie. It is the possession of this marihuana cigarette that formed the basis of the second count of the information of which MacArthur was acquitted.

The prosecution at the trial, over objection, was permitted to produce evidence that on the morning of April 22, 1953, MacArthur had completed a sale of some 950 grains of heroin, in 4 rubber finger stalls similar to the one found in the vanity box, to a narcotic officer, and was immediately arrested. Full details of that transaction were offered by the prosecution, and admitted over defense objections. MacArthur was charged, tried and convicted in a separate proceeding for his activities in connection with that sale. The judgment has been affirmed. People v. MacArthur, 125 Cal.App.2d ——, 270 P.2d 37. It was immediately after this arrest that MacArthur was taken to his apartment and the search was made that resulted in the discovery of the heroin and the user-equipment found in the vanity box.

During this search, and before the vanity box had been discovered, one of the officers had the following conversation with MacArthur: "I asked him if there was any more stuff around the house and he said, 'No,' that there wasn't, that 'unless there may be something left around for her use,' referring to Miss Gatica. * * *

"And I said, 'Do you know where it might be?' And he said, 'No,' that he did not 'unless she had it hid around the house someplace,' but he knew of nothing else himself."

Racquel, at the apartment, when booked at the police station, and at the trial, denied that she had ever used narcotics. However, at the apartment, and at the police station, a physical examination disclosed four or five puncture marks along the line of a vein in her left arm. She claimed that they were fleabites. At the trial one of the arresting officers testified that at the time of the search she appeared to be under the influence of narcotics, and several officers testified that the equipment found in the vanity box was moist, as if recently used.

The charge upon which MacArthur was convicted was "possession" of heroin. His main contention is that the evidence does not support the finding of the jury that he was possessed of the heroin found in the vanity box.

The evidence shows the following facts:

1. The heroin was found on premises jointly occupied by MacArthur and Racquel. While the heroin was in a locked vanity box owned by Racquel, the key to that box was in plain sight on the top of a table in the living room.

2. Just a few minutes before the heroin was found in MacArthur's apartment, MacArthur was in possession of a large quantity of heroin.

3. The rubber container in which the heroin in the vanity box was found, was similar to the four rubber containers of heroin sold by MacArthur to narcotic officers earlier that same day.

4. A necktie that MacArthur admitted was "probably" his was found in the vanity box.

5. When questioned about the possibility of any narcotics on the premises, MacArthur stated there was none "unless there may be something left around for her use," and that he did not know where it was "unless she had it hid around the house someplace."

6. There was evidence that Racquel, with whom MacArthur was living, was a user, was under the influence of narcotics when the officers entered the apartment, and that the equipment in the vanity box recently had been used.

7. It is a reasonable inference that MacArthur and Racquel were closely associated in the unlawful possession of narcotics, or that MacArthur was supplying his girl friend with heroin.

[1,2] It is our opinion that this evidence supports the implied findings of the jury that MacArthur knew of the presence of the contraband in the vanity box, exercised, or had the right to exercise, dominion and control over it, and was therefore in constructive joint possession of it. It is not the function of an appellate court to pass on the weight of the evidence. As was said in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780; "If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." See also People v. Huizenga, 34 Cal.2d 669, 676, 213 P.2d 710; People v. Torres, 98 Cal.App.2d 189, 193, 219 P.2d 480.

[3] There are many cases upholding convictions of possession where the evidence of possession was of a constructive joint possession and was of the general character of that here involved. See, for example, People v. Basco, 121 Cal.App.2d 794, 264 P.2d 88; People v. Williams, 121 Cal.App.2d 679, 263 P.2d 853; People v. Van Valkenburg, 111 Cal.App.2d 337, 244 P.2d 750; People v. Rodrigues, 25 Cal.App.2d 393, 77 P.2d 503; People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480; People v. Brown, 102 Cal.App.2d 60, 226 P.2d 609; People v. Charley Quong, 5 Cal.App.2d 137, 42 P.2d 386; People v. Graves, 84 Cal.App.2d 531, 191 P.2d 32; People v. Hardeman, 94 Cal.App.2d 51, 210 P.2d 283; People v. Rumley, 100 Cal.App.2d 6, 222 P.2d 913; People v. Foster, 115 Cal.App.2d 866, 253 P.2d 50. Under the rules announced in these cases the evidence was sufficient.

The second contention of MacArthur is that prejudicial error was committed in admitting, over objection, evidence by the arresting officers of the circumstances under which MacArthur, a short time before the heroin was found in his apartment, had sold a large quantity of heroin to an officer. In addition to the testimony of several officers as to the circumstances of that transaction, photographs taken during that prior transaction were introduced. MacArthur admits that such evidence was relevant and had some probative value, but contends that it was so inflammatory that no jury could listen to it for the limited purpose for which it was admitted without being prejudiced against him.

[4–7] There is no merit to this contention. The prosecution had to prove possession on the part of MacArthur of the heroin found in the apartment. This included the necessity of proving knowledge on the part of MacArthur of the presence of the contraband found in the vanity box. People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433. The fact that a few minutes before the heroin was found in the vanity box MacArthur was in possession of a large quantity of heroin, was obviously relevant on these issues, and was therefore also relevant to show that the heroin in the apartment probably belonged to him. As was stated in People v. Torres, 98 Cal.App.2d 189, 192, 219 P.2d 480, 481.

"The general test of relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. (Citing a case.)

"Evidence of other acts of a similar nature may be admitted when not too remote, to prove a material fact, or where it tends to show motive, scheme, plan or system, or to show *guilty knowledge* and intent. (Citing four cases.)" See, also, People v. Mullaly, 77 Cal.App. 60, 64, 245 P. 811; People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924; People v. Morani, 196 Cal. 154, 158, 236 P. 135. The evidence was properly admissible.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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126 Cal.App.2d 328

ASHLEY et al. v. JONES et al.

Civ. 4817.

District Court of Appeal, Fourth District, California.

June 29, 1954.

Rehearing Denied July 26, 1954.

Hearing Denied Aug. 26, 1954.

Action for damages for personal injuries to house guest who slipped on rug in home of hosts. The Superior Court of San Diego County, C. M. Monroe, J., granted hosts' motion for non-suit and entered judgment for host. Guest appealed. The District Court of Appeal, Barnard, P. J., held that evidence of negligence was insufficient for jury.

Judgment affirmed.

1. Negligence ⚷32(1)

Duty owed by an owner to an invitee is to exercise reasonable care in maintaining his premises in a safe condition so as not to injure such invitee.

2. Negligence ⚷32(1), 47

Owner of premises is not liable for injuries to licensee resulting from a condition of the premises, other than one amounting to a trap, in the absence of some active negligence on the part of such owner.

3. Negligence ⚷32(2, 2.3)

Generally, if the purpose for which a person is upon the premises of another is one of common interest or mutual advantage the person is considered an invitee while a license is inferred where the object is the mere pleasure or benefit of the visitor.

4. Negligence ⚷32(2)

Where the purpose of a person's presence upon the premises of another is a mutual interest in church, lodge or political activity without personal gain or benefit his status is that of a licensee.

5. Evidence ⚷5(2)

It is a matter of common knowledge that rugs, or a part thereof, will occasionally slip or move a little whether they have pads under them or not.

6. Negligence ⚷136(22)

In action against home owner by wife of pastor, who had been invited to home to discuss disposition of church realty, for injuries sustained when unpadded hall rug, which was not fastened to floor, slipped, evidence of negligence of home owner was insufficient for jury, regardless of whether the pastor's wife was an invitee or licensee.

Edward L. Butterworth, Los Angeles, for appellants.

Luce, Forward, Kunzel & Scripps, James L. Focht, Jr., San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries to Mrs. Ashley, alleged to have resulted from the slipping of a rug in the home of the defendants. The accident occurred on January 1, 1951.

Mr. Ashley is the pastor of a church in Compton. He was formerly the pastor of a church in San Diego which is attended by the defendants. This San Diego church had acquired a parcel of land and Mr. Jones was chairman of a committee which was seeking to dispose of this land. The two couples were warm friends and had frequently visited in each other's homes, at times staying overnight. Some months prior to December, 1950, Mr. Jones called on Mr. Ashley in Compton, seeking his advice concerning this land. In December, 1950, Mrs. Jones, at her husband's request, wrote to Mrs. Ashley asking her and her husband to come to San Diego, stating that Mr. Jones was anxious to talk to Mr. Ashley about this land. Mrs. Ashley replied that they could come during the coming holidays. Mrs. Jones replied that they appreciated Mr. Ashley's planning to come and asked them to stay overnight New Year's night, saying that they would like to invite some friends in to meet them. Mrs. Ashley replied that they would be able to stay that night but would have to leave early the next morning.

Mr. and Mrs. Ashley came to the Jones home toward night on December 31, 1950. When they arrived Mr. Jones told Mr. Ashley that he appreciated his coming down to consult him about the disposal of this property. Mr. Ashley testified that his sole purpose in coming was to give Mr. Jones information and advice about this land, and Mrs. Ashley testified that she nearly always traveled with her husband to look out and care for him. During that evening the two men discussed the land problem and the next day had further talks concerning it.

Shortly before 5:00 p. m. on January 1, 1951, Mr. Jones returned to his home, noticed that the women were in the kitchen, and went to his bedroom. Mr. Ashley was not in the house at the time of the accident. The women were preparing refreshments for the expected guests. Mrs. Jones noticed it was getting late, and said she would not be through in time to greet the guests. Mrs. Ashley said she would freshen up and answer the door. As she passed through a hall on the way to her bedroom she stepped on a rug which slipped, and she fell on her left side. This hallway was well lighted, and this was a 4 x 6 rug. There was no pad under the rug and the rug was not fastened to the floor. Mrs. Ashley got up, straightened the rug and went into her bedroom. She felt pain in her shoulder, arm and leg. She answered the doorbell and received some 15 or 20 people who came. After the guests left, about 8:30 p. m., she told her husband and the defendants about the fall. The Ashleys left for home the next morning, and on January 14, 1951, consulted a doctor. On January 20, Mrs. Ashley came to San Diego and stayed with the defendants some ten days while she was having some dental work done. She was treated by a doctor at home during February and March, and on April 9 consulted a doctor in Santa Barbara. She spent some seven weeks in a hospital and then wore a brace for some six months. She testified that her first doctor said the trouble might be bursitis but that there was never any definite decision that it was bursitis. Evidence was received as to various medical expenses.

Mrs. Ashley testified that the floor in this hall was a dark hardwood, such as you would find in the average home, and that Mrs. Jones told her after the accident that she had had a boy clean the floors recently but had not had them highly polished or waxed; that she had walked over this rug on many occasions before; that on such occasions it had never "slipped at all", or moved "in the least"; and that she had never seen anyone slip on it. Mrs. Jones testified that she had heard rather than seen her young daughter or one of her little friends accelerate her speed, jump on the rug and cause it to slip; that she had then seen the rug disarranged; that to her knowledge neither of the plaintiffs had ever slipped on the rug on any other occasion; that as a usual thing the rug did not move when she stepped on it; that on some occasions when she stepped on the rug "it has moved, it has been disarranged"; that when it moves it is a rare occasion; that she has walked over the rug daily without any difficulty; that while the rug has moved at times "I haven't slipped particularly. The rug has been disarranged"; that at times the way you put your foot on it would cause the rug to slide, sometimes more, sometimes less; and that she did not recall ever telling the Ashleys that this rug had slipped on occasions. Mr. Jones testified that in nearly every case when he would walk on the rug it would not slip; that on occasions when he would step on the rug it would move more or less; that it had never occurred to him that the rug might slip and injure someone; that "It never slipped that much with me"; that on every occasion when he saw either of the plaintiffs walk on the rug it remained stationery; that he had never told the plaintiffs that there was no pad under the rug; and that he had never warned them that the rug had a tendency to slip.

At the conclusion of the plaintiffs' evidence the court granted the defendants' motion for a nonsuit saying, among other things, that all of the parties who knew anything about the accident had testified, that there was no conflict in their testimony on any material matter, and that "I feel that if there were a verdict in favor of the plaintiff it would be my duty to set it aside." The plaintiffs have appealed from the judgment which followed, contending that Mr. Ashley was an invitee instead of a licensee; that Mrs. Ashley was on the premises for the convenience of her husband and acquired the same status; that it was a question of fact for the jury wheter the maintenance of this known hazardous condition constituted negligence; and that even if they were licensees the respondents breached their duty to give warning of this hazardous condition since they knew that an unreasonable risk existed and had reason to suspect that it would not be discovered by the appellants.

[1-3] We agree with the trial court's conclusion that on the undisputed evidence a new trial should be granted in the event of a verdict for the plaintiffs. However, in view of the different rules with respect to weighing the evidence which apply in granting a nonsuit, a closer question is here presented. The first question raised is whether under the evidence Mrs. Ashley may be considered as an invitee, as distinguished from a licensee. The duty owed by an owner to an invitee is to exercise reasonable care in maintaining his premises in a safe condition so as not to injure such invitee. Butcher v. Queen City Iron & Metal Co., 99 Cal.App.2d 25, 221 P.2d 265. The duty with respect to a licensee is somewhat different, the owner not being liable for injuries resulting from a condition of the premises, other than one amounting to a trap, in the absence of some active negligence on the part of the owner. Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221. As stated in Popejoy v. Hannon, 37 Cal.2d 159, 231 P.2d 484, 490, "It is the purpose for which a person is upon the premises of another which renders him an invitee rather than a licensee". As a general rule, if that purpose is one of common interest or mutual advantage the person is considered an invitee while a licensee is inferred where the object is the mere pleasure or benefit of the visitor. Aguilar v. Riverdale Cooperative Creamery Ass'n, 104 Cal.App. 263, 285 P. 889; Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472.

[4] As distinguished from a business interest between the parties how much of a mutual interest and benefit, aside from mere social interest and pleasure, is required to give a status of invitee to a guest in a home does not seem to have been definitely decided in this state. Mutual interest in church, lodge or political activity without personal gain or benefit is ordinarily considered a part of common social life. This has been recognized in other states. In Maher v. Voss, Del.Super., 84 A.2d 527, it was held that an invitation to attend a meeting of women interested in promoting the interests of a political party constituted the visitor a licensee and not an invitee. In Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588, 589, 92 A.L.R. 1002, the court said:

> "There are several well considered decisions in courts of other jurisdictions reaching the conclusion that, where a guest is invited to come upon the premises of his host for social or benevolent purposes, the relation created is not that of invitee and invitor in a business sense but that of licensee or licensor. In such circumstances the host as licensor is held to be under no liability unless the proximate cause of injury to the guest is something in the nature of a trap or active negligence."

In cases in this state, under the automobile guest law, a common interest in attending lodge or society meetings has been held insufficient to change the status of guest. Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53.

There is little, if any, evidence in this case to support the theory that Mrs. Ashley was an invitee. She and her husband were guests in this home and the only claimed mutual interest was a benevolent one, to discuss a church activity. In any event that matter had been thoroughly discussed and they intended to leave early the next morning. They had also been invited to, and did, remain over another night for the express purpose of a social gathering with their old friends. This accident happened while Mrs. Ashley was engaged in preparing for these social visitors and as she was hurrying to make herself ready to receive the guests who were momentarily expected.

If it be assumed that the evidence was sufficient to establish her status as an invitee, that fact is not controlling. Even in that event, the duty resting on the defendants was one to exercise reasonable care, and they would not be liable unless they failed to do what an ordinarily prudent person would have done under similar circumstances. In Nelson v. Smeltzer, 221 Iowa 972, 265 N.W. 924, 927, in upholding a judgment of dismissal, the court said:

> "(6) The extensive use of hardwood, polished, waxed floors, furnished with rugs, in homes is common knowledge. (7) Common experience teaches that this type of floor and furnishing, in such general use, is not inherently dangerous or a hazard to the safety of an employee or an invitee within the standard of care required. (8) There is nothing in the record to distinguish the floors and rugs in the Ringland home from the hardwood polished floors and rugs in the average home."

In Brown v. Davenport Holding Co., 134 Neb. 455, 279 N.W. 161, 162, 118 A.L.R. 423, in upholding a directed verdict the Supreme Court of Nebraska said:

> "The ordinary condition of an apartment or a home confronted the appellant. It is not comparable to a defect such as a hole in the floor, or a sloping aisle in a store. The common use of waxed and polished floors, covered with small rugs, in homes and apartments is a matter of common knowledge. In the instant case the evidence establishes that the appellant knew of such use. They are not inherently dangerous to invitees.
>
> In the absence of unusual circumstances and conditions, the maintenance of polished hardwood floors and the use of small rugs in an apartment is not negligence for which the owner is liable to a prospective tenant invited to inspect the premises. * * * Though a polished floor is slippery and light rugs are apt to slide, since such rugs are in common use their use is not negligence unless there is something unusual about them. There was nothing unusual about the floor or the rug in this case, and the verdict was properly directed."

[5, 6] This rug was similar to those commonly used in nearly all homes, many of which do not have pads under them. There was nothing inherently dangerous about the rug in the absence of unusual conditions. It is a matter of common knowledge that such rugs, or a part thereof, will occasionally slip or move a little whether they have pads under them or not. This happens many times in the average home without injury, and without giving cause for believing them to be dangerous. The undisputed evidence is that Mrs. Ashley had walked over this rug on many occasions without noticing anything wrong; that Mrs. Jones had walked over it daily without any difficulty; that while on some occasions it had moved or been disarranged this had rarely happened and she had never "slipped particularly"; and that Mr. Jones had had a similar experience to the extent that it had never occurred to him that this rug might slip and injure anyone.

There was no evidence that this rug had ever slipped enough to hurt anyone or to cause alarm; Mrs. Ashley herself had had a very considerable experience with the rug; and there is no evidence that the defendants knew that it created a dangerous situation and none that is sufficient to show that they should have so known. Not knowing that an unreasonable risk existed, there was no breach of duty on their part in failing to warn the plaintiffs of a hazard of which they themselves were unaware.

We conclude that there was no evidence here which was sufficiently substantial to have supported a verdict for the plaintiffs, and that the court was justified in making the order in question.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied: GIBSON, C. J., and CARTER, J., dissenting.

NARRON et al.

v.

SWITZER et al.

Civ. 4805.

District Court of Appeal, Fourth District, California.

June 30, 1954.

Rehearing Denied July 26, 1954.

Hearing Granted Aug. 26, 1954.

Dismissed Dec. 13, 1954.

Action for damages for fraud and to quiet title, arising out of failure of defendants to execute a partnership agreement in accordance with agreement pursuant to which plaintiff had conveyed business properties to defendants. The Superior Court of Imperial County, Elmer W. Heald, J., entered judgment from which defendants appealed. The District Court of Appeal, Mussell, J., held that where court found that defendant had promised plaintiffs that he would enter into a written partnership agreement or joint venture with plaintiffs who conveyed business property to defendant, and it appeared that losses were sustained in operation of the business, failure to find as to loss suffered by the business and to consider the loss in awarding damages to plaintiffs because of failure of defendant to enter into the partnership agreement constituted prejudicial error.

Judgment reversed.

1. Partnership ⇨12

A partnership connotes co-ownership in the partnership property with a sharing in the profits and losses of a continuing business.

2. Appeal and Error ⇨1071(6)
Partnership ⇨25

Where court found in action for damages for fraud, that defendant had promised plaintiffs that he would enter into a written partnership agreement or joint venture with plaintiffs who conveyed business property to defendant, and it appeared that losses were sustained in operation of the business, failure to find as to loss suffered by the business and to consider the loss in awarding damages to plaintiffs because of failure of defendant to enter into the partnership agreement constituted prejudicial error.

3. Fraud ⇨31

A person claiming to be defrauded by false representations may elect to rescind the contract or affirm it and claim damages, but he may not do both.

4. Partnership ⇨25

In action for damages for failure of defendants to execute a partnership agreement in accordance with an agreement by which plaintiffs had conveyed business properties to defendants, general finding that the promises as to contribution and participation of defendants in the partnership, and that all representations on part of defendants were false, untrue and fraudulent, was not supported by the evidence.

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Snyder & Fletcher, So. Pasadena, Horton & Knox, El Centro, for appellants L. Glenn Switzer and Howard Switzer.

Jacob Chaitkin, Douglas J. Stapel, Pasadena, for appellant Transmix Corp.

J. W. Fleming, Brawley, Arnold M. Schwartz, Howard W. Hunter, Los Angeles, of counsel, for respondents.

MUSSELL, Justice.

Defendants appeal from a judgment in favor of plaintiffs in an action for damages for fraud and to quiet title. Plaintiffs allege that they were induced to convey their real and personal property to defendant L. Glenn Switzer by reason of his promise to enter into a partnership agreement with them; that said promise was made without any intention to perform the same and plaintiffs were thereby damaged in the amount of the value of the property so conveyed.

Facts

In March, 1944, plaintiffs purchased a sand, rock, gravel and concrete business in Imperial Valley from a Mr. Winn on a conditional sales contract. They operated this business for approximately three years prior to June, 1947, and during the first part of that year they were having financial difficulties. In this connection plaintiff Ernestine Narron testified:

> "Well, we were short on operating finances. We were making such high payments to Mr. Winn on the property and also paying such a high rate of interest on all our borrowed money on the equipment or on the contracts that we were paying out, that we were sort of crippling ourselves, so-to-speak. I mean, we were just hobbling along, you might say."

Plaintiffs had commenced an action against Winn, the conditional vendor, for an injunction forbidding Winn from foreclosing the said conditional sales contract so long as plaintiffs continued to keep up all current payments due thereon, and a temporary injunction was issued in that action. The injunction was vacated and the action was set for trial on August 4, 1947. Upon receiving notice of the dissolution of the injunction and of the notice setting the trial for August 4th, plaintiffs sought financial help. In the latter part of May or early part of June, 1947, Mr. Narron went to the office of defendant L. Glenn Switzer (hereinafter referred to as Switzer) to see if he would be interested in buying some of Narron's equipment. Switzer and his brother, Howard, were then copartners operating about nine "batching plants" out of which they served the building trades and others with ready mixed concrete for foundations, curbs and other structures. Their principal offices were located at Pasadena. Howard Switzer took no part in the negotiations here involved. Switzer told Narron that he would not be interested in buying the equipment. Narron testified that when Switzer was asked if he might be interested in some kind of a partnership deal, Switzer said he didn't know and that he would have to come down and look it over before he would go into any kind of a business deal with anybody. However, in his deposition Narron stated that on this occasion he just asked Switzer about selling some equipment and the conversation was relative to selling trucks only.

A Mr. Harryman testified that he was present at this meeting; that Narron explained his needs; that Switzer told Narron that he might be interested; that he had anticipated expanding down in the desert areas and that if Narron would outline the equipment he had at the present time, he, Switzer, might consider buying the machinery in Imperial Valley.

About June 18, 1947, Narron and his wife returned to the Switzer offices in Pasadena. Mrs. Narron testified that she there supplied Switzer with information concerning their plant, equipment and business; that after stating that the Narron equipment was too small, Switzer made the remark that "he would have lots of equipment; that he could and would bring into the business larger equipment, larger trucks and larger mixers"; that she informed him that she considered the business to be worth around $70,000; that Switzer stated that if the equipment was as represented to him "the rest of the business and the business and outlook for business down here, why it would be worth $70,000 of anybody's money to go into a partnership deal, but at that time he said he was short on money—on cash, or money to bring into a business;" that after these conversations Switzer sent one of his field men, Mr. Lewis, to El Centro to look over the Narron equipment; that on or about July 29, 1947, she again went to Switzer's office and stated to him:

> "We have waited over a month since you made a survey of our equipment and you have had plenty of time to

> think it over and we are to a point where we have to know whether you are interested or whether you are not interested in coming into the business as a partnership with us, and he stated that he didn't—I said 'You have either got to come down there and make some arrangements with us or else we are going to have to start looking around for another partner or we are going to have to sell some of our equipment or trade it in on larger equipment.'"

That Switzer stated he would try to come down to El Centro; that he still didn't know for sure whether he would be able to come into the business with them unless he could make some transfers or unless the Narrons would be able to pay off Winn and then the properties could be transferred to Switzer and he could borrow the money and perhaps see his way clear to come into the business with the Narrons; that he told her to contact Winn and have him available and he, Switzer, would see what they could do about it.

On Saturday, August 2, 1947, Switzer and Lewis, his field superintendent, went to El Centro and while with the Narrons, Switzer listened in on a 'phone conversation between Mr. Winn and Mrs. Narron to the effect that Winn would postpone the trial set for August 4th if $2,500 was placed in escrow the following Monday, August 4th, under conditions that if the $14,000 balance of the purchase price stated in the conditional sales agreement was not paid within thirty days thereafter, the Narrons would not only forfeit the $2,500 to Winn, but also all title and right to possession of the real and personal property described in the conditional sales agreement.

Narron advised Switzer that the Reclamation Department of the United States was offering for bid the right to take rock, sand and gravel from the deposits of such aggregates along the old beach line, about thirty miles from El Centro. Narron and Switzer then went out to look over these deposits and Switzer gave Narron a check for $5,000, part to be deposited in escrow for the Winn contract, and the balance to be deposited to the bid to the Reclamation Department for the right to take materials from the beach line deposits. Narrons claim that $2,500 of this check was to be deposited in the Winn escrow and the balance was to be used to meet other obligations. Mrs. Narron testified that on August 2nd Switzer told them he would help them out "He had decided to make the deal, some kind that he and Wilson could work out whereby he could get by." On Monday, August 4, 1947, Mrs. Narron delivered the $5,000 check which her husband had received from Switzer to an attorney, who gave her his personal check for $2,500 to be deposited with the title company and kept the balance for her. This balance was apparently used by the Narrons as a deposit in connection with obtaining the permit to take aggregates from the beach line pit.

Mrs. Narron testified that on August 2nd Switzer stated that at that time he did not have the money "to come into the business with us, not cash money"; that "he didn't see his way clear unless we could borrow the money on the equipment and on the property to pay off these high rate of interest contracts which we were carrying"; that she gave Switzer a list of all their equipment and their valuation of it; that Switzer stated he would pay off the Winn contract and he would then "borrow money on it"; that he was positive he could finance the whole deal "and enable him to come into the business as a partner and match their equipment with additional equipment which he had and what he didn't have, he would be in a position to buy"; that Mr. Narron stated he would transfer plaintiffs' title to this property to Switzer until all the money advanced by him in paying off the debts had been repaid; that Switzer stated they could take their time about paying back the indebtedness; that Switzer asked how much money it took for the Narrons to get by on a month or how much they would want to take from the partnership a month; that they stated they "didn't want to take anything from the business, only just barely enough to live on" and that they would leave all their profits in the business with the exception of around $500 per month; that they informed Switzer that the remaining profits would go toward payment of the sums advanced by him; that Narron told Switzer he had to know something definite as to a partnership deal between them; that Switzer stated he was reasonably sure he would come into the business if they had an additional thirty days to wait for the escrow; that by then he could see his way clear to come into the business and then he would come in as a partner; that Switzer told Narron to have a contract drawn up; that Narrons' attorney was ill and he, therefore, told Switzer to go ahead and draw up the contract and bring it down. In this connection Narron testified that he and Switzer both stated they were going to have an equal partnership "50–50"; that Switzer said he would sign a contract but nothing was said by him as to what kind of a contract; that Switzer told him they would operate the business as partners and that nothing was said as to how much Narron was to get for his equity in the equipment and property; that if the business did not make a profit they were supposed to sell it; that they would pay Switzer from the proceeds of the sale the sums advanced by him, plus any loss.

On August 4, 1947, the Winn escrow was opened and on September 11th the Narrons assigned all their interest in the property covered by the Winn contract to Switzer.

Mrs. Narron, when signing the various instruments transferring title to their property, asked Switzer's attorney for an explanation as to the assignments without a contract with Switzer and at the attorney's suggestion and with his assistance wrote a letter to Switzer, dated September 12, 1947, outlining their understanding of the deal as follows:

> "We feel that it might be wise for you and us to set down in writing the understanding between you and us whereby we are transferring our business and all property used therein to you, so that we may avoid any possible misunderstanding which may arise in the future. It is our understanding that you do not wish to obligate yourself to pay us any certain sum of money but generally speaking is agreed that we are to be employed by you in your continuation of the present business at reasonable salaries and that if the business earns a profit we are to receive from you a portion of the profit until we have been repaid our initial investment in the business.
>
> "We have discussed the foregoing with Mr. Fletcher and he has suggested that we write you our views on the matter with the thought that perhaps a written agreement can be entered into between us making somewhat definite your plans with regards us for the future.
>
> "Please give this your earnest thought and advise us just how you feel, that is if you are not planning on coming back down real soon. We want you to know that we want to be as fair with you as you have been with us. We are signing the two assignments, the right title and interest in escrow 38603 and all right title and interest in and to that certain contract dated March 1, 1944 by and between W. M. Winn and Wilson Narron, and are enclosing same to you today. We certainly hope that all of this works out as soon as possible that we may be able to get going here.
>
> "We shall be awaiting word from you as to the above matter, and want to now express our thanks to you for all that you have done so far and just hope we will be able to repay in gratefulness and our services. Hoping to see you soon,
>
> "We wish to remain
>
> "Sincerely yours,
> /s/ Wilson Narron
> /s/ Ernestine Narron."

Switzer replied as follows:

> "Your letter of Sept. 12th received with the various enclosures which you mention, signed. Note the various items contained in your letter and feel that you are entitled to a written understanding for your own information as well as for our own records here. You may be assured that something that will be satisfactory to all concerned will be prepared and submitted

for your approval as soon as all details are gotten together and we are ready to take over the operation there.

"We naturally want to have you remain in our employ there and to consider that you are not going out of business but that you are being taken into and joining us in a venture that will prove profitable and a happy one for all concerned.

"It is our understanding that you have talked over with Mr. Fletcher the matter of your retaining your accounts receivable and also any cash in the bank there; also that you are to pay all your accounts payable. It might be that we would want to assist you in taking care of some of these and in that case any money we paid out for your account could be charged to your account to be repaid as might be determined later on.

"You mention a salary for you both; this will be arranged also some arrangement for you to receive from the net profits of the business a certain percentage until you have received back out of your original investment your present net worth. This figure we would like to have you submit your idea of just what that amount would be.

"We are getting all things under way as fast as we can and will undoubtedly be seeing you again very soon.

"Yours very sincerely
/s/ *L. Glenn Switzer*
L. Glenn Switzer."

Following September 11, 1947, defendants operated the business in El Centro. Equipment was moved from Pasadena to El Centro by Switzer. The Narrons were permitted to work in the business and to draw $500 per month for living expenses until their employment was terminated by a letter from Switzer on May 10, 1948. The record shows that the business commenced to lose money and the net loss for the period October 1, 1947 to November 30, 1949, amounted to the sum of $124,248.69. This loss was paid by the defendants.

Plaintiffs took the position at the trial that Switzer promised to enter into a partnership with plaintiffs and that he did not intend to keep this promise; that plaintiffs, in reliance upon Switzer's promises and representations with respect to a partnership, conveyed their property to him and that they are entitled to recover the value of the property so conveyed.

[1, 2] The trial court found, among other things, that defendants paid to the creditors of plaintiffs and advanced to and for plaintiffs the total sum of $29,034.66; that the plaintiffs are entitled to a judgment against the defendants for $83,108.50 (the fair market value of all real property with improvements attached thereto and all personal property), $21,801.18 (fair market value of material taken from the government pit), and $5,000 (advanced royalties by the plaintiffs to the Bureau of Reclamation to the new government pit), a total of $109,909.68; that defendants are entitled to a credit in the said sum of $29,034.66. The court quieted plaintiffs' title to the permit issued by the Bureau of Reclamation and also quieted title in defendants to certain real and personal property. It found that Switzer promised plaintiffs he "would prepare and enter into a written partnership agreement or joint venture with plaintiffs and that it was at no time the intention of Switzer to enter into a partnership in the cement business in good faith with the plaintiffs and said promise was made without any intention of fulfillment." However, according to Narron's testimony the terms of the proposed written partnership contract were never discussed and we find no evidence in the record from which the precise terms of such a proposed contract can be ascertained. That the parties never reached an agreement as to their contractual relationship is evidenced by the letter of September 12th to Switzer and his reply thereto. The contract was never prepared or submitted to the parties for execution. Narron testified that he and Switzer both stated that they were going to have an equal partnership and Switzer stated that they would operate the business as partners. However, if a partnership agreement had been drawn and executed by Switzer in accordance with Narron's understanding, it would necessarily contain a provision relative to sharing the

losses as well as the profits of the business. As was said in Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931, 933:

> "A partnership connotes coownership in the partnership property with a sharing in the profits and losses of a continuing business."

The trial court made no finding as to the losses paid by Switzer during the time the business was operated by the parties and this was a material issue raised by the allegations of the answer of the Transmix corporation to the amended and supplemental complaint. Since the damages recoverable by plaintiffs for the alleged failure of defendant Switzer to perform a promise to execute a partnership agreement are limited by the amount they would be entitled to receive had the promise been kept, Civil Code section 3358; Cutler v. Bowen, 10 Cal.App.2d 31, 37, 51 P.2d 164, the failure of the court to find as to the loss suffered by the business and to consider this loss in awarding damages to plaintiffs constitutes prejudicial error.

[3] The trial court erroneously awarded plaintiffs $21,081.18, found to be the fair market value of the material taken from the government pit involved. A person claiming to be defrauded by false representations may elect to rescind the contract or affirm it and claim damages but he may not do both. LeClercq v. Michael, 88 Cal.App.2d 700, 703, 199 P.2d 343; Bagdasarian v. Gragnon, 31 Cal.2d 744, 750, 192 P.2d 935. In the instant case the trial court found that the plaintiffs elected to pursue the remedy of damages. The evidence shows that it was agreed between the parties that the permit to take rock, sand and gravel from the government pit was to be taken in plaintiffs' name and the material used in the operation of the business. At least $2,500 of the $3,000 deposited with the Reclamation Bureau was furnished by Switzer as advanced royalties for the first year's use of the pit. Switzer, at his own expense, built a road to the pit and installed a rock, sand and gravel plant, with a sand washer. After the plant was installed, the pit material was segregated and washed and, in part, stockpiled. The total amount of material used in the business was found to be 72,670.60 cubic yards. The government permit was merely to take materials from the pit and pay a royalty to the Reclamation Bureau of 15¢ per cubic yard. It was limited to five years and the quantity of materials available under the permit was approximately 5,000,000 cubic yards. It was not shown that the removal of 72,670.60 cubic yards and its use in the business damaged the Narrons to the extent of the fair market value thereof. The trial court found in this connection that plaintiffs permitted the mining of sand and rock in said pit by defendants in the belief that it would be mined for the benefit of the partnership in which plaintiffs had an interest and the evidence shows that it was so mined and used. The damage to plaintiffs, if any, occasioned by the removal and use of the pit materials in the business occurred by reason of the failure to realize a profit from the operation of the business and not by the failure of Switzer to execute a formal partnership agreement.

[4] The trial court further found that Switzer informed plaintiffs he could borrow money at a lower rate of interest than plaintiffs; that he represented to plaintiffs that defendants had a great deal of equipment and had competent men in their employ who could and would act as managers and office men; that Switzer promised plaintiffs that he would examine their properties and equipment and if plaintiffs' equipment and properties were as represented, he would furnish equipment equal or greater in value than that owned by the plaintiffs; that he promised to furnish a manager and office man and money for working capital. It was then found that all of the aforesaid promises, statements, representations and conduct on the part of the defendants were false, untrue and fraudulent. The evidence does not support this general finding as the record does show that the defendants did have a great deal of equipment and competent men in their employ; that they did examine the properties of plaintiffs and did furnish the equipment, men, and working capital as promised.

It is apparent from the record before us that the plaintiffs, faced with a foreclosure trial, needed capital to save their business. Switzer agreed to and did pay their debts in the sum of $29,034.66, taking title to their equipment and property. He took charge of and operated the business, employed plaintiffs and agreed that plaintiffs could pay back the money advanced by him out of the profits of the business. While the evidence supports the finding that Switzer agreed to execute a formal partnership agreement and failed to do so, there was no proof that the defendants wasted or mismanaged the business or business property, or that a profit would have been made if a written partnership agreement had been executed. If we assume that Switzer fraudulently represented that he would execute such an agreement or promised to execute it without any intention to keep the promise there was nevertheless a failure on the part of plaintiffs to prove that they were thereby damaged in the amount awarded by the judgment. The record shows that plaintiffs' loss was caused by the failure of the business and not by defendants' failure to execute a partnership agreement.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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126 Cal.App.2d 191

BROWN v. KIELY.

Civ. 15911.

District Court of Appeal, First District,
Division 2, California.
June 23, 1954.

Action for personal injuries sustained when plaintiff was struck by defendant's automobile. The Superior Court, Alameda County, Donald K. Quayle, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Nourse, P. J., held that where there was evidence that plaintiff had cut corner in crossing streets at intersection and was within but near edge of unmarked crosswalk when struck, instruction on statute relating to crossing other than at crosswalk was not prejudicial to defendant, even though evidence was undisputed that plaintiff was within crosswalk when hit.

Judgment affirmed.

1. Appeal and Error ⚷1064(1)

Where in pedestrian's action for injuries sustained when she was hit by defendant's automobile, there was evidence that pedestrian had cut corner while crossing streets at intersection and was near edge of unmarked crosswalk when hit, instruction on statute relating to crossing other than at a crosswalk was not prejudicial to defendant, even though evidence was undisputed that pedestrian was within crosswalk when hit. Vehicle Code, §§ 560(a), 562.

2. Appeal and Error ⚷1033(5)

Where, in a pedestrian's action for injuries sustained when hit by automobile while crossing street, evidence on pedestrian's motions is undisputed and it is a matter of law that pedestrian was crossing within crosswalk and had right of way, that trial court deems pedestrian's right of way question of fact for jury and instructs on crossing other than at crosswalk, is not prejudicial to defendant. Vehicle Code, §§ 560(a), 562.

Carlson, Collins, Gordon & Bold and John Ormasa, Richmond, for appellant.

Weinmann, Rode, Burnhill & Moffitt, Oakland, Cyril Viadro, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action for personal injuries caused to plaintiff when as a pedestrian she was struck by defendant's car. The verdict was for defendant and plaintiff appeals from the judgment entered thereon.

The accident happened on March 16, 1952, at 5:45 P.M. at the intersection of Dana Street and Parker Street in Berkeley. Dana Street runs north and south, Parker Street, east and west. According to the evidence most favorable to respondent the plaintiff in crossing from the northeast corner to the southwest corner of the intersection first went due west in the unmarked crosswalk across Dana Street but did not continue in that direction until she reached the northwest corner; she deviated in a southerly direction cutting the corner. While doing so she hesitated, and then continued at a trot across Parker Street just into the path of defendant's car; she was hit by the left front of the car, according to markings made by witnesses on a map of the intersection received in evidence, approximately on or just within the eastern borderline of the unmarked western crosswalk across Parker Street. Defendant did not see her as he was blinded by the sun in the approximate direction of which he was driving.

On appeal the only grievance presented is that the court gave an instruction in the terms of section 562, Vehicle Code, relating to crossing at other than crosswalks, whereas according to appellant the evidence was undisputed that appellant was within the crosswalk when she was hit, so that the instruction found no support in the evidence and was calculated to mislead the jury.

[1] There is no reversible error. The court in instructing the jury read to it both section 560(a) of the Vehicle Code relating to pedestrians' right of way at crosswalks and section 562(a) and (b) relating to crossing at other than crosswalks. The circumstances that appellant did not cross from the northwest corner to the southwest corner but reached the unmarked crosswalk by cutting the northwest corner, describing an arc from the northeast, and that she was near the eastern borderline of the crosswalk when she was hit could cause a doubt as to whether she was crossing within the crosswalk and had the right of way. In case of such doubt it seems correct to instruct the jury on the law with respect to both possibilities, compare Reed v. Stroh, 54 Cal.App.2d 183, 190, 128 P.2d 829; Carney v. RKO Radio Pictures, Inc., 78 Cal.App.2d 659, 666, 178 P.2d 482, and leave the decision which rule is applicable under the facts to the jury, Reed v. Stroh, supra. It was conceded by appellant at the oral argument that the question whether a pedestrian who was hit within a legal crosswalk, but had not duly walked within the crosswalk until he was hit, was crossing within the crosswalk in the sense of section 560(a), Vehicle Code, might depend on the manner and degree in which he had previously deviated from the course within the crosswalk and therefore contains a question of fact.

[2] Even if in this case the question whether plaintiff was crossing within the crosswalk and had the right of way had been a matter of law for the court, because there was no conflict in the evidence as to appellant's movements before she was hit, as contended on appeal, appellant would not be in a position to complain because she herself in the court below took the position that it was a question of fact for the jury by proposing an instruction reading in part: "The Vehicle Code of the State of California, in effect at the time of this accident, provided that the driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection. If you find from the evidence in this case that the plaintiff at the time of this accident was crossing Parker Street in a legal crosswalk, as defined by these instructions, plaintiff Ella B. Brown was entitled to the right of way." The last sentence quoted evidently implies that there was in this respect a question of fact for the jury to decide. The trial court refused the instruction on the ground that it was covered by other instructions. The instruction in the terms of section 560(a) Vehicle Code correctly covered the subject matter of the proposed instruction and if there was a question of fact as assumed in the proposed instruction, covering of the opposite possibility by instructions in the terms of sec. 562(a) and (b) was a normal and correct complement, of which under the doctrine of invited error (if any) appellant cannot complain. Smith v. City and County of San Francisco, 117 Cal.App.2d 749, 751, 256 P.2d 999, and cases there cited; Drotleff v. Renshaw, 34 Cal.2d 176, 185, 208 P.2d 969.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

125 Cal.App.2d 478

SACRAMENTO & SAN JOAQUIN DRAINAGE DIST.

v.

TRUSLOW et al.

Civ. 8226.

Sac. 6296.

District Court of Appeal, Third District, California.

June 24, 1954.

Action by drainage district to condemn an easement on certain lands. The lessor, lessee, a reclamation district which had issued bonds on assessments levied against the land, and the county treasurer appeared as defendants. The Superior Court, Yolo County, McDonald, J., entered judgment from which the lessor, reclamation district, and county treasurer appealed. The District Court of Appeal, 270 P.2d 928, affirmed the judgment. On petition for rehearing, the District Court of Appeal held that lessor under continuing lease was not entitled to interest from time possession was taken by condemnor prior to trial.

Rehearing denied.

1. Eminent Domain ⚷148

Just compensation for property taken ought to include value of loss of use arising where condemnor takes possession prior to trial and judgment on theory that where such prior possession is taken the one entitled to the use of the property will not be adequately compensated by award of damages for value of property taken, and this value of loss of use may be measured by legal interest upon the award for the period from time of taking to time award is paid into court.

2. Eminent Domain ⚷148

Where taking of part of leased property did not abrogate lease, even pro tanto, lessor suffered no loss of use through possession taken by condemnor prior to trial and judgment, and was not entitled to interest from time possession was taken as damages in addition to award for value of property taken.

3. Appeal and Error ⚷835(2)

Lessee's attempt to present for first time via answer opposing lessor's petition for rehearing, a request for modification of lessee's condemnation award so as to include interest as damages for loss of use of leased property arising where condemnor took possession prior to trial and judgment, was too late.

◆

Earl S. Patterson, Los Angeles, William B. Borthwick, Beverly Hills, Carl E. Rodegerdts, Woodland, for appellant Truslow.

Chalmers, Cowing & Sans, Woodland, for appellant Irrigation Dist.

E. L. Means, James F. Roach, Woodland, for appellant Yolo County and others.

Edmund G. Brown, Atty. Gen., Walter S. Rountree, Deputy Atty. Gen., for Drainage Dist.

Mento & Buchler, George K. Littlefield, Sacramento, for respondent King.

PER CURIAM.

[1, 2] On petition for rehearing appellant Truslow points out that this Court did not in its opinion dispose of his contention that he was entitled to have the award in his favor modified by the addition thereto of interest from the time when, prior to trial and judgment, possession of the property was taken by the condemnor to the time when the award in his favor was paid into court for him. It has been held that just compensation for property taken ought to include the value of the loss of use arising where possession is so taken and that this value may be measured by legal interest at the rate of 7% per annum for that period upon the award. Metropolitan Water Dist. of Southern California v. Adams, 16 Cal.2d 676, 107 P.2d 618; see also Los Angeles County Flood Control District v. Hansen, 48 Cal.App.2d 314, 119 P.2d 734. This modification cannot be made in favor of appellant Truslow because the reason of the rule under which it is granted does not here apply. Interest is allowed on the theory that where such prior possession is taken the one entitled to the use of the property will not be adequately compensated by an award of

damages for the value of the property taken. Truslow's interest in the property taken was a reversionary interest, he having leased the land to King. He, therefore, was not entitled to the use of the property and since, as has been seen, the taking of a part of the leased property did not abrogate the lease, even pro tanto, Truslow has suffered no loss through the prior possession taken by the condemnor. That loss, if any, has fallen upon King. We cannot, therefore, modify the award to Truslow.

[3] King has throughout been a respondent in the appeals taken by Truslow and by the Reclamation District. It is a matter of grave doubt, therefore, he not having appealed from the judgment fixing his award, that this Court has appellate jurisdiction to modify his judgment by adding interest to the award. But if we assume such jurisdiction exists we could not upon this record so modify his judgment. The first time that he made the request was when he filed his answer to Truslow's petition for a rehearing, in which he opposed the granting of that application. Noting apparently that Truslow was asking an award of interest, King took the position that his status was identical with Truslow's and he, therefore, asked this Court to modify the judgment in his favor by adding interest thereto. We have nothing before us to tell us the status of the judgment in favor of King which he, as respondent, seeks to have us modify. For aught that appears here that judgment may not belong to him, or may have been satisfied, in which latter event it would no longer exist for purpose of modification. The only information we have upon the matter comes through the contention on appeal by Truslow that during the time intermediate the trial and judgment King had assigned all of his interest in the award made to him. Nowhere has this assertion been controverted by any party to this record. We deny King's application for modification on the ground that it comes too late and that in the state of the record no basis exists for such modification.

The petition for rehearing is denied.

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126 Cal.App.2d 255

MURPHY et al. v. WOOD.

Civ. 20098.

District Court of Appeal, Second District, Division 2, California.

June 25, 1954.

Suit by payees of a promissory note against the maker. The Superior Court, Los Angeles County, Frederick F. Houser, J., rendered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Fox, J., held that evidence supported finding that the note had been made as part of an effort to clarify the financial structure of a corporation and was not supported by consideration.

Judgment affirmed.

1. Bills and Notes ⟹518(1)

In action by stockholders to recover on a promissory note made by corporation's president, evidence supported finding that the note had been made as part of an effort to clarify the financial structure of the corporation, and was not supported by consideration.

2. Bills and Notes ⟹539

Trial court which had determined, in stockholders' action against the corporation president to recover on promissory note made by a corporation's president, that the note had been made as part of an effort to clarify corporation's financial structure and had not been supported by consideration, was not required to make findings on the validity of stock issued as part of the same transaction.

◆

Charles L. Nichols, Beverly Hills, Ivan Miller, Thomas W. Hughes, Los Angeles, and Anthony T. Carsola, Beverly Hills, for appellants.

Thomas B. Sawyer, San Pedro, for respondent.

FOX, Justice.

This is a suit by the payees of a promissory note against the maker. From a judgment for defendant, on the ground that there was no consideration for the note, plaintiffs appeal.

In January, 1951, defendant Jim Wood and plaintiff Murphy discussed informally the acquisition of an automobile dealership. Wood was district manager for the DeSoto Motor Corporation. Murphy was an automobile dealer in Culver City. A dealership was located in San Pedro that was for sale for $25,000. Murphy (who represented his coplaintiff throughout this entire transaction) and Wood worked out an arrangement whereby plaintiffs would furnish the money to buy the dealership, Wood to put up $10,000 working capital and operate the business at a salary of $500 per month and $150 expenses; plaintiffs' investment to be repaid out of the profits, after which defendant's investment would also be returned, and then the profits would be shared equally between the plaintiffs and the defendant. Plaintiffs provided $25,550 to purchase the business. (The price was increased $550 to cover a service truck that was added.) Defendant's contribution was made up of $8,500 cash and two automobiles valued at some $1,700. The new group took over the agency on March 1, 1951, with Wood in charge.

Murphy arranged for Charles Rollinson, who had represented his firm for some time, to handle the legal work of this new enterprise.[1] Here the picture becomes somewhat cloudy because Mr. Rollinson died and certain of the corporate books and records which were apparently in his possession have not been located. It does appear, however, that Mr. Rollinson had organized a corporation known as Jim Wood, Inc., with a capital of $25,000 and having 25,000 shares at a par value of $1.00 each. Defendant Wood was president and his wife was secretary. An application for a permit to issue stock was filed with the Division of Corporations. A permit was granted on April 17th, authorizing the issuance of 12,501 shares to defendant and 12,499 shares to plaintiffs for cash. Soon thereafter stock certificates for these shares, made out to the respective parties, were signed by Wood and his wife as president and secretary, respectively, and the corporate seal affixed. Wood then delivered these certificates to Rollinson, who later turned them over to Murphy. No money was then or thereafter paid to the corporation by any of the parties.

About the middle of March, Murphy told Albert Berg, an accountant, whose firm had done work for him that, he was interested in a DeSoto-Plymouth dealership in San Pedro and suggested he see Wood about "setting up the corporation." As a consequence Berg was employed to handle the accounting work of the new enterprise. He was to come in monthly and prepare quarterly reports. The corporation had its own bookkeeper. In the course of preparing the report for June 30, 1951, Berg contacted Rollinson, relative to the capital stock structure of the corporation. Rollinson advised him that the corporation had been authorized to issue 25,000 shares of $1 par value stock for cash. Berg told him, "the corporate records did not reflect any deposit of cash in the corporation bank account for which the corporate stock could be issued," that the $25,550, which had been used to purchase the business with, had been credited on the corporation records to an account designated "Due to Jim Wood." This, of course, was the capital furnished by plaintiffs. In order to meet this situation, Rollinson suggested that the corporation write a check in favor of Wood in the amount of $25,550 and charge that check against the Jim Wood advance account on the corporate records and that subsequently a deposit of $25,000 (out of this check for $25,550) be made in the corporation's bank account as a means of showing payment in cash for the stock.

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[1] Mr. Rollinson prepared an agreement which the parties executed under date of March 1, 1951. It recited the respective contributions of the parties to the capital as above stated, Wood's designation as manager, at the salary and expense allowance previously agreed upon, the fact that a corporation had been organized, and an application for a permit to issue stock was pending. This agreement, however, is unclear. As a consequence plaintiff included a second cause of action, joining the corporation as a defendant, to interpret it. At the conclusion of the trial, however, plaintiffs dismissed this cause of action without prejudice.

Bookkeeping entries to this effect appear to have been made though the check was not actually issued and the redeposit was not made. Later, Berg inquired of Rollinson as to what security plaintiffs had for the $25,550 they had put up since they had only received $12,499 in stock. Berg suggested to him the execution of a note by Wood as security for plaintiffs "to represent the additional money which they had furnished for the purchase of the dealership."

The note here in suit was prepared by Rollinson. Wood signed it and endorsed the stock certificate which had been made out to him in Murphy's office. Murphy explained that Rollinson had advised it was necessary for Wood to sign these papers so that the corporate work could be concluded. Wood's explanation of this phase of the transaction was that he had wished to set the corporation up for $35,000 capitalization but that Berg had recommended that the $10,000 provided by Wood be shown as a loan to the corporation by him but "it was only a bookkeeping entry." It was Wood's impression when Murphy asked him to sign these papers that "it was to offset the $10,000" item—"that is the reason I signed the note."

[1] Plaintiffs' first ground for reversal is that the court erred in finding there was no consideration for the note. This means, in effect, that the evidence is insufficient to support such finding. At the conclusion of the trial the court observed it did not believe that in signing the note Wood "meant to assume any personal liability"—that Rollinson, Berg and the two partners were going through a "shadow-box fiction in order to comply with the permit for the issuance of stock. * * *"

It will be recalled that at the initial conversations between Murphy and Wood about the purchase of the dealership Wood indicated he could only invest $10,000. When the purchase was made Wood had difficulty raising that amount. In fact, he had to raise most of the money by a loan on his home and pending the realization of funds from this source he borrowed $5,000 temporarily from Murphy to put into the deal. This loan, however, from Murphy was repaid when the loan on Wood's house was consummated. Even at that Wood had difficulty in meeting his $10,000 commitment. Although there is some conflict in the evidence, it justifies the inference that he actually put $8,500 in cash into the business and that the difference was represented by "approximately $1,700 worth of automobiles" according to Berg. The agreement of March 1st also refers to Wood's contribution as $10,000. There is no suggestion from any source that either Wood or Murphy contemplated any larger investment by Wood. If, however, the note which Wood signed for $12,501 was intended as a binding obligation then he would be more than doubling his investment and increasing his indebtedness to a point that was out of line with his apparent limited financial position. Furthermore, if the note be considered as representing a loan of such portion of plaintiffs' contribution to the purchase of the business or as a purchase of stock in the corporation from plaintiffs, then their investment in the enterprise is immediately, in effect, reduced by one half. It does not appear that such results were intended or that the note was executed by Wood for either of these suggested purposes. Also, of substantial significance is the manner in which the investments of the parties were entered on the books of the corporation, and, more particularly, the application to the Division of Corporations requesting permission to issue 25,000 shares of $1 par value stock for cash which permission was granted. This was undoubtedly an erroneous approach to this problem and produced an unintended result. The only explanation that appears is that the principals failed to adequately explain their deal to their attorney and accountant. In any event, after the permit was granted and the stock issued, the attorney and accountant realized the setup was not what was desired; viz., cancellation of indebtedness for stock and not the sale of stock for an additional $25,000. They thereupon attempted to correct the situation by certain bookkeeping entries and a contemplated "in and out" check and redeposit transaction. The note here in question was executed at the suggestion of the attorney as a part of the effort to unscramble the situation. The trial judge characterized this as "shadow-box fiction" and drew the inference that no liability was intended by the execution of the note. These facts and circumstances furnish ample support for the finding that there was no consideration for the note.

[2] Plaintiffs' second ground for reversal is that the court failed to find on material issues. They argue that to find there was no consideration for the note, "the trial court was forced to rule that the entire stock issuance was illegal and void, that, in effect, the entire corporate entity was some sort of *alter ego* to be disregarded * * *." They then complain that the court failed to make any findings on these matters. Such issues were not before the court either by the pleadings or by necessary implication. Although the trial judge expressed his opinion as to the validity of the stock issue he actually only decided that no liability was intended by the execution of the note and consequently there was no consideration for it. It was therefore unnecessary to make findings on these other questions.

Furthermore, upon the dismissal by plaintiffs of their second cause of action, wherein the corporation was named as a defendant, it left the suit as simply one between the payees and maker of a note. The judgment does not purport to determine either the status of the corporation or the validity of its stock issue.

Plaintiffs also contend that the defendant failed to perform his agreement with them in that he "never did actually advance the total sum of $10,000 and of greater importance, whatever amounts he did advance from time to time were *at his own instance* carried upon the books of the corporation as an account payable to and receivable by him from the corporation * * *." It is true, as previously noted, that defendant did not put the full $10,000 in cash into the business. He did, however, more than make up the $1,500 difference in automobiles which he turned over to the corporation. No objection appears to have been made to this substitution. It is a fair inference that the cash and automobiles provided by defendant were then accepted by plaintiffs as full compliance with his commitment to furnish $10,000.

Plaintiffs emphasize that defendant's contribution was carried on the books of the corporation as an account payable to him and that this was done at his instance. Defendant, however, testified that Berg "suggested that we show the $10,000 as a loan to me." Berg claimed he found this entry in the books when he first examined them about the middle of March, 1951. Viewing the testimony, as we must, in the light most favorable to the successful party below, it is clear that plaintiffs' position as to who caused this entry to be made cannot be sustained. Defendant further testified "it was only a bookkeeping entry." The clear inference from this testimony is that defendant's $10,000 contribution was not in fact regarded as a debt due him by the corporation.

Plaintiffs have developed a number of hypotheses from the evidence on which they have predicated arguments which would lead to the conclusion that the note in question is supported by a consideration. The difficulty, however, with plaintiffs' position is that they would have us view the evidence and evaluate it differently from the trial court, and draw inferences contrary to those drawn by that court. We, of course, must accept the trial court's appraisal of the evidence.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

SPARKS et al.
v.
REDINGER et al.*

HOMEN v. SPARKS.

THOMAS
v.
REDINGER et al.
Civ. 16031, 16030.

District Court of Appeal, First District,
Division 2, California.

June 23, 1954.

Hearing Granted Aug. 19, 1954.

Action by automobile driver and passengers against owner and driver of tractor for personal injuries sustained when automobile made left turn across path of tractor and collision resulted. Tractor owner cross-complained against automobile driver for property damage. The Superior Court, Alameda County, Thomas J. Ledwich, J., after verdicts for tractor owner on cross-complaint and for tractor driver, entered orders granting new trials to automobile driver and passengers on sole ground of error in refusing last clear chance instruction. Tractor owner and driver appealed. The District Court of Appeal, Dooling, J., held that where jury was instructed that right to assume that others will perform their duties and obey the law does not exist when it is apparent, or in exercise of ordinary care would be apparent, that others are not going to perform their duties or obey the law, refusal to give last clear chance instruction was not prejudicial.

Orders reversed.

1. Negligence ⚷83.7

The last clear chance doctrine applies only where party has actual knowledge of other party's dangerous situation.

2. Appeal and Error ⚷1067

In action for personal injuries sustained in collision resulting when automobile made left turn into path of tractor, wherein tractor driver cross-complained against automobile driver, and jury was instructed that right to assume that others will perform their duties and obey the law does not exist when it is reasonably apparent, or in exercise of ordinary care would be apparent, that others are not going to perform duty or obey law, and jury's verdict for owner on cross-complaint could be based only on finding that tractor driver was not negligent, refusal to give last clear chance instruction was not prejudicial.

Scott Conley, Keith, Creede & Sedgwick, San Francisco, Cresswell & Davis, Oakland, for appellants.

James G. Quinn, Jr., William H. Quinn, Oakland, for respondents.

DOOLING, Justice.

Defendant and cross-complainant Homen and defendant Redinger appeal from orders granting new trials to plaintiff and cross-defendant Charles K. Sparks and to plaintiffs Robert N. Sparks and Thomas. The new trials were granted on the sole ground that the court erred in refusing to give an instruction proposed by respondents on the doctrine of last clear chance.

The litigation arose out of a collision between an automobile driven by plaintiff and cross-defendant Charles K. Sparks in which the other plaintiffs were riding and a tractor pulling two trailers loaded with gravel owned by defendant and cross-complainant Homen and driven by Homen's employee Redinger. While the automobile was engaged in making a left-hand turn across the path of the tractor the tractor collided with the automobile.

The three respondents sued Homen and Redinger for personal injuries. Homen cross-complained against the driver of the automobile, Charles K. Sparks, for damages to his equipment and the value of its loss of use. The jury brought in verdicts against all three plaintiffs on their complaints and a verdict for damages on the cross-complaint in favor of Homen against Charles K. Sparks.

Apart from the failure of the court to give the proposed instruction on last clear chance no complaint is made of any of the instructions. The jury was otherwise properly instructed on negligence, contributory negligence and proximate cause. The jury could only find for cross-complainant Homen on his cross-complaint, under the instructions given, if they found that Redinger, the driver of Homen's tractor, was not guilty of any negligence which proximately contributed to the collision. This being so appellants argue that the failure to give the last clear chance instruction was not prejudicial, since the last clear chance instruction is only applied by the jury when it finds that *both parties were negligent*. 19 Cal.Jur., Negligence, sec. 80, pp. 651–652. Thus it is argued that when the jury, as it did here, finds that one party was not guilty of any negligence proximately contributing to the injury there can be no place for the application of the doctrine of last clear chance.

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* Subsequent opinion 279 P.2d 971.

Respondents reply that negligence "may consist of the failure to avoid an accident under the last clear chance doctrine" and where the jury is not instructed on that doctrine in a proper case the jury might find a party free from negligence, whereas if it was instructed on the doctrine of last clear chance it might find the same party guilty of negligence in that he had the last clear chance to avoid the collision and did not exercise ordinary care to avoid it. Under the instructions given in this case such a result would not have been possible. The jury was instructed:

"A person who, himself, is obeying the law and exercising ordinary care has a right to assume that others, too, will perform their duty and obey the law, and he has a further right to rely and act on that assumption, unless he knows, or in the exercise of ordinary care it would be apparent to him as a reasonable man that the contrary is true. Thus, it is not negligence for such a person to fail to anticipate injury which can come to him or to others only from a violation of law or duty of another.

"However, this exeption to the above rule should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from himself exercising ordinary care."

[1, 2] This instruction was even more favorable on the question of the duty to use ordinary care in the face of the negligence of another than a last clear chance instruction would have been since it included the situation where such negligence "in the exercise of ordinary care would be apparent to him", while the last clear chance instruction only applies where the party has actual knowledge of the other party's dangerous situation. 19 Cal.Jur., Negligence, sec. 82, p. 655. It is perfectly clear, in view of the instruction actually given and the finding of the jury under that instruction that appellant Redinger was not guilty of any negligence, that the giving of the last clear chance instruction could not have changed the result and the error, if any, in failing to give it was not prejudicial.

The situation here, because the judgment for cross-complainant can only rest on a finding that his driver was not negligent, is distinguishable from the cases relied upon by respondents where there is simply a verdict against a plaintiff on his complaint. In the latter case an appellate court cannot tell whether the verdict was based on a finding that defendant was not negligent, or on a finding that both parties were guilty of negligence, and so cannot say that the failure to give a last clear chance instruction was not prejudicial.

Orders granting new trials reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

126 Cal.App.2d 381

BRAWNER v. WILSON et al.

Civ. 4824.

District Court of Appeal, Fourth District,
California.
July 1, 1954.

Action in unlawful detainer for possession of farm land leased by plaintiff to defendants, the amount of rent due, and damages for detention of the land. From a judgment of the Superior Court of San Diego County, John A. Hewicker, J., for plaintiff, defendants appealed. The District Court of Appeal, Mussell, J., held that whether plaintiff lessor properly prepared part of the land for cultivation, as required by the lease, was a fact question for the trial court to determine on conflicting evidence and that the judgment, being supported by substantial evidence, the court's decision would not be disturbed.

Judgment affirmed.

1. Landlord and Tenant 🔑291(16)

In lessor's unlawful detainer action against lessees of farm land, whether plaintiff properly prepared part of land for cultivation, as required by lease, was fact question for trial court to determine on conflicting evidence.

2. Appeal and Error 🔑1010(1)

Where judgment appealed from is supported by substantial evidence, trial court's decision of fact question will not be disturbed by District Court of Appeal.

3. Landlord and Tenant 🔑124(1)

Construction of provision of lease of farm land that lessor should pay lessees for use of any surplus water, not consumed by lessees, from well on land, at rate of 60 cents per kilowatt hour for electricity consumed while using 60 horsepower pump at well, as requiring payment at such rate, which was about 60 times cost of operating pump, must be rejected as involving absurdity. Civ.Code, § 1638.

4. Contracts 🔑143

A contract must receive such interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if possible without violating parties' intention. Civ.Code, § 1643.

5. Contracts 🔑154

The language of contract governs its interpretation only so far as language is clear and explicit and does not involve an absurdity. Civ.Code, § 1638

6. Contracts 🔑154

Language involving absurdity in contract or any phrase or clause therein inconsistent with parties' object and intention is rejected in construing contract. Civ.Code, §§ 1638, 1650, 1652, 1653.

7. Contracts 🔑154

Where contract admits of two constructions, court should adopt that which is most equitable and will not give unconscionable advantage to one party over the other.

8. Evidence 🔑461(1)

In lessor's unlawful detainer action against lessees of farm land, parol evidence of parties' intent that lessor should pay lessees 66 cents per hour for use of 60 horsepower pump in obtaining surplus water, not consumed by lessees, from well on land, as authorized by lease, instead of 60 cents per kilowatt hour for electricity consumed in operating pump, as specified in lease, was not inadmissible as varying terms of written instrument, since construction of lease as requiring payment by lessor at specified rate, which was about 60 times cost of operating pump, must be rejected as involving absurdity. Civ.Code, § 1638.

9. Landlord and Tenant 🔑291(12)

In lessor's unlawful detainer action against lessees of farm land, testimony as to amount of electricity consumed by lessor in operating pump at well on land to obtain surplus water, not consumed by lessees, as authorized by lease, was inadmissible to show that such amount would have exceeded amount of rent alleged to be due plaintiff, as parties did not intend that plaintiff should pay more for such electricity than rental payments under lease.

10. Landlord and Tenant ⚷290(5)

In lessor's unlawful detainer action against lessees of farm land, defendants could not offset by counterclaim or cross-complaint, amount claimed to be due them from plaintiff under erroneous provision of lease for plaintiff's payment to defendants of 60 cents per kilowatt hour for electricity consumed in operating pump to obtain surplus water, not consumed by lessees, from well on land, as authorized by lease.

11. Landlord and Tenant ⚷291(13)

Lessees of farm land were not released from obligation to pay rent on ground of their eviction by lessor from substantial portion of land by his failure properly to prepare such portion for use and further cultivation by lessees, where evidence supported trial court's implied finding, in lessor's unlawful detainer action, that lessor prepared entire tract for use and further cultivation by lessees, as required by lease, and lessees remained in possession of entire premises at all times.

◆

Johnson & Johnson, San Diego, for appellants.

Swing, Scharnikow & Staniforth, San Diego, for respondent.

MUSSELL, Justice.

This is an action in unlawful detainer in which plaintiff (lessor) recovered judgment against the defendants (lessees) for possession of the leased property, the amount of rent found to be due, damages for detention, attorney's fees and costs.

The lease, executed October 17, 1951, was for a period of three years and the property involved consisted of 124 acres of farm land in San Diego county. It was agreed that approximately 75 acres of this land was, at the time of the execution of the lease, ready for use and cultivation by the lessees and that approximately 49 acres was to be disced and cleared by the lessor and ready for use and cultivation by lessees on or before July 1, 1952. Lessor agreed to furnish all water reasonably needed by lessees from a well on the property. It was further agreed that any surplus water from said well not actually consumed by lessees might be used by the lessor and that he should pay lessees therefor at the rate of "60¢ per K.W.H." for the electricity consumed while lessor used the "60 H.P." pump at the well.

Defendants in their answer to the complaint denied that they were ever put in possession of the 49 acre tract; denied owing any rental and affirmatively alleged failure of plaintiff to perform the conditions of the lease and put the 49 acres in condition for use and further cultivation. As a further and separate defense defendants alleged that plaintiff had not paid lessees the sum of "60¢ per K.W.H." for the use of electricity consumed in pumping water for lessor's purposes and that by reason of such nonpayment by lessor, lessees did not owe any rent for the demised property.

[1, 2] There is substantial evidence in the record supporting the implied finding of the court that plaintiff disced and cleared the 49 acres in the manner specified in the lease. (After trial by the court without a jury, written findings of fact and conclusions of law were waived by written stipulation of counsel.) In this connection plaintiff testified that the entire 124 acre tract was prepared in the same manner and that the easterly part of it (49 acres) was just as well prepared as the westerly part; that he directed his employees to prepare the 49 acre tract just the same as they had the 75 acre tract; that when he talked with defendant Wilson in June and July, 1952, Wilson made no request that plaintiff clear the 49 acre portion or that he, plaintiff, should do anything more or different to the 49 acres.

Henry Conant, who did the work of preparing the land for plaintiff, testified that he worked on the 49 acre portion from November 5th to November 21, 1951; that when he started his work, the 49 acre portion had been cleared of brush and had been disced the same as the 75 acre portion, except for some large holly bushes; and that he left both portions of the ranch in the same condition when he finished his work. Henry Vogt, who also worked for plaintiff in clearing and leveling the entire tract, testified that in his opinion the 49 acre portion was ready for further cultivation by a farmer after he, Vogt, had finished his work on it.

Defendants introduced evidence to the effect that while the 75 acre portion had been properly prepared for cultivation, the 49 acres had not been so prepared. However, this was a question of fact for the trial court's determination and the only effect of the testimony of defendants' witnesses was to create a conflict in the evidence on this point. Where, as here, there is substantial evidence supporting the judgment, the decision of the court below will not be disturbed. Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 597, 234 P.2d 16; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[3–8] Defendants argue that the court improperly permitted parol evidence to vary the terms of a written instrument. This argument relates to the provision of the lease that the lessor was to pay lessees "per K.W.H." for electricity consumed while pumping water for lessor's purposes. However, defendants' counsel in cross examining plaintiff asked the following questions and received the following answers:

> "Q. How does it happen in this document you prepared that you agreed to pay Mr. Wilson sixty cents per kilowatt hour for the electricity consumed in there? A. I never intended to pay him on the kilowatt hours. It was for the horsepower. Sixty-six cents for the 60 horsepower motor. I agreed to pay him sixty cents, I believe, and then I was informed by the gas company it would take more than that until they used this amount up and I added another 10% to it. I asked them if 10% would take care of it and they said it would.
>
> "Q. So you feel the agreement is that you pay sixty-six cents? A. Per hour for the use of that 60 horsepower pump.
>
> "Q. Sixty-six cents per sixty minutes? A. That is right."

Plaintiff also testified on cross examination that he had ascertained that the cost of operation of the pump was approximately 1¢ per horsepower per hour with a possible leeway of 10% above that; that his agreement with the defendants was that he should pay 60¢ per hour of operation, which he voluntarily raised 10% to 66¢; that he had written and delivered his checks to the defendants on this basis; that defendants made no objection and that the provision in the lease for the payment at the rate of 60¢ per kilowatt hour was "a social error" on the part of the typist who drew up the lease. Defendants also introduced evidence from which it appears that the amount specified in the lease and claimed to be due them for the operation of the pump (60¢ per K.W.H.) was approximately 60 times the cost of operating the pump. An examination of the lease indicates that the parties agreed that the lessor could use any surplus water from the well involved and would pay lessees the cost of electricity used by the lessor in this connection. Obviously the parties never intended payment at the rate of 60¢ per kilowatt hour. Such a construction would involve an absurdity and must be rejected. Civil Code section 1638. As was said in Jackson v. Puget Sound Lumber Co., 123 Cal. 97, 100, 55 P. 788, 789:

> "'A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.' Civ.Code, § 1643. * * *
>
> "But the language of a contract governs its interpretation only so far as it is clear and explicit *and does not involve an absurdity*. Civ.Code, § 1638. Language involving an absurdity is rejected, and so is any phrase or clause which is inconsistent with the object and intention of the parties. Civ.Code, §§ 1650, 1652, 1653."

Where a contract admits of two constructions, the court ought to adopt that which is most equitable and which will not give an unconscionable advantage to one party over the other. Southern Surety Co. v. Bank of Lassen County, 118 Cal.App. 149, 154, 4 P.2d 952. In the trial of the instant case the court remarked that it was obvious that the price was error and defendants' counsel conceded that it was. Defendants by their answer claim that they did not owe plaintiff any rent by reason of the fact that plaintiff did not pay 60¢ per kilowatt hour for electricity used. We find no error in the action of the trial court in admitting evidence as to the intention of the parties as expressed by the lease.

[9, 10] Defendants next contend that the court erred in striking testimony relative to the amount of electricity consumed by the lessor as not being proper in an unlawful detainer action. Defendants argue in this connection that if they had been permitted to show the amount of electricity consumed by the lessor at the agreed rate of 60¢ per kilowatt hour then the amount owed the defendants by plaintiff for electricity under the lease would have amounted to more than the amount alleged to be due plaintiffs as rent. Obviously, it was not the intention of the parties that plaintiff should pay more for the electricity used by him in pumping surplus water than the rental payments on the lease. The evidence shows that he kept a record of his use of the pump and paid defendants by check for the power used at the rate of 66¢ per hour of use; that defendants accepted and retained the checks without objection as to the amounts thereof. Defendants are not permitted to offset the amount claimed to be due them under the erroneous "60¢ per K.W.H." provision of the lease by counterclaim or cross-complaint, this being an unlawful detainer action. Schubert v. Lowe, 193 Cal. 291, 294, 295, 223 P. 550; Bekins v. Trull, 69 Cal.App. 40, 45, 46, 230 P. 24; Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423; Smith v. Whyers, 64 Cal.App. 193, 194, 221 P. 387; Lakeside Park Ass'n v. Keithly, 43 Cal.App.2d 418, 422, 110 P.2d 1055.

[11] Defendants further argue that the asserted failure of plaintiff to properly prepare the 49 acre tract for use and further cultivation constituted an eviction by the plaintiff of a substantial portion of the demised realty and released the defendants from their obligation to pay rent. This argument is likewise without merit. The evidence supports the trial court's implied finding that plaintiff did in fact prepare the entire tract for use and further cultivation by defendants as required by the lease. Furthermore, there was and could be no constructive eviction of the defendants for the reason that they at all times remained and continued in possession of the entire premises. Veysey v. Moriyama, 184 Cal. 802, 805, 195 P. 662, 20 A.L.R. 1363; Lori, Ltd. v. Wolfe, 85 Cal.App.2d 54, 65, 192 P.2d 112.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

126 Cal.App.2d 187

MARIANI et al. v. SCHONFELD et al.

Civ. 15785.

District Court of Appeal, First District, Division 2, California.

June 23, 1954.

Action by buyers of business for damages based on fraud in connection with sale. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment on verdict for buyers and sellers appealed. The District Court of Appeal, Dooling, J., held that statements of sellers, relied upon by buyers because of fraudulent private records, that income of business was much higher than actual income, were false representations which gave buyers a cause of action for fraud.

Judgment affirmed.

1. Fraud ⚷12, 20

A representation concerning the past income from property is a representation of fact and one material misrepresentation that is relied on by defrauded party is sufficient to satisfy a cause of action for fraud.

2. Appeal and Error ⚿930(1)

In action for damages based on fraud, where evidence was conflicting, and jury returned verdict for plaintiff, on appeal, court was required to assume plaintiffs' version of the evidence to be true.

3. Fraud ⚿22(2)

Where, prior to sale of business, sellers showed buyers private figures purporting to show true income from business, but figures were later found to be higher than records held by accountant, and sellers explained discrepancy existed because accountant's figures were prepared for tax purposes only and were incorrect, statements by sellers, relied on by buyers because of private records, that income was much higher than actual income, were false representations which gave buyers a cause of action for fraud.

4. Fraud ⚿62

Where statute allowed person defrauded in purchase of property to recover difference between actual value of that with which he parted and actual value of that which he received, together with additional damages, an award of $37,500 to defrauded party purchasing for $80,000, a business actually valued at $38,607 was not excessive and the result of passion and prejudice. Civ.Code, § 3343.

Joseph L. Alioto, Walter F. Calcagno, San Francisco, for appellants.

Samuel D. Hamburg, San Francisco, for respondents.

DOOLING, Justice.

,This is an appeal from a judgment for $37,500 entered upon a jury verdict in favor of the plaintiffs. The cause of action was based on misrepresentations made by defendants in connection with a sale of a business.

Appellants Charles and Sidney Schonfeld sold to respondents all the stock in the Lincoln Bowl, a corporation, which operated a bowling alley at 319—6th Avenue in San Francisco. The contract of sale was signed on October 25, 1950 in which it was agreed that the purchase price was to be $80,000, and if it should become necessary for the sellers to personally finance any part of the transaction, then the purchase price was to increase to $82,500. The respondents took over the business on November 1, 1950 with the appellants remaining in an advisory capacity for the first 10 days. Respondents made payments aggregating $40,000 and signed promissory notes agreeing to pay the balance.

In October 1951 respondents filed a complaint for damages based on fraud alleging that the appellants misrepresented the net income of the Lincoln Bowl and that appellants kept and maintained two sets of statements of the business operation in order to defraud respondents.

Appellants make two contentions: (1) The evidence is insufficient to support a recovery based on fraud; (2) the damages awarded were excessive and the result of passion and prejudice.

Appellants argue that there was no misrepresentation of any material fact. To support this contention they cite separate facts that were either known to the respondents or were truthfully represented to them. For example, the respondents obtained a complete inventory of all the equipment at the Lincoln Bowl prior to sale, they knew the terms of the lease, etc. Respondents however testified that there were two sets of statements on the operation of the business, one of which is false and is the one on which respondents relied to their damage. They further testified that prior to the purchase appellants showed respondents some figures which were represented to be the true income from the business. At the conclusion of the meeting appellants put these papers away and stated that these papers would be destroyed. However, four or five months after the purchase a portion of these secret figures were discovered accidentally by Mariani when he was cleaning out the files at the Lincoln Bowl. Manning took the papers down to Lazarus & Co., the accountants for the Lincoln Bowl, in order to compare the figures. A comparison of the two sets of figures shows that the records held by Lazarus & Co. were invariably lower in the amount of income. During preliminary negotiations the explanation of the appellants for the discrepancy was that the statements prepared by Lazarus, which showed a loss, were not correct and were prepared for tax purposes only.

According to the income tax statements the total income for the years 1946–1950 was as follows: 1946–1947 $15,078; 1947–1948 $22,752; 1948–1949 $20,395; 1949–1950 $18,089.

But the appellants told respondents on several different occasions that they had made $258,000 net profit in the past five years. The respondents were also informed that the income for the previous year was $42,000 and that they could make more money because appellants were operating on an absentee basis which is very inefficient. Respondents testified that they relied on the above representations because of the private records which showed a larger amount of money taken in than the records of the accountant.

[1] A representation concerning the past income from property is a representation of fact. Wilson v. Shultz, 102 Cal.App.2d 345, 351, 227 P.2d 524. Furthermore one material misrepresentation that is relied on by the plaintiff is sufficient to satisfy a cause of action for fraud. Hefferan v. Freebairn, 34 Cal.2d 715, 721, 214 P.2d 386.

[2] Although appellants attempted to explain the existence of the private records found by one of the respondents in the file cabinet and also denied the existence of any other secret statements, the rule relating to conflicts in the evidence requires this court to assume respondents' version to be true.

Appellants argue that respondents did not rely on the former's representations for the following reasons: (1) Prior to taking possession of Lincoln Bowl, they visited owners of bowling interests to find out about the handling and operation of the bowling alley; (2) before making the down payment the respondents thoroughly checked the daily receipts and the daily details of the business; (3) respondents worked at the bowling alley beginning on November 1 from 8 a. m. to 3 a. m. and in doing so obtained a complete picture of the operation. The appellants avoid any reference to the fact that many of the bills and expenses had not become apparent in the first month and it was not until almost 90 days later that the accumulated expenses appeared. Furthermore, the accountant's statement for the month of November was not received until December 10 so that there was no way to determine accurately the amount of income for November until that time. At the end of 90 days the respondents realized for the first time that the bowling alley was operating at a loss.

Appellants cite cases that stand for the proposition that where the plaintiff makes an independent investigation of his own he is precluded from asserting that he relied on the representations of the defendant. Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397; Gratz v. Schuler, 25 Cal.App. 117, 142 P. 899; Hayward v. Widmann, 133 Cal.App. 184, 23 P.2d 762.

[3] We need go no further than Hefferan v. Freebairn, supra, 34 Cal.2d 715, 214 P.2d 386, where the facts were not dissimilar to those presented here. The District Court of Appeal accepted a like argument in that case, Hefferan v. Freebairn, 207 P.2d 602, 605, but the Supreme Court after granting a hearing ruled otherwise. That court held that where the buyer actually relied upon deliberately false representations of the seller that the true income was greater than that shown by the records of the business he had a cause of action for fraud and that the fact that the representations were inconsistent with the records, where the seller gave an explanation for the inconsistency which the buyer believed and relied upon, did not compel a finding that the buyer was put on notice of their falsity. See the discussion on pages 719–721 of 34 Cal.2d, 214 P.2d 386.

[4] Respondents' two expert witnesses valued the Lincoln Bowl between $32,000 and $38,607. Taking the largest figure as the true value of this business the measure of damages fixed by the code amounts to more than the judgment. Civ.Code, § 3343. After the jury retired it returned to the courtroom so that the testimony of the experts could be reread. In view of the fact that the amount of damages awarded does

not exceed the lowest amount of damages that could be allowed if the experts' figures are accepted the amount awarded finds full support in the evidence.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

AUSTIN
v.
RIVERSIDE PORTLAND CEMENT CO.
BOEHM
v.
RIVERSIDE PORTLAND CEMENT CO.

Civ. 4739, 4740.

District Court of Appeal, Fourth District, California.

June 18, 1954.

Rehearing Denied July 12, 1954.

Hearing Granted Aug. 10, 1954.

Vacated 282 P.2d 69.

Actions for injuries sustained by contractor's employees who received electrical shocks when contractor's crane came into contact with overhead power lines on defendant cement company's premises. The Superior Court, San Bernardino County, Martin J. Coughlin, J., rendered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence on issues of whether defendant had had superior knowledge of the dangerous condition or had failed to exercise ordinary care in providing a safe place to work did not support finding that defendant had breached its duty to plaintiffs.

Judgments reversed.

1. Negligence 🔑32(1), 48, 52

An owner of land owes to an invitee a duty to have premises in a reasonably safe condition and to give warning of latent or concealed perils which are known to him and not to the other, but he is not an insurer, and his liability, if any, is grounded in his superior knowledge of perilous condition and the resulting danger to the invitee.

2. Negligence 🔑32(1), 52

An owner of land is required to use ordinary care for the safety of an invitee, and to give warning of a danger attendant upon the work which the person invited is to do thereon if such danger arises from causes or conditions which are not readily apparent to the eye, but, usually, is not required to give invitee notice or warning of an obvious danger.

3. Electricity 🔑16(4)

Cement company which engaged a contractor to use a crane on premises had a right to assume that contractor would not violate statutes and regulations prohibiting operation of such equipment within six feet of a high voltage line not deenergized or otherwise protected. Administrative Code, Tit. 8, §§ 1784, 2603; Pen. Code § 385.

4. Electricity 🔑19(5)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, evidence on issue of whether company could have anticipated that crane would be used near wires and whether company had superior knowledge of the dangerous condition did not support finding that company had failed to exercise ordinary care to provide a safe place to work.

Swing & Gillespie, Donald S. Gillespie, San Bernardino, for appellant.

William H. Levit, Long & Levit, Los Angeles, John P. Knauf, Curtis, Knauf, Henry & Farrell, San Bernardino, for respondents.

BARNARD, Presiding Justice.

These actions, for damages for injuries suffered by the plaintiffs when a crane was brought into contact with an overhead power line, were consolidated for trial and on this appeal.

Riverside Portland Cement Co., which will be referred to as "Riverside", owned a cement plant which covered some six acres of ground, and which was operated 24 hours a day. Power for the plant was furnished by high voltage wires owned and maintained by the California Electric Power Co. In July, 1946, Riverside entered into a contract with Haddock Company, herein called "Haddock", whereby Haddock was to do certain construction and alteration work which was still in progress at the time here involved. This contract provided that Haddock should "act as an independent contractor, maintaining complete control over its personnel and operations", and that it should perform its work "with as little interference as possible with the operation of the cement mill."

Among the many structures on the premises were two rock crushers. A roadway some 30 feet wide ran north from the entrance to a building housing one of these rock crushers. Three high voltage wires, running east and west, crossed this roadway at a point about 160 feet north of this building. These wires were 43.8 feet above the surface of this roadway, being supported by poles and cross-arms on which were signs reading: "High Voltage". In December, 1946, at the request of Riverside, Haddock had done certain repair work on a "mauler and shaft" which was a part of the equipment in this rock crusher. At that time a truck crane owned by Haddock was brought there to lift this mauler and shaft, which weighed some 20 or 30 tons and which was about 20 feet long. This repair job started December 4, and lasted until December 23rd.

Early in January, 1947, Riverside requested Haddock to again make the same kind of repairs to this mauler and shaft. The accident here in question occurred about six o'clock P. M. on January 10, 1947, while this repair work was being done. Earlier that day the mauler and shaft was removed from the building and placed on the roadway in a north-south position, with its south end 35 or 40 feet north of the building. On the afternoon of that day, one Martin, who was superintendent of all the work being done by Haddock, ordered the same truck crane taken to this area for the purpose of lifting this shaft. This truck was 30 feet long and the boom, which was 50 to 60 feet long, was attached some five or six feet from the rear of the truck. There was a swinging cab for the operator of the crane, and another cab for the operator of the truck. The crane was operated by one Fisher, and the truck was operated by one Hartman, both employees of Haddock. There was a sign affixed to the crane reading: "Do not operate this equipment within 6 feet of high tension lines."

About 5:30 P. M. this truck crane, with the boom lowered, was backed down this roadway under these wires and was stopped with the tip of the boom about 100 feet south of the wires, and about five feet from the ground. These plaintiffs and another man, all employees of Haddock, who had been working on the mauler and shaft, then started to change the cable on the crane, changing it from a 2-part line to a 3-part line so that this heavy lift could be made. It was then dark, and several electric lights on portable standards had been installed by Haddock. Austin was told by a superior to leave 40 or 50 feet between the shaft and the tip of the crane so that a bulldozer could level the ground in front of the shaft. It was intended to construct a sled or cribbing to the north of the shaft, which was to be slipped under the shaft when it was raised. Austin, who had worked for Haddock since October, as a structural iron worker, was then left in charge of the work. Boehm was one of the men working under him. Austin gave the order and the crane was moved 40 or 50 feet forward, leaving the tip of the crane some 50 or 60 feet from the wires. When the changing of the cable was finished, Austin gave the crane operator a signal and the boom was raised to an angle of about 45 degrees, leaving the hook on the end of the cable about three feet from the ground. Austin then asked Boehm to help him bring the "headache ball", which he intended to attach to the hook at the end of the cable. This was a ball weighing 100 to 125 pounds, the purpose of which was to prevent any slack and keep the cable straight on the drum. When the headache ball was attached to the cable it was intended to move the crane back to within 12 or 15 feet of the shaft, in order to make the lift. Another employee threw the headache ball off the rear of the truck, and the plaintiffs put a wrench through an eye on the ball and started to carry it back to the hook. Austin testified that when they had walked back "maybe 30 feet", he noticed that the hook was "dangling a little", indicating to him that the truck had moved causing the hook to swing several feet; that he had given no order for the truck to move; and that "When the hook swung into me I got hold of it with my right hand, and that is when the accident happened."

Hartman, the truck operator, testified that as he sat in the cab ready to move he got a signal from Fisher, the crane operator, to go forward; that he was "ready to go in a reverse direction towards the lift, towards that shaft, which we were going to lift"; that he "eased out real easy" and moved a matter of inches back toward the shaft; that Fisher gave him one blast to stop and then two blasts to go forward; that he then moved the equipment forward "maybe 15 feet, maybe less"; that there was a flash which lit up the countryside; that Fisher gave him a signal and he stopped; that Fisher "boomed down" so fast it raised the front end of the truck; that Fisher then gave him a signal and he moved ahead a couple of hundred feet; that he then went back to where Austin and Boehm were on the ground; that he wondered what he had hit and looked up; and that he could see the wires "vaguely, but they were there." He also testified that he knew these power lines were in that area and was familiar with the danger of the crane contacting such wires; that he "just failed to recollect them being there"; and that the fact that it was dark may have had something to do with his failure to recollect. Fisher did not testify.

Martin, who was not present when the accident occurred, testified that this crane had been used around the premises as needed since October; that high voltage lines extended over other areas of the plant; that on the prior repair of this shaft in December this crane had been brought under these wires and used to make the lift; that prior to that occasion he had asked a Riverside superintendent if they could deenergize the power lines; that permission was refused because that would necessitate closing down the plant; that according to their course of dealing Haddock was not to shut off the power without Riverside's permission; that he knew they were not allowed to operate the crane so it would come within six feet of high-tension lines; that he had ordered the men to keep the boom down when moving in close proximity to wires; that Riverside had asked that this second repair job be done as quickly as possible; that on January 10, he did not advise the power company of the nature of the work being done as he thought this was not necessary; and that he made no request of Riverside on that day to have the line deenergized because "I didn't think there was any danger because we had plenty of room to work without going into the lines." Austin also testified that he knew there were high voltage lines in the vicinity and knew they were dangerous; that at that time he estimated that the wires were approximately 40 feet from the ground; and that "nobody gave a thought of the wires." Boehm testified that he had noticed these wires that afternoon and knew they were dangerous, that they were bare and looked like they were made of copper, and that he would have guessed on that afternoon that they were 40 or 45 feet from the ground.

There was also evidence that the only practical way to eliminate all hazard where equipment is to work near power lines is to deenergize the lines; that Riverside knew the location of these high voltage wires and knew that at times the cranes required by Haddock's work would have to work in the vicinity of these lines; that the customary place to prepare a crane for a lift is at the job site; that while the plaintiffs knew that these wires were somewhere in that area they were not conscious at the time of their proximity to the wires, because of the darkness and their attention to their work; that quite often a crane truck was moved forward while the men were carrying the headache ball, to save time; and that "possibly" it was normal for a crane operator to do this without a signal from the man in charge of the ball.

Both complaints alleged that the plaintiffs were injured as a result of Riverside's negligence in permitting and requiring Haddock to operate this crane without any provision for preventing the transmission of electricity if the crane contacted the wires, and without providing adequate lighting so that the wires could be seen from the ground. Second causes of action were directed against the power company. Third causes of action, directed against Haddock, Hartman and Fisher, alleged that Hartman and Fisher, through carelessness on their part, caused the crane to come in contact with high-tension wires. Prior to the trial the actions were dismissed as against Haddock, apparently because of the proceedings before the Industrial Accident Commission. During the trial they were dismissed as against Hartman and Fisher. A jury found in favor of the power company, and for the plaintiffs as against Riverside, awarding Austin $50,000 and Boehm $100,000. Motions for a new trial were denied, but in the Austin case a reduction of the verdict to $25,000 was accepted. Riverside has appealed from the judgments which followed.

The appellant's main contention is that the evidence is insufficient to establish any breach of duty or negligence on its part, which proximately contributed to the injuries sustained by the respondents. The respondents contend that Riverside owed them, as invitees, the duty to exercise ordinary care to provide them with a safe place to work; that Riverside's retention of control of the power lines placed a duty on it to exercise such control with reasonable care so as not to cause injuries to them; that the rule of momentary forgetfulness was also applicable to them; that the danger was not obvious to them because they were required to work after dark where the lighting was not sufficient to disclose the proximity of the wires, and when their attention was necessarily centered on a "rush" job; and that the evidence is sufficient to support the implied finding that Riverside breached its duty to provide them with a safe place to work.

[1, 2] The general rules as to the duty owed by an owner of land to an invitee thereon are well settled. He owes a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils which are known to him and not to the other. The owner is not an insurer as to such an invitee and the true ground of his liability, if any, is his superior knowledge of the perilous condition and the resulting danger to the invitee. The owner is required to use ordinary care for the safety of the invitee, and to give warning of a danger attendant upon the work which the person invited is to do thereon if such danger arises from causes or conditions which are not readily apparent to the eye. Usually, he is not required to give the invitee notice or warning of an obvious danger. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793. In seeking to apply these rules the appellant relies on such cases as Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231; Hard v. Hollywood Turf Club, 112 Cal. App.2d 263, 246 P.2d 716; Stackpole v. Pacific Gas & Elec. Co., 181 Cal. 700, 186 P. 354; Stasulat v. Pacific Gas & Elec. Co., 8 Cal.2d 631, 67 P.2d 678. The respondent relies on Young v. Bates etc. Corp., 52 Cal.App.2d 86, 125 P.2d 840; Polk v. Los Angeles, 26 Cal.2d 519, 159 P.2d 931; Revels v. Southern California Edison Co., 113 Cal.App.2d 673, 248 P.2d 986; Lozano v. Pacific Gas & Elec. Co., 70 Cal.App.2d 415, 161 P.2d 74, and Dunn v. Pacific Gas & Elec. Co., Cal.App., 262 P.2d 66 [hearing granted S.Ct.] and similar cases. In most, if not all, of the cases sustaining the theory that there was a failure to provide a safe place to work, there were facts justifying a finding either that the plaintiff had no knowledge of the dangerous condition and the defendant had failed to give an adequate warning, or that the persons whose duty it was to provide the safe place to work were guilty of specific acts of negligence or had permitted

conditions to exist in violation of existing rules or ordinances. In high-voltage line cases, as in other cases, liability depends upon the facts of the particular case.

The evidence here is not sufficient to support a finding that the appellant breached its duty to provide the respondents with a safe place to work, or of any other form of negligence on its part. Haddock was in complete charge of the work as an independent contractor, was familiar with these premises, and was experienced in handling cranes in work of this general nature. It was presumably expert in that field, and Riverside had nothing to do with this work except to order it done. These high tension wires were 160 feet from where the repair work began, were 43.8 feet above the ground, and were not only obvious to everyone but their presence and location were actually known to all of the Haddock employees who were involved. The plaintiffs were experienced workmen who had been working on this job for more than three months. The fact that Riverside exercised a permissive control over when the power might be shut off, and the fact that the work was being done after dark, are not controlling under the circumstances which here appear. The contract provided that the work should be done with as little interference as possible with the operation of the plant, and Haddock did much of its work after dark and provided such lights as it considered necessary. Although Riverside requested that this repair job be done as rapidly as possible the work would take many days, and there is no evidence that Riverside knew when the work of lifting this shaft would be performed or that it would be done after dark. If Riverside refused to permit the power to be shut off on the prior occasion when a similar lift was made, and the evidence is conflicting in that regard, that work was done safely and no such accident occurred. On this occasion Haddock's superintendent, who ordered the crane brought in for this purpose, did not ask to have the power shut off because he thought they had plenty of room to do the work without any danger from the lines.

The point where the lift was to be made was some 85 or 90 feet from the wires, and the lift could have been made there without any danger. The accident occurred not while the lift was being made, or even while the crane was being brought into that area for that purpose, but while Haddock's equipment was being prepared for a heavier lift. Not only could the crane have been prepared elsewhere, if reasonably necessary, but after it was brought in to a point where the boom could have been safely raised to any position it was moved 40 or 50 feet toward the wires, for Haddock's convenience, where the main part of the preparation was done. Even at that point there would have been no danger, with the boom raised as it was, had not Fisher taken it upon himself to signal the truck operator to move forward. Even the truck operator then thought the wrong signal had been given and started to move back toward the place where the lift was to be made, but was stopped and directed to go ahead by Fisher.

[3] Riverside could not reasonably be expected to have anticipated that Haddock's employees would make these various changes and movements while preparing its equipment, or that the crane would thus be brought into dangerous proximity to the wires. While it probably knew that this shaft would be taken out of the building, which was 160 feet away from the wires, it could not be expected to foresee that it would be moved 35 or 40 feet away, that an additional 40 or 50 feet would then be used for another purpose, and that the crane would then be raised and moved a further distance bringing it into contact with the wires. Assuming that Fisher could reasonably take it on himself to order this last move, that and these other matters were things done by Haddock employees which, if not entirely unnecessary, were unknown to Riverside and its employees. Riverside had a right to rely on Haddock's ability to equip its own tools without bringing them into contact with these high voltage wires, which were obvious to all and the location of which was known to everyone concerned. It was the

duty of Haddock to comply with sections 1784 and 2603 of Title 8 of the Administrative Code, which prohibit the operation of such equipment within six feet of high voltage lines unless they are deenergized or otherwise protected. Section 385 of the Penal Code makes it a misdemeanor to move such equipment within six feet of a high voltage overhead conductor. Under the circumstances here, Riverside had a right to assume that Haddock would not violate these statutes and regulations. Benard v. Vorlander, 87 Cal.App.2d 436, 197 P.2d 42.

[4] While Riverside had knowledge that cranes had been and would be used on this job it also knew that they were usually moved about with the booms down, and it had a right to expect that this crane would be thus moved into position to do this particular work at a point some 100 feet away from the wires. It could not reasonably be required to foresee that, after being brought in, the crane would be moved away a considerable distance and then again moved ahead, without the order of the man in charge, in order to save a few feet of carry for employees of the contractor who were engaged in preparing that equipment for later use at a point nearly 100 feet in the other direction. Not only was no superior knowledge of the dangerous situation by Riverside shown, but the evidence fails to show any failure on its part to exercise ordinary care in providing a safe place to work. A safe place to work was provided which was sufficient if properly used. The dangerous situation here was not caused by any breach of duty or negligence on the part of Riverside, but was created when the independent contractor, Haddock, brought the crane in a position of proximity to the high tension wires and then, through its employees, caused the boom to be raised and thereafter moved into contact with the wires. Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231. The evidence clearly shows that this accident was caused by the careless and unnecessary acts of one or more of Haddock's employees, and it could not reasonably be held that any act or failure to act on the part of Riverside was a proximate cause of the injuries to respondents.

It is unnecessary to consider appellant's further contentions that the respondents were guilty of contributory negligence; that they assumed the risk; and that the instructions were erroneous in several respects.

The judgments are reversed.

GRIFFIN and MUSSELL, JJ., concur.

126 Cal.App.2d 210

FAULKNER v. BURTON et al.

Civ. 8391.

Sac. 6375.

District Court of Appeal, Third District,
California.
June 23, 1954.

Action against a local labor union and its agent for damages because of such agent's threats and fraudulent misrepresentations including plaintiffs to break their contracts of employment as iron workers by a shipbuilding corporation performing a contract with the United States. From a judgment of the Superior Court, Sacramento County, Malcolm C. Glenn, J., awarding damages to one of plaintiffs and denying relief to the other plaintiffs, defendants and such other plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that the successful plaintiff's action, commenced over three years after alleged perpetration of the fraud inducing his breach of contract, was barred by the statute of limitations, in the absence of evidence as to when he discovered the fraud, the conditions under which he discovered it, or why it did not become known to him sooner than he alleged.

Judgment affirmed as to the unsuccessful plaintiffs, and judgment for the other plaintiff reversed and cause remanded for a new trial as to him.

1. Limitation of Actions ⚷179(2)

In action for fraud, commenced over three years after perpetration of fraud, plaintiff is held to stringent rules of pleading and evidence and must distinctly aver time when fraud was discovered and what discovery was, so that court may clearly see whether discovery might have been made sooner by ordinary diligence.

2. Limitation of Actions ⚷179(2)

In action for fraud, commenced over three years after alleged perpetration thereof, general allegation of plaintiff's ignorance of fraud at one time and knowledge thereof at another time is ineffective, and if he made any particular discovery thereof, complaint should state when and how such discovery was made and why it was not made sooner.

3. Limitation of Actions ⚷100(13), 193

A plaintiff seeking to avoid bar of statute of limitations in action for fraud must aver and show that he used due diligence to detect fraud, and he will be held to have known thereof if he had means of discovery in his power.

4. Limitation of Actions ⚷179(2), 197(2)

To avoid bar of statute of limitations in action for fraud, circumstances of plaintiff's discovery thereof must be fully stated and proved and delay in bringing action must be shown to be consistent with requisite reasonable diligence.

5. Limitation of Actions ⚷179(2)

To avoid bar of statute of limitations in action for fraud, plaintiff must set forth times and circumstances under which facts constituting fraud came to his knowledge, so that court may determine from allegations of complaint whether plaintiff's discovery of fraud was within limitation period.

6. Limitation of Actions ⚷199(2)

Whether plaintiff in action for fraud properly alleged discovery of facts constituting fraud within limitation period is question of law to be determined by court from facts pleaded.

7. Limitation of Actions ⚷193

Commencement of action over three years after alleged perpetration of fraud, inducing plaintiff's breach of employment contract, to recover damages for such fraud from labor union and agent thereof, cast on plaintiff burden of properly pleading and effectively proving facts concerning his discovery of fraud to avoid bar of statute of limitations.

8. Limitation of Actions ⚷195(5)

An action against labor union and agent thereof to recover damages for fraud inducing plaintiff's breach of employment contract over three years before commencement of action was barred by statute of limitations, in absence of any evidence as to when plaintiff discovered fraud, conditions under which he discovered it, or why it did not become known to him sooner than he alleged.

9. Labor Relations ⚷767

In action against labor union and agent thereof to recover damages for alleged threats and fraudulent misrepresentations, inducing plaintiffs' breaches of employment contract, in defendant agent's letter to one of plaintiffs, ordering him to resign his position or stand trial for violating certain union working rules and stating that order applied to all members of international union and that they would be so advised by their local unions, whether other plaintiffs were entitled to rely on statements in letter as applicable to them and break their contracts, without having received like letters from their various local unions, was fact issue to be resolved by trial court.

10. Labor Relations ⚷766

In labor union members' action against local union and agent thereof to recover damages for alleged threats and fraudulent misrepresentations, inducing plaintiffs' breaches of employment contract, in agent's letter to one of plaintiffs ordering him to resign his position or stand trial for violating certain working rules and stating that order applied to all members of international union and that they would be so advised by their local unions, evidence was sufficient to support trial court's finding that other plaintiffs than recipient of letter were not entitled to rely on statements therein as applicable to them and break their contracts.

◆

James D. Meredith, Sacramento, for appellant.

Jack Flinn & Jackson E. Nichols, San Francisco, for cross-appellants.

VAN DYKE, Presiding Justice.

The complaint in this action contained nine separate counts in each of which the plaintiff named therein brought action against C. R. Burton and Local Union No. 118, Bridge, Structural and Ornamental Iron Workers, a labor union. All of the counts concern the same general subject matter and the substantial allegations thereof may be stated as follows: The plaintiffs were all members of either the defendant union or of other local unions of bridge, structural and ornamental iron workers who had separately signed contracts with Pollock-Stockton Shipbuilding Company, a corporation, hereinafter called "Pollock-Stockton". This corporation was engaged in performing a contract with the United States at Samar, Philippine Islands, and in their several contracts plaintiffs agreed with Pollock-Stockton to do the work of iron workers at stipulated wages or salaries. The contracts covered in detail the contractual obligations of the employer and the employee and bound the employee to perform labor for a minimum of one year at Samar or at such other site in the Pacific war theater where Pollock-Stockton might be performing contracts for the Navy. All of the locals to which the plaintiffs belonged were members of the International Association of Bridge, Structural and Ornamental Iron Workers, a labor organization made up of local unions. The contracts obligated Pollock-Stockton to furnish transportation to and from the job and the stipulated wages began on embarcation and continued until the men were returned to this country. The contract of plaintiff Faulkner was executed April 20, 1946, and most of the plaintiffs executed their contracts within that month. All of the contracts were in the same general form. The men went to Samar and those first arriving worked for about 9½ months, at which time all of the plaintiffs quit work in breach of their contracts with Pollock-Stockton and returned to the United States. They all alleged that their breach was caused by the fraudulent conduct of defendant Local Union No. 118 and of Burton who was the agent of the defendant union. On January 28, 1947 Burton wrote a letter to Faulkner, reading as follows:

> "January 28, 1947
>
> "Dear Sir and Brother:
>
> "You are hereby ordered to resign your position and return to the United States on or before February 28, 1947, or stand trial for violating the Working Rules by working for time and a half and working with non-union men below the scale of pay.
>
> "This applies to all members of the International and they will be so advised by their Locals.
>
> "With best wishes, I am
>
> "Fraternally yours,
> "(Signed) C. R. Burton
> "C. R. Burton, Bus. Rep.
> Iron Workers Local #118"

Plaintiffs allege, in view of the relationships between each of them and their local unions and the International, that this letter not only ordered plaintiff Faulkner to resign his position and return to the United States, but that it also told him and them, through him, that they were all violating union rules and that if they continued in their employment they would be subject to the following detriments and punishments as members of organized labor, to wit: They would be tried by their local unions for the subject violations, would lose their membership in the unions and in the International, and be classified as non-union men. Plaintiffs alleged that these statements and the necessary inferences therefrom were known by Burton to be false, were made in bad faith by him and for the purpose of inducing the several plaintiffs, including Faulkner, to breach their contracts of employment on penalty of losing their union standing without which all alleged they would be unable to obtain work in their trade. Plaintiffs aver reliance upon Burton's statements and representations and that, so relying, each breached his contract with Pollock-Stockton and left his work because of Burton's threats and representations which the complaints aver were made without any authorization or approval from the International; that because they thus breached their contracts with Pollock-Stockton plaintiffs suffered damage through loss of employment and loss of transportation to and from the job and lost other benefits that would have inured to them had they finished out their minimum employment of one year. For these damages they sought judgment against Burton and Local Union No. 118. Defendants answered, placing in issue the allegations of fraudulent conduct and ensuing damage and pleading the statute of limitations.

The trial court gave Faulkner judgment for something in excess of $3,000 and denied relief to the other eight plaintiffs. From this judgment Burton and Local Union No. 118 appeal and the eight plaintiffs who were denied relief likewise appeal.

[1-6] We shall first consider the appeal of Burton and the local. These appellants contend that the action was barred by the statute of limitations and that by virtue of an assignment made by Faulkner of his claims against Pollock-Stockton and of the release he signed when those claims were compromised, his cause of action herein sued upon was lost. They further contend that Burton's letter spoke the truth and could not therefore support a judgment based on its alleged fraudulency. Lastly, these appellants contend that because Faulkner was working beyond the jurisdictional limits of the defendant local plaintiff Faulkner could not and, therefore, did not rely upon the letter in breaching his contract. Because we have concluded that upon the record here Faulkner's action was barred, we deem it unnecessary to discuss any other contention brought against the validity of the judgment he obtained. The requisites of pleading and proof when, from the face of the complaint, it appears that the action is brought more than three years after the perpetration of the fraud are well settled. Out of the many cases that might be referred to we quote from the case of Haley v. Santa Fe Land Imp. Co., 5 Cal.App.2d 415, 420, 42 P.2d 1078, 1081:

> "In cases where relief is sought from fraud, by action commenced more than three years after the perpetration of the fraud, the plaintiff is held to stringent rules of pleading and evidence; and especially must there be distinct averments as to the time when the fraud was discovered and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery might not have been sooner made. A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery it should be stated when it was made, how it was made, and why it was not made sooner. A party seeking to avoid the bar of the statute must aver and show that he used due diligence to detect the fraud; and if he had the means of discovery in his power he will be held to have known it. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite reasonable diligence. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268. He must set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period. Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311. 'Discovery' and 'knowledge' are not convertible terms; and whether there has been a proper allegation as to a 'discovery' of the facts 'constituting the fraud' within the meaning of the statute of limitations is a question of law to be determined by the court from the facts pleaded."

[7, 8] In his complaint Faulkner alleged merely:

> "That on or about the 2nd day of May, 1949, plaintiff learned for the first time that the threats and representations made by the defendants as aforesaid were unauthorized and unapproved by the International Association of Bridge, Structural and Ornamental Iron Workers and that said threats, actions and representations were wholly false and were made in bad faith and for the purpose of persuading and inducing him to violate his contract of employment with Pollock-Stockton Shipbuilding Company, as aforesaid."

These allegations were generally denied by appellants and by amendment to their answer they pleaded the appropriate statute of limitations. Faulkner's breach of his contract, which he alleged was induced by the fraud of appellants, occurred on February 4, 1947. He commenced his action March 29, 1950, more than one month in excess of three years from the alleged perpetration of the fraud. This cast upon him the burden of properly pleading and effectively proving the facts concerning discovery in accordance with the rules above stated. We will assume that his pleading may be held to be sufficient without additional allegations as to why he did not sooner discover the fraud of which he complains, since no demurrer was specifically directed to the insufficiency of the allegations. But this assumption of sufficient pleadings did not relieve him of the necessities of proof which the rules embrace. When we search the record for proof we find that Faulkner gave no testimony whatever as to when he had discovered the fraud, as to the conditions under which he discovered the fraud on which he sues or as to why fraud did not become known to him sooner than he alleged it did. This proof is not supplied by anything else in the record and indeed it would be difficult to conceive of how such proof could be made in the absence of any testimony whatever from Faulkner upon the subject. We may observe also that Faulkner was one of those who went to Pollock-Stockton to find out if the letter was a fake, that he was at the meeting on Samar when the jurisdiction of Local No. 118 was challenged and spent two weeks at Samar before his boat left. Therefore it clearly cannot be assumed that he had no opportunities to inquire as to fraud nor that he lacked warning that inquiry ought to be made. For this failure to prove discovery within three years of action brought the judgment in favor of Faulkner must be reversed.

[9, 10] We turn now to the appeals of the eight plaintiffs who were denied recovery. Here the trial court found that they neither relied, nor could have relied, upon Burton's letter to Faulkner when they breached their contracts with Pollock-Stockton. Upon this subject matter the court found that the letter which Burton wrote was addressed personally to Faulkner, that Burton had not intended to have the same read or acted upon by anyone else, that no threat or intimidation contained therein was directed to anyone other than Faulkner and that, while the letter stated that it applied to all members of the International, it also limited this statement by saying that other members would be so advised by their locals and that none of the plaintiffs other than Faulkner were advised by any local or ever received a letter such as that written to Faulkner, excepting only one or two other members of Local No. 118 who are not parties herein. The court further found that Burton was neither careless nor negligent in writing the letter nor wording the same as written and had no intention of threatening or misleading anyone other than Faulkner.

Ordinarily it might be said that in view of the situation existing at Samar, of which Burton was well informed, the writing of such a letter as Burton wrote to Faulkner would greatly disturb other union men working for Pollock-Stockton at the same place and time and under identical contracts, so that it might be supposed the men so situated would act as did the eight plaintiffs, notwithstanding the letter was not addressed to them. To union men their union memberships are of vital importance and, as some of the plaintiffs testified, loss of their memberships would mean it would become well-nigh impossible for them to make a living as iron workers. But whether they were entitled to rely upon the statements made in Burton's letter as being applicable to them and, so relying, breach their contracts with Pollock-Stockton without, as the letter indicated they would, receiving any word from their various locals addressed personally to each of them, was an issue of fact to be resolved by the trial court. The trial court found against the eight plaintiffs upon this matter and the question presented here is the usual one, that is, does the record contain substantial support for that finding? We hold that it does. It is supported by these matters appearing in the record: The letter was a personal one addressed to Faulkner only, notwithstanding there were twenty or more union iron workers engaged with Faulkner on the Pollock-Stockton job at Samar. Of this number there were several besides Faulkner who were members of Local No. 118. Yet no plaintiff other than Faulkner received any communication from anyone indicating that he was breaking union rules by continuing on the job or that he might be held responsible by his local if he continued to do so. When the letter was received by Faulkner he exhibited it to a number of iron workers and an impromptu meeting was held at which the matter was discussed. During that discussion one man told the meeting that Local No. 118 had no jurisdiction of any of them since they were within the jurisdiction of the Honolulu local and without the jurisdiction of Local No. 118. There was testimony that a committee was appointed out of those who attended the meeting to wait upon Pollock-Stockton and, as one witness said, to find out whether the letter was a fake or not. It appeared that this committee, upon receiving what they deemed improper consideration by Pollock-Stockton, ceased their efforts to inquire into the matter of Burton's communication. There was also testimony that although nearly thirty men quit work that a number of them were simply "fed up" and went along with the rest. The foregoing supports the court's finding that, notwithstanding the fraudulency of Burton's letter, it was not a cause of the plaintiffs breaching their contracts and returning home.

The judgment that the eight plaintiffs take nothing is affirmed. The judgment in favor of Faulkner is reversed and the cause as to him is remanded for a new trial.

SCHOTTKY and PEEK, JJ., concur.

126 Cal.App.2d 51

ROSATI v. HEIMANN.

Civ. 20090.

District Court of Appeal, Second District, Division 2, California.

June 16, 1954.

Action on a book account for services rendered. The Superior Court, Los Angeles County, Robert H. Scott, J., appointed a referee under a general order of reference to hold hearings and make findings to determine items which should be allowed and which should be rejected and upon his findings judgment was rendered for plaintiff and defendant appealed. The District Court of Appeal, Moore, P. J., held that action on book account brought within statutory period after entry of last item was not barred by statute of limitations as to any item although some items were entered more than statutory period before institution of action.

Judgment affirmed.

1. Account, Action on 🔑24

Where referee, under general order of reference, fixed as amount of award to plaintiff on action for services rendered, the reasonable value of services, referee did not compromise settlement of accounts and judgment rendered thereon was not a compromise of issues of liability and damages.

2. Account, Action on 🔑24

A reference requiring examination of a long account with instructions to hear and decide whole issue is a general reference.

3. Account, Action on 🔑24

Where certified public accountant was appointed to determine items which should be allowed and which should be rejected in action on account for services rendered, statement by trial judge that referee was able to make inquiry into all matters germane to issues raised, agreed with by defendant's counsel, entitled accountant to inquire into nature and extent of services rendered by plaintiff as well as a determination of the merits of disputed items.

4. Account, Action on 🔑24

Where referee heard testimony from both sides of controversy and examined financial records and other exhibits, referee had taken sufficient evidence to make a finding as to reasonable value of services rendered by plaintiff in action on account.

5. Appeal and Error 🔑901

Where appeal is made on ground that evidence does not sustain findings, appellant must show wherein the evidence does not sustain the findings.

6. Reference 🔑100(6)

Where referee, under general order of reference, makes certain findings, it is presumed, in the absence of a record of the reference, that the evidence supports the findings.

7. Appeal and Error 🔑198

Where, in action on account before a referee, defendant had made no objections to choice of referee or qualifications or to his procedure in making findings, and clerk's transcript showed all parties had appeared before referee and defendant had not been prevented from objecting or introducing evidence, nor denied opportunity to object to the referee's procedure, District Court of Appeal would not consider defendant's claim that procedure before referee denied him a fair trial because referee did not adhere to rules of court practice in determining facts. Code Civ.Proc. § 2103.

8. Evidence 🔑382

Whether a book of accounts meets the requirements of the law either as to the proximity of the entries to the date of transaction or as to accuracy of entries, is a question to be determined by trial court in the exercise of a sound discretion. Code Civ.Proc. §§ 1953e–1953h.

9. Evidence 🔑354(5)

Where "ledger" of plaintiff contained accounts in addition to account on which action on account was brought, and income tax of plaintiff was computed from ledger entries, "ledger" met the competency test of the Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1953e–1953h.

10. Limitation of Actions 🔑53(2)

Action on open book account brought within statutory period after entry of last item was not barred as to any item although some items were entered more than the statutory period before institution of action.

Bloom & Bloom, Hollywood, by L. A. Bloom, Hollywood, for appellant.

Fred J. Martino, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Appellant is an art collector and connoisseur; respondent is an artist. The connoisseur possessed a collection of rare paintings including one by the master, Leonardo da Vinci, which had been despoiled by time and neglect. It required treatment by an efficient artist for its restoration and for its exhibition with the works of the great master. Appellant employed respondent to perform such services and to purchase other paintings by the ingenious artists of olden times. The relationship thus created continued from April 1944 to June 1950. Respondent purchased materials and paintings and performed services over the six-year period during which he recorded his receipts and disbursements in a "ledger." Then a dispute arose and respondent sued for $6,152.10 as (1) the quantum meruit; (2) for $3,117.50 as the balance of his account for services rendered; (3) the balance of $3,117.50 on a "mutual open and current book account" for services. At the opening of the trial, by reason of the necessity of examining the ledger, statements, invoices and cancelled checks, the parties and the court agreed that such records should be examined by an expert accountant as a referee.

Mr. Karle, a certified public accountant, was appointed and held hearings and duly filed his reports and findings whereby he determined the items that should be allowed and which should be rejected. His conclusion was that for his action and account respondent should be paid $3,117.50.

[1] Appellant contends that the judgment is a compromise of the issues of liability and damages. Such is not the fact. The trial court emphasized that the referee did not compromise the settlement of the accounts, but pointed out that the referee fixed as the amount of the award, the reasonable value of respondent's services. The referee undertook his task under a general order of reference. The trial judge, with appellant's concurrence, in discussing the order said: "Naturally the parties themselves are the ones who are primarily interested in the scope of the reference. I see no reason why we should do it piecemeal, why the referee could not make inquiry into all of the matters germane to the issues raised by the pleadings.

"Mr. Ventress: It will just be a general order of reference then? I think the pleadings do raise primarily an accounting issue, so far as I could see, so there is no reason why he couldn't pass on all the issues.

"The Court: Very well * * *."

[2, 3] It is the law that a reference requiring the examination of a long account with instructions to hear and decide the whole issue is a general reference. Lewis v. Grunberg, 205 Cal. 158, 162, 270 P. 181. In view of the stipulation of the parties, the statement of the judge, the statement of appellant's counsel and the language of the Grunberg case, supra, it is unavoidable that the scope of reference encompassed the nature, and extent of services rendered by the artist as well as a determination of the merits of disputed items. Clark v. Millsap, 197 Cal. 765, 242 P. 918, is not in point. The court in that decision had for determination whether the reference was general or special. It was special by reason of the fact that only a clerical duty was referred without power to make findings.

[4] Appellant contends that the judgment should be reversed because of errors during the course of reference; that the referee heard no evidence as to reasonable value and that the referee's hearings were confined to a review of the "ledger" and the financial records of the parties. Such is not the fact. In response to the court's inquiry as to the progress of the referee's report, appellant's counsel replied that the referee had finished taking evidence and excused the delay with the additional excuse that the referee has an accounting practice he had to neglect for the purpose of making the report to the court and was "trying to catch up." The witness Grossman was appellant's accountant. In response to the court's inquiry he stated that he had had an opportunity to point out to the referee the items disputed by appellant and that there were only minor differences between his findings and those of the referee. In testifying as to his authority to conclude his findings, Mr. Karle said: "I didn't in the first instance because there was such a wide divergence of testimony from each side as to what the actual engagement was." Appellant's attorney, Mr. Bloom, argued to the court that "we ought to have a right, as we would before the court, also to prevent our side of it before Mr. Karle, although Mr. Karle in the beginning and in the first place, all the way through, just went about it in his own way; he talked to one side and talked to the other side, looked at their books, looked at their checks; and that is O.K., he is just getting down to the facts and seeing what it is, without any red tape or without any technicalities. However, when it comes to the final decision we still want to reserve certain objections, certain things about the evidence and other things about admissibility of the books and things of that sort." From the foregoing it appears that the referee, pursuant to the stipulation, heard material evidence bearing upon the issues between the parties, not only testimony of witnesses but also he inspected the ledger and other exhibits including original paintings before and after restoration.

[5, 6] But the taking of evidence was not by the referee only. The court heard testimony relative to the reasonable value of respondent's services and made its own findings besides adopting the findings and conclusions of the referee. No objection was made to the court's hearing evidence on the issues. It covered the field laid open by the litigation and since it made complete findings as to the reasonable value of respondent's services there is little to be said in criticism of the labors and methods of the referee. In fact, appellant makes no specification as to which finding is not supported by the evidence. When an appeal is grounded upon such failure, it is incumbent upon the appellant to particularize the details. Wieczorek v. Texas Co., 45 Cal.App. 2d 450, 457, 114 P.2d 377. The referee found the total earnings of respondent, the sum paid by appellant and the unpaid balance due respondent. The fact that he found the amount due to be $4,585 but concluded that only the sum of $3,117.50 should be paid is not to the prejudice of appellant. In the absence of a record of the reference it is presumed that the evidence supports the findings of the referee. Brodie v. Barnes, 56 Cal.App.2d 315, 319, 132 P.2d 595.

[7] Appellant contends that the procedure before the referee was such as to deny him a fair trial; that such officer is obligated to adhere to the rules of court practice in determining facts, citing Code of Civil Procedure, section 2103. But he made no objection to the choice of the referee or to his qualifications. It is too late to do so before the reviewing court. With regard to the alleged ex parte hearings and to every matter of trial procedure before the referee it was obligatory upon the appellant to object before the referee and to the trial court. Having failed to do so, his complaints will go unheeded on appeal. The same rule applies with reference to the referee's analysis of respondent's books of account or to the admissibility of any item of evidence. He cannot now for the first time register such objection and because there is no record of proceedings before the referee, the finding is presumed to have been based upon sufficient proof. The clerk's transcript contains proof that the parties and their counsel appeared before the referee, introduced testimony and filed exhibits and appellant was not prevented from objecting or from introducing any evidence. Moreover, there is uncontradicted proof in the record of the proceedings before the court that appellant was denied no opportunity to object to the referee's procedure. When respondent's counsel expressed dissatisfaction with proceedings before the referee, appellant's counsel proclaimed: "At the time the referee was conducting the hearings, counsel had ample opportunity to object to his method of operation." Also, while the parties were before the referee on December 10, 1952, appellant's counsel presented a transcript of a conversation between court and counsel on a prior occasion which contained the court's suggested method of compromise as to the amounts due, and undertook to induce the referee to follow such method. It follows that instead of being silenced at the hearings before the referee, appellant's counsel were bellicose and aggressive. He must, therefore, abide the consequences of his own acts. Rodehaver v. Mankel, 16 Cal.App.2d 597, 605, 61 P.2d 61.

[8, 9] Complaint is made that appellant was prejudiced by the court's admitting into evidence the "ledger" in that it failed to meet the competency test of the "Uniform Business Records as Evidence Act", Code Civ.Proc., secs. 1953e–1953h in that the entries were not made "at or near the time of the act." Whether a book of accounts meets the requirements of the law either as to the proximity of the entries to the date of the transaction or as to the accuracy of the entries, is a question to be determined by the trial court in the exercise of a sound discretion. The same book contained other accounts. From its entries respondent's income is computed for tax purposes. The case of Tabata v. Murane, 76 Cal.App.2d 887, 174 P.2d 684, is not pertinent. The book there had no permanent form.

[10] Appellant contends that respondent's services with respect to the da Vinci exhibition were not a part of his "account"; that they were never entered in the ledger; and that compensation for such services is therefore barred by the statute of limita-

tion. The exhibit belies such assertion. It contains in clear entries the charges for service in connection with the da Vinci painting as well as charges for pictures purchased by respondent for appellant. They are entered just as charges for other services of respondent that were bargained for and received. The action is on a book account and is therefore on the entire account and not upon the separate items. It follows that the action may include items entered more than the statutory period prior to the entry of the last item. Gardner v. Rutherford, 57 Cal.App.2d 874, 136 P.2d 48. The action is not barred by any statute of limitations.

Appellant challenged every step taken by respondent in the progress of the action and at the hearings before the referee and before the court. The motion for a new trial developed into a lively tilt with appellant carrying the war into Africa. Nothing in the record indicates that he did not receive a fair and faithful consideration of every contention advanced.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

126 Cal.App.2d 295

TRAINOR v. MAUS.

Civ. 15873.

District Court of Appeal, First District, Division 2, California.

June 29, 1954.

Action for injuries to plaintiff when banister along stairway on premises of defendant gave way while plaintiff was leaning thereon, causing plaintiff to fall to concrete areaway below. The Superior Court, City and County of San Francisco, Edward F. O'Day, J., entered judgment from which the defendant appealed. The District Court of Appeal, Kaufman, J., held that where complaint for injuries sustained in fall alleged that banister along stairway was in dangerous and defective condition and that plaintiff was injured as proximate result of negligence of defendant when banister collapsed under weight of plaintiff, allowance of amendment, outside the presence of the jury, to add to the word "collapse" the further designation that the banister "gave way, yielded, became loose and broke," did not constitute an abuse of discretion.

Judgment affirmed.

1. Landlord and Tenant 🔑169(8)

In action for injuries to plaintiff as result of fall when banister on stairway on premises of defendant gave way, causing plaintiff to fall to concrete areaway below, evidence warranted conclusion that the banister was in a dangerous and defective condition for approximately a year prior to the accident.

2. Landlord and Tenant 🔑169(11)

In action for injuries to plaintiff who fell when banister along stairway on premises of defendant gave way, matters of credibility and inconsistencies in testimony of witnesses as to manner in which the accident occurred were for jury.

3. Negligence 🔑134(11)

Where facts established by plaintiff go no further than to establish a possibility that the defendant's negligence was the proximate cause of the injury, there can be no recovery.

4. Landlord and Tenant 🔑169(4)

Where evidence established that defective condition in banister along stairway on premises of defendant had existed for more than a year, and defendant, through her guardian, had made inspection trips regularly, it could properly be inferred that defect had existed long enough for the guardian, in the exercise of reasonable care, to have discovered and remedied it, thereby resulting in liability for injuries sustained by plaintiff when banister gave way, causing him to fall to the ground.

5. Trial 🔑139(1)

A motion for directed verdict must be denied if there is any evidence to sustain case of plaintiff against whom the motion is directed.

6. Pleading 🔑236(5)

Allowance of amendments to conform to proof rests in sound discretion of trial court, and there is no abuse of discretion unless prejudice is shown. Code Civ.Proc. § 470.

7. Pleading 🔑236(6)

Where complaint for injuries sustained in fall alleged that banister along stairway was in dangerous and defective condition and that plaintiff was injured as proximate result of negligence of defendant when banister collapsed under weight of plaintiff, allowance of amendment, outside the presence of the jury, to add to the word "collapse" the further designation that the banister "gave way, yielded, became loose and broke", did not constitute an abuse of discretion.

* * *

C. Ray Robinson, R. A. McCormick and William B. Boone, Merced, for appellant.

B. W. Hirschberg, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of San Francisco after jury verdict in favor of plaintiff and respondent in the sum of $75,000, and against appellant Margaret M. Maus, an incompetent person. Respondent, Edmond Trainor, sustained permanent brain damage and disability as a result of a fall over the banister and onto a concrete areaway below on the premises of an apartment house of 815 Van Ness Avenue South, San Francisco, owned by appellant. The injury was alleged to have occurred because of a dangerous and defective condition of the stairway in that the banister collapsed under the weight of plaintiff as he was descending the stairs, causing him to fall to the concrete areaway approximately ten feet below.

Appellant was sued through the guardian of her estate, Lee Alex MacNicol. A second action filed in the same court by respondent against Mr. MacNicol, individually, and Wilbert J. Clarke as defendants, was consolidated for trial with the suit herein, and motions for nonsuit were granted as to both defendants in the second motion. Plaintiff has taken no appeal in that action.

Appellant's two contentions on this appeal are: (1) that the evidence did not establish the liability of the defendant; (2) that it was error to permit plaintiff to amend his complaint during trial to conform to proof by adding to the allegation that the banister "collapsed", the words "gave way, yielded, became loose and broke."

Respondent was an investigator employed by Brown Brothers Adjusters of San Francisco. He was considered a very good man in the business who knew his work well and performed it capably. On November 16, 1951, he went to interview a Mr. Wilbert Clarke, a tenant in appellant's apartment building at 815 Van Ness Avenue S. Mr. Clarke had been a witness to an accident which respondent's employer was investigating. When he finished his business with Clarke he proceeded to leave by the outside front stairway, using the banister for support. Respondent's right hip was somewhat stiff as the result of an injury received playing football several years earlier. He wore special shoes because of some shortening of the right leg. It was therefore his practice to lean rather heavily on a handrail in descending stairs. His weight at the time was between 180 and 185 pounds.

Respondent testified that he had descended several steps, he didn't know exactly how many, anywhere from one to two to ten, when he said, "the banister caved, gave or broke, or something." The banister threw him off balance, causing him to fall over it and he landed on his head on the cement below. After the fall he remembered nothing until he regained consciousness in the hospital shortly before Christmas of 1951.

Mrs. Mural Duncanson, a tenant of a basement apartment in appellant's building, testified that she had resided at these premises since May, 1950. She had noticed that the banister railing was loose prior to the accident, and that several of the upright standards above the lower newel post were loose. Later she said that she didn't notice that the uprights were loose till after the accident. The banister had been loose from the lower newel post for more than a year before the accident. She had trouble in using the banister as far up as the point where the mail boxes were fastened to the stairway. The mail boxes were attached to the uprights about half way up the stairs. The banister shifted when she used it for support in going up or down. Below the mail boxes she used the banister gingerly. She testified that on the morning of November 17, 1951, she found respondent's glasses on the areaway below the banister and also discovered blood at the site. She pointed out on the photographic exhibit the spot where she saw the blood and stated that it was larger than her hand. On the morning of November 17 she saw Wilbert Clarke, another tenant, making repairs to the banister. He fastened the banister rail to the newel post and nailed some of the uprights supporting the banister above the newel post. She said that the uprights above the newel post were loose and two at the bottom next to the newel post were missing.

Wilbert Clarke testified that respondent visited him on the evening of November 16, 1951, on business; that on the morning of November 17, 1951, he made repairs to the outside banister of the stairway which led down from his apartment. He hammered some nails into the base of the banister attaching it to the lower newel post and nailed several uprights above the newel post. The banister was torn away from the newel post and the nails were protruding. The banister was entirely detached from the newel post. He made repairs as high as the ninth and tenth steps. The uprights were loose and could be moved as high up as he made repairs.

Clarke also testified that on the evening when respondent finished his visit, the witness saw him to the door, closed the door after him and started to sit down to read the paper when he heard a thud. He went to the door and saw nothing, so he went back in. It was dusk, and there were no lights on the landing outside the second floor entrance. The closest street light was across the street—that is on the other side of Van Ness Avenue S. and about the distance of one house to the south of the premises.

Violet Bernal, who also resided in appellant's apartment house, testified that the premises were not in good repair and that she had never seen anyone make any repairs to the building at any time. As she was leaving the apartment at about 6 p. m. on November 16, 1951, she saw respondent standing by the cement pole which is near the gate to the basement apartment. He was holding onto the pole. He did not have a hat or glasses, nor was he holding a brief case. When she returned at about 6:30 p. m. he was still in the same position. He tried to say something to her, but she went on into the building and did not see him again.

John Trainor, a brother of respondent, visited the premises on November 17, 1951, and examined the banister which Clarke had repaired. He stated that the new nails were visible and extended all the way up to the mail boxes which were half way up the stairway. Lee Alex MacNicol, guardian of appellant's estate, stated that he had been so appointed in 1948; that he visited the premises here involved on an average of once in every month or six weeks. His last visit prior to the accident had been on October 12, 1951. The only repairs he remembered ever having made were to a water heater, a tree, and part of the building which had been damaged in the rear by a small fire.

The witness Leon Bernal also saw respondent holding on to the cement pole as he went into his apartment for dinner on the evening of November 16, 1951. About an hour later he was working on a car with his friend Moranda, when respondent approached, told him he was sick, and asked him to drive him home. Bernal saw blood on the back of respondent's head. Eventually, Moranda took Trainor's car and drove him home, Bernal following in Moranda's car. They left respondent in his car in front of his home and departed. At about 7:20 p. m. Mrs. Trainor saw her husband standing by the car with his head down. She went out and brought him in.

He was shivering and incoherent. She noticed the laceration on his head and summoned the doctor.

[1, 2] Appellant contends that her motion for a directed verdict and/or for judgment notwithstanding verdict should have been granted, arguing that plaintiff's own evidence established that at all times prior to the accident there was nothing dangerous or defective about the north banister of appellant's stairway. However, the testimony of Mrs. Duncanson, one of the tenants of the premises, reviewed above, is sufficient to establish that the banister of the stairway was in a dangerous and defective condition for a year prior to the accident. She stated that it was loose from the bottom newel post and it shifted when she used it for support as far up as the mail boxes. They are located at the eighth and ninth steps from the bottom of this flight of eighteen steps. The mail boxes are therefore about nine and ten steps from the top of the stairway. Respondent testified that he had taken somewhere between two and ten steps down when the banister shifted under his weight, throwing him off balance and causing him to fall over it to the concrete below. Appellant points out that Mrs. Duncanson was emphatic in her testimony that the banister was firm above the mail boxes; that she located the blood spot on the pavement as behind the twelfth step, and hence respondent could not have descended beyond the sixth step from the top when he fell. The jury may very well have disbelieved her testimony as to the firmness above the ninth step, in view of the numerous photographs showing the condition of the stairway, banister and uprights, which show that the condition was pretty uniform throughout, with the exception that two uprights were entirely missing at the bottom. The jury may also have chosen to believe respondent's testimony that he had descended ten steps, which would bring him well within the area where the banister had been shifting under Mrs. Duncanson's weight for the past year.

[3] Appellant points to certain inconsistencies in the testimony of respondent, but again, it was for the jury to resolve all conflicts and to determine credibility. It is asserted that there is no definite evidence that any defect anywhere in the banister caused respondent's fall. There can be no recovery where the facts go no further than to establish a possibility that defendant's negligence was the proximate cause of the injury. McKellar v. Pendergast, 68 Cal.App.2d 485, 489, 156 P.2d 950. Appellant speaks of the upper banister and the lower banister as if they were separate objects, saying that there is no evidence of looseness in the upper banister and that the evidence does not show that he ever reached the lower banister, citing Trembley v. Capital Co., 89 Cal.App.2d 606, 608, 201 P.2d 398. However, the evidence, discussed just above, disposes of this contention. The photographic evidence showed that the banister was one continuous beam from top to bottom. It may also be noted that Clarke had time to go into his apartment after closing the door and was about to settle down to read his paper when he heard the thud. If the time elapsed would permit respondent only to descend two steps, the jury might think it rather odd that Clarke's curiosity was not aroused when he locked out on the stairs and discovered that respondent had vanished.

There is testimony by Clarke that respondent appeared very ill to him, that he looked as if he were suffering from a stroke, and that he left hurriedly. Clarke had noted respondent's somewhat crippled hip condition. It is rather incredible that if the testimony as to the illness were true, that the witness would have shown him to the door, saying simply, "Watch your step," and retired within. Clarke's testimony is, of course, in conflict with other testimony that respondent was in excellent health. It was for the jury to resolve all conflicts.

Appellant stresses the fact that witnesses who were tenants of the building testified that the banister was not "collapsed" after the accident. However, the complaint was amended to conform to proof, adding to the allegation "gave way, yielded, became loose and broke." Respondent's testimony was that it gave way or broke or something under his weight throwing him off balance, causing him to fall over the banister. Mrs. Duncanson's testimony also established that the banister had been yielding or shifting under her weight for more than a year before the accident.

[4, 5] Although it is contended that there is no evidence that either defendant or her guardian should have known of any dangerous and defective condition, it may be noted that the evidence established that the defective condition had existed for more than a year. Since the guardian made inspection trips regularly, it may be inferred that the defect had existed long enough for the guardian in the exercise of reasonable care, to have discovered and remedied it. Girvetz v. Boys' Market, Inc., 91 Cal. App.2d 827, 829, 206 P.2d 6. In view of this evidence it was not the court's duty to direct a verdict for defendant. Therefore the cases of Owen v. Beauchamp, 66 Cal. App.2d 750, 152 P.2d 756, and Reinhard v. Lawrence Warehouse Co., 41 Cal.App.2d 741, 747, 107 P.2d 501, cited by appellant, are not in point. Such motions must be denied if there is any evidence to sustain plaintiff's case. Turner v. Lischner, 52 Cal.App.2d 273, 126 P.2d 156; Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 275 P. 980; Deike v. East Bay Street Railways, Ltd., 7 Cal.App.2d 544, 46 P.2d 812.

It is contended that it was prejudicial error to permit plaintiff to amend his complaint to conform to proof, by adding after the word collapse, the words "gave way, yielded, became loose and broke." This motion was granted over objection of appellant at the end of respondent's case. Appellant did not ask for a continuance, but proceeded with her testimony. The motion was made, argued and granted outside the presence of the jury. However, appellant claims that she was greatly prejudiced in her defense since she had prepared it on the theory that plaintiff would have to prove a collapse of the banister in order to establish a case. It is to be noted that the complaint alleged that the banister was in a dangerous and defective condition, that the vertical supports were weak, rickety and unsafe for use; that the condition had existed for a long period of time, that as a proximate result of the negligence of defendant the banister collapsed under the weight of plaintiff, causing him to fall.

Appellant relies on Sanguinetti v. Moore Dry Dock Co., 36 Cal.2d 812, 228 P.2d 557, 561, wherein it was held prejudicial error to allow plaintiff's counsel, *in the presence of the jury*, to amend the prayer of the complaint to ask for $75,000 instead of $50,000 damages. That case is not in point because here counsel moved the court for the amendment in chambers. Appellant contends that the reasoning of the case applies here, however, since respondent's counsel in his opening and closing arguments to the jury stated that the court had allowed the amendment. In the Sanguinetti case the court also instructed the jury that the amount of damages allowed in the complaint was $75,000. The Supreme Court in the cited case pointed out that the influence of the judge on the jury is of great weight, " 'that his lightest word or intimation is received with deference, and may prove controlling.' " Here there was no reference whatsoever to the matter by the trial judge in the presence of the jury.

[6] Allowance of amendments to conform to proof rests in the sound discretion of the trial court, and there is no abuse unless prejudice is shown, and new and entirely different issues are brought into the case. Code Civ.Proc. § 470; Crown Products Co. v. California Food, etc., Corp., 77 Cal.App.2d 543, 175 P.2d 861; Genger v. Albers, 90 Cal.App.2d 52, 202 P.2d 569. The court must permit an amendment to conform to proof offered by plaintiff where no prejudice results to defendant. Eckart v. Brown, 34 Cal.App.2d 182, 93 P.2d 212.

[7] In view of the fact that the complaint advised appellant that it was the defective condition of the banister which caused respondent's fall, we cannot see that he was prejudiced by further defining the term "collapse" in the complaint. "Collapse" does not necessarily mean that the banister must completely fall off. Other dictionary definitions of the word are: "cave in", "fail", "to lose strength, etc. suddenly", "a sudden complete failure". No abuse of discretion on the part of the

trial court has been shown by allowing the amendment to conform to the proof.

A review of the record satisfied us that there is no prejudicial error and that the evidence justifies the verdict and judgment.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

125 Cal.App.2d Supp. 901

PEOPLE v. MELTON.

Cr. 3118.

Appellate Department, Superior Court,
Los Angeles County, California.
May 25, 1954.

Prosecution for driving automobile while under influence of intoxicating liquor. From order of Municipal Court, Compton Judicial District, Ralph C. Dills, J., placing accused on probation, the accused appealed. The Appellate Department of the Superior Court, County of Los Angeles, Stevens, J., held that where accused pleaded guilty and waived a jury trial at a time when he had no counsel, but one week thereafter, upon employment of counsel, moved for a jury trial, and there was no indication that granting of jury trial would delay the trial or prejudice the interests of the prosecution, denial of motion for jury trial was an abuse of discretion.

Order reversed.

1. Jury 🔑29(7)

A waiver of trial by jury, voluntarily and regularly made, cannot afterwards be withdrawn except in discretion of the court.

2. Jury 🔑29(7)

Where request to withdraw waiver of jury trial is made sufficiently in advance of trial so as not to interfere with orderly administration of business of court, or to result in unnecessary delay or inconvenience to witnesses, or to prejudice other party, the court should exercise its discretion to allow moving party a jury trial.

3. Jury 🔑29(7)

Expense to state of a jury trial may not be considered by trial court in exercising its discretion to deny a motion for withdrawal of a waiver of jury.

4. Jury 🔑29(7)

In prosecution for driving automobile while under influence of intoxicating liquor, wherein one week after entry of plea of not guilty and waiver of jury trial by accused at a time when he had no counsel, accused, following employment of counsel, moved for jury trial, and there was nothing to indicate granting of jury trial would delay the trial or prejudice the interests of the prosecution, trial court abused its discretion in denying motion for jury trial. Vehicle Code, § 502; Const. art. 1, § 7.

5. Criminal Law 🔑1023(12)

Where accused was convicted of driving a vehicle while under influence of intoxicating liquor and imposition of sentence was suspended and accused placed on probation, appeal by accused from what was described as "judgment of conviction" would be treated as an appeal from the order granting probation. Vehicle Code, § 502.

Gray, Glass & Allen, Gardena, for appellant.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

STEVENS, Judge.

The trial court, sitting without a jury, tried and adjudged defendant guilty of driving a vehicle upon the highway while under the influence of intoxicating liquor. Imposition of sentence was suspended by the court, and, in lieu thereof, defendant was placed on probation for two years upon conditions which include revocation of his driver's license for one year and the payment of a $200 fine. Defendant has appealed from "the judgment of conviction" and also from the order denying his motion for a new trial. Although defendant questions the sufficiency of the evidence to support the adjudication of guilt, his primary challenge of the orders from which he appeals is directed to the refusal of the trial court to grant him a jury trial.

Following the defendant's arraignment on October 7, 1953, on a charge of violating Section 502 of the Vehicle Code, at which time the trial court's docket recites that he was "informed of legal rights," time for entry of defendant's plea was continued to October 9 at his request. On the latter date, according to the docket, defendant pleaded not guilty to the offense charged and waived trial by jury, and the case was set for trial on October 29.

One week after entering his plea, however, defendant appeared for the first time with counsel and moved the court to set the action for jury trial. The motion was denied. On October 29, the date set for trial, defendant's counsel again moved for a jury trial, which motion likewise was denied. The taking of testimony then began and, at its conclusion, the trial court adjudged defendant guilty as charged. On November 2, the court suspended imposition of sentence and placed defendant on probation as previously noted.

Defendant's notice of intention to move for a new trial was likewise filed and the motion made on November 2. In his affidavit supporting this motion, defendant stated that he at no time was asked by the trial judge "whether he desired a trial by the court or by a jury." After announcing in open court his plea of not guilty, according to his affidavit, defendant was told by the judge to "see the Clerk." In his conversation with the clerk, the affidavit continues, the "Clerk then asked your affiant whether he desired a trial by jury or by the court. Your affiant asked said Clerk what would be the difference and the Clerk responded to your affiant that in the event your affiant requested a jury trial the bail bond (then in the amount of $250) would be increased. Your affiant then stated to said Clerk that he had no other monies on his person and that he did not desire to be returned to custody, so he would take a trial by the court." There was no denial of these allegations.

In California, the "right of trial by jury shall be secured to all, and remain inviolate * * *. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel * * *." Cal. Const. Art. I, sec. 7.

[1] A waiver of trial by jury, voluntarily and regularly made, cannot afterward be withdrawn except in the discretion of the court. People v. Colton, 1949, 92 Cal.App.2d 704, 707, 207 P.2d 890; People v. Cowan, 1940, 38 Cal.App.2d 144, 149, 100 P.2d 1079; People v. Hooper, 1936, 16 Cal.App.2d 704, 707, 61 P.2d 370; and see 50 C.J.S., Juries, § 111(b), pp. 825–826. In the exercise of the discretion thus vested in it, the court may consider such matters as the timeliness of the motion to withdraw the waiver and whether a delay of the trial or inconvenience to witnesses would result from the granting of such motion.

Thus in People v. Colton, supra, the court had vacated a prior order directing a venire of 100 persons to be summoned as jurors in reliance on the waiver of jury. Defendant did not move to set aside the waiver until the case was called for trial. Under the foregoing circumstances, the court was held not to have abused its discretion in denying the motion first made at the commencement of trial.

In both People v. Cowan, supra, and Peo- v. Hooper, supra, the defendants' applications to withdraw their waivers of jury were not made until after considerable testimony had been taken in each case. Consequently, the action of the trial courts in denying the motions in those actions was held a proper exercise of discretion. For, as observed in the Hooper case [16 Cal. App.2d 704, 61 P.2d 371], "It would seriously interfere with the orderly conduct of the business of the court if the accused could waive a jury trial and later, near the close of the trial by the court, could demand that the waiver be set aside without giving any good and sufficient reason for such action."

[2] On the other hand, where the request to withdraw the waiver of a jury trial is made sufficiently in advance of trial

so as not to interfere with the orderly administration of the business of the court or to result in unnecessary delay or inconvenience to witnesses or to the prejudice of the other party to the action, the court should exercise its discretion to allow the moving party the jury trial he seeks. Certainly, when dealing with a right so fundamental as to be characterized by our Constitution as one which should "remain inviolate," the court should only deny the privilege thus accorded a defendant charged with crime to a trial by his peers where some adverse consequence will flow from his change of mind.

[3] Of course, it may be urged that in any such case, the cost to the People of a jury trial through the payment of the jurors' per diem fees and mileage allowance is such as to result in prejudice whenever a jury demand is reinstated. Such an expense, however, is not one which may be considered by the trial court in exercising its discretion to deny a motion for withdrawal of a waiver of jury, for the constitutional guarantee of a jury trial is in no way conditioned upon the fact that the State must bear the cost of supplying the jury in criminal cases. To provide the necessary venire is a duty of the State arising under the Constitution of which it may not constitutionally complain.

While no criminal appeals in California appear to have involved a situation calling for the exercise of the court's discretion to grant an application for a jury trial once waived, courts of other jurisdictions have announced the rules governing such action. As stated in State v. Rankin, 1925, 102 Conn. 46, at page 50, 127 A. 916, at page 917, "The court may permit the withdrawal, in the exercise of its discretion. Wadkins v. State, 127 Ga. 45, 56 S.E. 74. Such a discretion is a reasonable one in the light of the circumstances. If the application for such withdrawal be made seasonably; that is, so that the withdrawal will not unreasonably delay the cause, or impede justice, or otherwise prejudice the state—the court should permit it. * * *" And in Wilson v. State, 1939, 60 Ga.App. 641, 4 S.E.2d 688, the court said that a defendant should be permitted to revoke the waiver of a jury trial "provided he acts timely and in such season 'as not substantially to delay or impede the cause of justice.' (Cain v. State, 102 Ga. 610, 612, 29 S.E. 426)". When a timely demand for a jury trial previously waived was denied by the trial court, the Oklahoma Criminal Court of Appeal reversed the judgment of conviction, holding that "the action of the court in refusing the defendants a jury trial was an abuse of discretion and deprived the defendants of a fair and impartial trial as guaranteed to them by the constitution and the laws of this state." Staley v. State, 1938, 65 Okl.Cr. 227, 238, 84 P.2d 813, 818; and see People v. Standish, 1914, 185 Ill. App. 485, 487. Even in civil cases, the California Supreme Court has observed: "We think that, as a general rule, a party should be relieved from a stipulation waiving a jury where the same can be done without injury to the other side, and without disarranging the orderly conduct of the business of the court." Ferrea v. Chabot, 1898, 121 Cal. 233, 235, 53 P. 689, 690, 1092.

[4] An additional reason for permitting a withdrawal of a jury waiver exists when, as in this case, the defendant waived a jury trial when not represented by counsel. In such cases, where following the employment of counsel by the defendant, a timely demand has been made for a jury trial, the court should permit a revocation of the waiver and grant a trial by jury. State v. Williams, 1942, 202 La. 374, 377, 11 So.2d 701; Butler v. State, 1895, 97 Ga. 404, 23 S.E. 822; Wilson v. State, 1939, 60 Ga.App. 641, 4 S.E.2d 688. Further support for this conclusion is supplied by the provision of Article I, Section 7, of the California Constitution, requiring the consent of *both* the defendant and his counsel before a waiver becomes effective. See People v. Wilkerson, 1929, 99 Cal.App. 123, 278 P. 466; People v. Spinato, 1929, 100 Cal.App. 600, 280 P. 691. Consequently, even though a waiver of jury by a defendant appearing *in propria persona* may be legally effective, see People v. Thompson, 1940, 41 Cal.App. 2d Supp. 965, 967, 108 P.2d 105, once he has

engaged counsel who is of the opinion that the defendant's interests will be furthered by a jury trial rather than a trial by judge, the constitutional concern that the consent of the lawyer, as well as of the defendant, to the waiver be secured should be given consideration in ruling upon a subsequent application of defendant's counsel to withdraw the waiver.

Reviewing the facts in this case as they were presented to the trial court, it appears that, one week after the entry of the plea of not guilty and the waiver of jury by defendant at a time when he had no counsel, he, through his subsequently retained lawyer, moved the court for a jury trial. This request was made some thirteen days before the date set for trial. Nothing in the record before the trial judge or on this appeal indicates that the granting of a jury trial would have delayed the trial of the case or in any way have prejudiced the legitimate interests of the prosecution. Nor was any rebuttal of defendant's conversation with the clerk of the trial court, as set forth in his affidavit in support of his motion for new trial, introduced either by way of oral testimony or counter-affidavit. Defendant's uncontradicted version of the conversation reveals that his choice of trial by judge rather than by jury was induced by his inability to furnish the additional bail he was told his insistence on a jury would require and was not an informed selection reached after a consideration of the factors involved in a trial by jury as distinguished from one by judge. Under the foregoing circumstances, the trial court abused its discretion in denying the motion for jury trial.

[5] Although no judgment of conviction was entered in this case, the appeal from what defendant describes as "the judgment of conviction" shall be construed as an appeal from the order granting probation. People v. McShane, Super.Ct.A.D.1954, 272 P.2d 571; People v. Stanley (CR A 3132, 1954), 1 A.D. (Met. ed.) 22. As so construed, that order is reversed, as is the order denying the motion for a new trial.

SHAW, P. J., and BISHOP, J., concur.

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126 Cal.App.2d 89

LOS ANGELES COUNTY
v.
BEVERLEY et al.

Civ. 20107.

District Court of Appeal, Second District, Division 2, California.

June 17, 1954.

Eminent domain proceeding brought by county. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered judgment for county, and condemnees appealed. The District Court of Appeal, McComb, J., held, inter alia, that where complaint alleged that the property sought to be condemned constituted a part only of a larger parcel and such allegations were admitted by the answer and trial court failed to rule upon county's motion to amend its complaint by striking therefrom all reference to the property as being a part of a larger parcel and all reference to severance damages, jury was entitled to consider whether or not condemnees were entitled to severance damages.

Reversed.

1. Trial ⟹98

A judge presiding at the trial of a case should rule promptly and clearly upon each and every objection or motion, thus not only affording the parties benefit of his judgment and guidance as to future conduct of trial, but also making a crystal clear record for assistance of a reviewing court when reviewing his action.

2. Pleading ⟹376
Trial ⟹36

Where allegations in a complaint are admitted by answer, no evidence need be offered in their support, evidence is not admissible to prove their untruth, no finding thereon is necessary, a finding contrary thereto is error and the introduction of evidence relative to such admitted allegations is error.

3. Eminent Domain ⟹195

Where complaint alleged that property sought to be condemned constituted a part only of a larger parcel and such allegations were admitted by answer and trial court failed to rule upon condemnor's motion to amend its complaint by striking therefrom all reference to property as being a part of a larger parcel and all reference to severance damages, jury was entitled to consider whether condemnees were entitled to severance damages.

4. Eminent Domain ⚷134

In determining the market value of property taken in a condemnation proceeding, the test is not its value for special purposes but fair market value in view of all purposes to which it is naturally adapted.

5. Eminent Domain ⚷202(4)

In a condemnation proceeding, evidence that the property is valuable for any particular purpose may always be given and should be freely received, but value in terms of money which a witness might think it would have for some specific purpose is inadmissible.

6. Eminent Domain ⚷202(4)

In condemnation proceeding, testimony of geologist that the oil possibilities of the the property in question had a speculative value of $5,500 was inadmissible.

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Jesse A. Hamilton, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Arthur Loveland, Deputy County Counsel, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for the taking of private property in an eminent domain proceeding, defendants appeal.

Facts: The complaint in condemnation filed February 14, 1952, alleged "That the property hereinafter described constitutes a part only of a larger parcel," and the prayer of the complaint asked: "That such several estates and interests may be determined and adjudicated in this action, and that the value of each and every separate interest or estate in the parcel of real property sought to be condemned herein, *and the severance damages,* if any to those parts of larger parcels, which will accrue to the portions thereof not sought to be condemned herein, *by reason of their severance from the portion sought to be condemned herein,* and the construction of the improvement in the manner proposed by the plaintiff, be separately ascertained and adjudicated." (Italics added.)

In the answer filed May 22, 1952, by defendants it was alleged:

"Defendant alleges that said parcel sought to be condemned is only a part of a larger contiguous parcel, which whole, has for a number of years been devoted to use as a cheese processing and manufacturing plant, that it is an integral part of said plant and the operation of the plant as a manufacturing unit would be impossible without said parcel sought to be condemned; that all of said property has been in said industrial use for a number of years; that after the dedication of said property to industrial use the property was zoned by the County Regional Planning Commission as a residential property zone; that no other industries can be established in said zone; that the property of defendant being dedicated to industrial use prior to the zoning was unaffected thereby, and that said zoning had the effect of greatly enhancing the fair market value of the said property of the defendant.

"That in the year 1949, while this defendant was owner of said parcel of the property sought to be condemned, a subsidiary organization of the Richfield Oil Company chose this parcel as a drilling site for extensive oil exploration and development. That in the months of August and September of 1949, said subsidiary for the Richfield Oil Company did drill an oil well upon said site to an approximate depth of 5,000 feet, and placed casings in the shaft drilled, expending in all some fifty thousand dollars. That though no oil was then produced this defendant has been informed and does believe that there are others who are interested in reaching a lower level oil bearing sand, and that the existing shaft greatly enhances the value of said parcel sought to be condemned. That the casing now in said well is worth four thousand dollars.

"Defendant alleges that the reasonable fair market value of the parcel sought to be condemned is twenty-four thousand Dollars."

[1] In plaintiff's brief it is stated that after the commencement of the trial plaintiff made a "motion to amend its complaint by striking therefrom all reference to subject property being a part of a larger parcel and all reference to severance damages, and the Court reserved its ruling until after the evidence was in."

It is conceded by all parties that the trial judge never made a ruling on plaintiff's motion.[1]

The trial court instructed the jury, before submitting the cause, to disregard all evidence of severance damages. The trial judge also struck from the record testimony of John H. Wents, geologist and oil consultant, that the oil possibilities of the land had a speculative market value of $5,500.

[2, 3] *Questions:* First: *Did the trial court err in instructing the jury to disregard all evidence of severance damages?*

Yes. The rule is established in California by a plethora of cases that where allegations in a complaint are admitted by the answer, no evidence need be offered in their support; evidence is not admissible to prove their untruth; no finding thereon is necessary; a finding contrary thereto is error; and the introduction of evidence relative to such admitted allegations is error.[2] (Fuentes v. Tucker, 31 Cal.2d 1, 4[3], 187 P.2d 752; Lifton v. Harshman, 80 Cal.App.2d 422, 431 [2], 182 P.2d 222 (hearing denied by the Supreme Court); see also cases cited 36 West's Cal.Dig. (1951) Pleading, 🔑36(3), p. 340, 🔑376, p. 608.)

Therefore in the instant case, since the trial judge failed to rule upon plaintiff's motion to amend its complaint, the allegations that the property sought to be condemned "constitutes a part only of a larger parcel" remained an admitted fact in the case and the jury were entitled to consider whether or not defendants were entitled to any severance damage.

It is to be noted that at no time during the trial did defendants concede either (1) that the property sought to be condemned was not a part of a larger parcel, or (2) that they were not entitled to severance damages. The trial did not take place upon the assumption that the complaint had been amended in accordance with plaintiff's request.

[4] Second: *Did the trial court err in striking from the record the testimony of geologist Wents that the oil possibilities of the property in question had a speculative value of $5,500?*

No. The rule is established in California that in determining the market value of property taken in a condemnation proceeding the test is not its value for special purposes but the fair market value of the land in view of all the purposes to which it is naturally adapted.

[5] Evidence that it is valuable for any particular purpose may always be given and

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[1] A judge presiding at the trial of a case should rule *promptly* and *clearly* upon each and every objection or motion which is made by the attorneys, thus not only affording the parties the benefit of his judgment and guidance as to the future conduct of the trial, but also making a crystal clear record for the assistance of an appellate court when reviewing his action.

[2] Mr. Chief Justice Gibson in Fuentes v. Tucker, 31 Cal.2d 1 at page 4 [2], 187 P.2d 752, 754, succinctly states the rule as follows:

"One of the functions of pleadings is to limit the issues and narrow the proofs. If facts alleged in the complaint are not controverted by the answer, they are not in issue, and no evidence need be offered to prove their existence. Travelers' Ins. Co. v. Byers, 123 Cal.App. 473, 482, 11 P.2d 444; Code Civ.Proc. §§ 462, 588, 1868, 1870, subds. (1), (15); see I Wigmore on Evidence, 3d Ed. 1940, p. 9, § 2. Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. (Citations.)"

should be freely received in a condemnation action. However, its value in terms of money which a witness might think it would have for some specific purpose is inadmissible. (Sacramento, etc., R. Co. v. Heilbron, 156 Cal. 408, 412, 104 P. 979.)

[6] Applying the foregoing rule to the facts in the present case, Mr. Wents' testimony, if qualified, was admissible to show what in his opinion the entire property was worth including mineral rights having in mind all the uses to which the property could be put. His testimony as to one particular use and the value thereof to the whole was inadmissible. The latter testimony was highly speculative and therefore inadmissible.

In view of our conclusions other questions argued by counsel need not be considered.

Reversed.

MOORE, P. J., and FOX, J., concur.

126 Cal.App.2d 144

PEOPLE v. BATES.

Cr. 5086.

District Court of Appeal, Second District, Division 1, California.

June 22, 1954.

As Modified on Denial of Rehearing July 7, 1954.

Defendant was convicted of robbery. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., rendered judgment and denied new trial and defendant appealed. The District Court of Appeals, Drapeau, J., held that evidence was sufficient to support conviction.

Judgment and order affirmed.

1. Robbery 🔑24(3)

Identification by one witness of a defendant charged with robbery is sufficient to support conviction. Code Civ.Proc. § 1844.

2. Criminal Law 🔑260(11)

In reviewing an attack upon the finding of a trial court a reviewing court may consider only whether there is substantial evidence to support it. Const. art. 6, §§ 4a, 4b.

3. Criminal Law 🔑260(11)

It is for the trial court to weigh the evidence, to draw reasonable inferences deducible therefrom, and to resolve question of credibility of witnesses.

4. Robbery 🔑24(1)

Evidence was sufficient to sustain conviction for robbery.

Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Dep. Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted by a judge of the Superior Court of two counts of first degree robbery. He admitted a prior conviction of grand larceny, for which he served a term in the penitentiary in Virginia. After the crimes in California, he went to Louisiana and was there convicted of armed robbery. When he was released from the Louisiana penitentiary he was brought back here for trial.

Defendant appeals from the judgment that he be imprisoned in the state prison in California for the term prescribed by law, and from the order denying his motion for a new trial. He bases his appeal upon the sole ground that the evidence is insufficient to support the finding that he was guilty.

Two liquor stores in the San Fernando valley were held up. Two men took part in one hold up; three men in the other. In each case one of the men was armed. And in each case defendant took part in the robbery.

The victim of one robbery positively identified defendant. Her testimony was not shaken on cross-examination. The victim of the other robbery said that defendant's face looked "like I did see him before." Cross-examined he said, "as positive identification I would not give it."

The officers who returned defendant from Louisiana asked him if he had ever robbed anyone in California. He answered that he "might have or he might not have." That was his stock answer to many questions after that by the officers. But he finally admitted to one of the officers that he took part in both of the robberies.

On the trial defendant testified in his own behalf. He denied any part in the robberies or any admissions of guilt. He said he was living in the San Fernando valley at the time, and could well have been in both liquor store for purchases.

Turning now to the law of the case:

[1] Identification by one witness of a defendant charged with robbery is sufficient to support the conviction. Code of Civ.Proc., § 1844; People v. Ferlito, 100 Cal.App. 355, 280 P. 136; People v. Ash, 88 Cal.App.2d 819, 199 P.2d 711.

[2-4] It is basic in the law of appeals in this state that in reviewing an attack upon the finding of a trial court an appellate court may consider only whether there is substantial evidence to support it. When it appears that the finding is supported by substantial evidence, that is all there is to the case. People v. Alexander, 92 Cal.App.2d 230, 206 P.2d 657. It is for the trial court to weigh the evidence, and to draw reasonable inferences deducible therefrom. Rosicrucian Fellowship v. Rosicrucian, etc., 39 Cal.2d 121, 245 P.2d 481. And the credibility of witnesses is to be resolved by the trial court. Anglin v. Conway, 41 Cal.2d 683, 263 P.2d 1.

In criminal cases the constitution of California explicitly states that the Supreme Court and the District Court of Appeal have jurisdiction *"on questions of law alone"*. Const. Art. VI, §§ 4a and 4b.

In 1851 in Vogan v. Barrier, 1 Cal. 187, 188, our Supreme Court said:

"The case throughout presents nothing but questions of fact, which it is the peculiar province of juries to pronounce upon."

In 1950, in People v. Gutierrez, 35 Cal.2d 721, 727, 221 P.2d 22, 25, our Supreme Court said:

"After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it."

For more than a hundred years since that first case our courts have stated this simple legal rule over and over again. But the number of appeals in such hopeless cases seems to continue about the same.

It is not surprising that litigants who have lost in civil cases, and defendants who have been convicted in criminal cases, should turn to a consideration of what might be done for them on appeal. In the instant case, no criticism is intended to be directed toward present counsel who entered the case after the appeal had been perfected by another attorney who later passed away, and at the urgent request of appellant present counsel accepted the responsibility of representing him in the presentation of the appeal to this court. However, the record in this case does afford an opportunity for this court to comment upon the futility of appeals when the evidence is conflicting and there are no errors of law.

It is the duty of every member of the legal profession to go carefully over the record before perfecting an appeal. If it is evident that a conflict in the evidence has been resolved by the trier of fact and that there has been no error of law, it is then the lawyer's duty to advise his client of the hopelessness of such an appeal. Litigants should never be put to the expense, and courts and counsel to the waste of time and effort involved in such cases.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

126 Cal.App.2d 147

LAUDER
v.
WRIGHT INV. CO. et al.
Civ. 19882.

District Court of Appeal, Second District, Division 2, California.
June 22, 1954.

Action against subdividers by neighboring landowner for damages resulting to owner's land and buildings from water, mud, and debris which, during unusually heavy rain, came from subdivision which was then under construction. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment adverse to landowner, and landowner appealed. The District Court of Appeals, Fox, J., held that evidence was sufficient to sustain trial judge's finding that subdividers had not created any situation or hazard which amounted to a nuisance or endangered or depreciated landowner's property or which justified injunctive relief or general damages.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

If there is any substantial evidence to support trial court's findings, they cannot be set aside by the reviewing court even though reviewing court may believe that preponderance of evidence is the other way.

2. Appeal and Error 🔑994(3), 1012(1)

All questions of weight of evidence and credibility of witnesses are for trier of facts.

3. Appeal and Error 🔑931(1)

All conflicts must be resolved in favor of party successful in court below and all legitimate and reasonable inferences must be drawn in support of the findings.

4. Appeal and Error 🔑996

Where divergent inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge.

. Trial 🔑375

In action against subdividers by neighboring landowner for damage resulting to owner's land and buildings from water, mud, and debris which, during unusually heavy rain, came from subdivision, which was then under construction, view of owner's premises, of subdivision, and of topography of surrounding area was independent evidence which could be considered by trier of facts in arriving at his conclusion.

6. Waters and Water Courses 🔑126(2)

In action against subdividers by neighboring landowner for damage resulting to owner's land and buildings from water, mud, and debris which, during unusually heavy rain, came from subdivision, which was then under construction, evidence was sufficient to sustain trial judge's finding that subdividers had not created any situation or hazard which amounted to a nuisance or endangered or depreciated owner's property or which justified injunctive relief or general damages.

7. Trial 🔑375

In tort action against subdividers by neighboring landowner for damages from water, mud, and debris which, during unusually heavy rain, came onto owner's land from subdivision, trial judge, who was trier of facts, was not required to accept evidence favorable to owner rather than on-the-spot factual picture obtained by judge in his own personal inspection of the area involved.

Edwin H. Casey, Tujunga, for appellant.

Belcher, Kearney & Fargo and Lester E. Olson, Los Angeles, for respondents.

FOX, Justice.

In 1950 defendants commenced subdividing operations on 36 acres of unimproved hillside ranch land located in the North Hollywood section of Los Angeles. Vineland Avenue is adjacent to defendants' subdivision and is the last improved street prior to defendants' development. Plaintiff's home is on the southeast corner of Vineland Avenue and Fruitland Drive, which latter street deadends at this intersection. Defendants' tract lies to the southwest of Vineland Avenue and at a higher elevation than plaintiff's property. There were unusually heavy rains in this vicinity during the period of January 15–18, 1952. As a result, quantities of water, mud and debris came down from defendants' subdivision upon plaintiff's property and into the buildings thereon, causing substantial damage.

Plaintiff charged defendants with negligence in carrying on their subdivision operations, and that they created and maintained a nuisance thereon. She sought both general and special damages and injunctive relief. From a judgment denying her any relief, plaintiff appeals.

The first step taken by defendants in the development of their subdivision was to employ Otto Baldus, an experienced subdivision engineer, for the purpose of laying out the subdivision and preparing a plan for its development. Mr. Baldus' plans were submitted to the Planning Commission of the city of Los Angeles for approval, and, in due course, were approved. Thereupon defendants employed the Donald Warren Company, highly respected soil engineers, to prepare grading plans. After a careful study of the topography of the area and the soil structure such plans were developed by the Warren organization. These were approved by the appropriate city department. The grading, compaction and other work incidental thereto was done by a "well-known firm" in accordance with the grading plans.

The next step in the development of the subdivision was the installation of sewers. These were installed by a large, reputable sewer contractor. Permits for this work as well as for the paving of the streets and installation of curbs were obtained from the proper city department. Certificates approving the completed work were duly issued. The subdivision plans were submitted to the Los Angeles County Flood Control District, which "made an inspection of the property as to the amount of water shed" and "recommended the size of the drains." The plans, including the provisions for drainage, were approved by the district. A contract was then let to a responsible contractor for the installation of the indicated storm drains and catch basins. This work was inspected and duly approved.

Just prior to the heavy rain which caused the damage here complained of, the status of the work on the subdivision was as follows: The general grading over the tract had been finished, the rough street grading was completed, much of the concrete curbing had been poured, pre-mixed flood control channels were graded but not yet paved, and the sewers installed with the trenches "refilled" and "puddled."[1] The only work remaining on the sewer installation was the lowering of the manhole covers. These could not be put in place until after final street grading and paving, which had not yet been done when the rain of January 15th came. During this storm the water gouged out the newly filled sewer trench, and the mud and water came down Vineland Avenue. The curbing on that street (which is not a part of the subdivision) ended just above plaintiff's property. The mud and water flowed onto plaintiff's property, entering her garage and basement, over the place where the curb would be had it extended to her property. There was no appreciable erosion on any part of the subdivision except in the neighborhood of the sewer line. Defendants, however, took immediate steps, through the use of sandbags during the storm, to prevent the sewer line from being washed out. Final paving was completed in September, 1952, and no further flood damage had occurred to plaintiff's property up to the time of the trial which was held in the middle of February, 1953, though in the meantime there had been other rains. In due course defendants put out ice plants on the banks of their subdivision and also scattered mustard seed over them to prevent erosion. They improved and enlarged some of the berms and installed others for protective purposes. Prior to the storm plaintiff had lived on this property for 16 years without suffering any flood damage.

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[1] This procedure was described as follows: "The dirt is filled and they dike it about every 30 or 40 or 50 feet, puddle it, sink it, let it settle, they install more dirt into the ditch, and then they have sometimes a long hose with a metal bar, and stick it into the ground and let the water go in there until finally it is settled."

At the outset the trial judge, upon stipulation of the parties, viewed plaintiff's home, defendants' subdivision, and the area involved in this action.

The court found that the defendants were not "careless or negligent in any respect whatsoever" and that they were not guilty of "any act or omission" which constituted "a threat" of further damage to plaintiff's property or which constituted a violation of any ordinance; that in developing and carrying forward this project "defendants employed competent engineers of good reputation to plan" the subdivision and selected "competent contractors to carry out such plan"; that all permits required in such an operation were secured and their terms and conditions complied with; and that prior to the "flood period of January, 1952" such contractors had commenced grading, bulldozing, and leveling the tract "in the course of which operation certain natural vegetation was removed and certain natural water courses and drainage channels altered." Other charges against the defendants were found to be untrue. The court further found that the damage to plaintiff's property "resulted solely from an inevitable and unavoidable accident and circumstance so far as defendants are concerned consisting of a severe and unusual fall of rain of unusual intensity and unforeseeable by defendants."

Plaintiff contends the evidence does not support these findings. In such contention she is in error.

[1–4] In considering this question it is elementary that if there is any substantial evidence to support the findings they cannot be set aside by the reviewing court even though such court may believe the preponderance of the evidence is the other way; all questions of the weight of the evidence and the credibility of the witnesses are for the trier of the facts; all conflicts must be resolved in favor of the successful party in the court below and all legitimate and reasonable inferences drawn in support of the findings; and where divergent inferences can be reasonably deduced from the facts, the appellate court is without power to substitute its deductions for those of the trial judge. Jackson v. Burke, 124 Cal.App.2d 519, 269 P.2d 137.

[5–7] The "view" of plaintiff's premises, defendants' subdivision, and the topography of the surrounding area was "independent evidence which could be considered by the trier of facts in arriving at his conclusion and its substantial evidence in support of his findings consonant therewith." Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 266, 237 P.2d 32, 37; Summers v. Parker, 119 Cal.App.2d 214, 218, 259 P.2d 59; McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 889, 264 P.2d 932. Such a view of the locality not only enabled the trial judge to get a first hand factual picture of the entire area, the nature and character of defendants' development, the grades and elevations, the location of the streets and the sewer line, the effort that had been made to prevent erosion of the banks, the location and exposure of plaintiff's property to future damage, but it also enabled the judge to better understand and evaluate the testimony of the witnesses and to determine the weight that should be given thereto. The independent evidence which the judge acquired from his inspection of the area is ample to support his finding that defendants had not created any situation or hazard that amounted to a nuisance, or endangered or depreciated the value of plaintiff's property, or which justified injunctive relief or any award of general damages. While there was evidence, principally opinion in character, on behalf of plaintiff which would have supported a different finding, the trial judge was not required to accept it rather than the on-the-spot factual picture his own personal inspection of the area revealed. It was his responsibility also to draw any reasonable inferences from the situation thus disclosed, and to make a proper deduction from the facts. In practical effect, the court simply resolved the conflict between what he saw and the testimony he heard. This, of course, is binding on a reviewing court.

Plaintiff, however, insists the court's view of the area at the time of the trial is without significance in passing on the alleged negligence of the defendants since conditions were then different from those prevailing when the storm of January, 1952, descended. There were naturally some changes as a result of the completion of the subdivision, e.g., the final street grading and paving had been done and the manhole covers lowered into place in the sewer line. But there had been no change in the subdivision plan and layout, the general grading of the tract, and the rough street grading had been completed before the storm, the location of the streets and the sewer line had been established, the contours and elevations were the same, and the grades were substantially the same. It is therefore obvious that the change in the locality had not been such as to render the court's view valueless. Undoubtedly the judge's inspection of the area enabled him to better evaluate the testimony of the witnesses. It also gave him a picture of the physical conditions prevailing at the time of the storm and a foundation for his inferences and deductions when he had finished trying the case. It is true, of course, that the judge did not see the havoc the storm wrought, but that was not important because it related to the extent of the damage, which the court was not called upon to assess since he found defendants were not liable therefor.

Plaintiff points out that the fact defendants "complied with approved plans and permits does not exonerate them from liability or justify their creation or continuance of a nuisance" and that "governmental authority is no defense to the acts and conduct of defendants." In the first place, it should be noted that the trial court did not find—and the evidence did not require such a finding—viz., that defendants either created or continued any nuisance through their subdivision operations. Defendants did not offer evidence of compliance with governmental regulations as a defense to liability, but as evidence tending to establish their compliance with a reasonable standard of due care in the circumstances. Such evidence was obviously received only for that purpose.

Plaintiff seeks to deprecate the magnitude and intensity of the storm of mid-January, 1952. However, the "climatological Data" for North Hollywood in January, 1952, shows that on the 15th the precipitation was 1.70 inches; on the 16th 4.96 inches; on the 17th 1.26 inches; and on the 18th 3.60 inches, thus making a total for the storm of 11.52 inches. These figures demonstrate the volume and intensity of the rainstorm. In fact, the precipitation for this storm is within approximately three inches of the average annual rainfall for the Los Angeles Area for the 16 prior years, such average being 14.54 inches.

Plaintiff points to the fact that during these 16 years there had been a greater rainfall in one 24-hour period in the year 1938. Her expert, however, testified that the 1938 flood "would be termed a fifty year cycle storm." There would thus appear to be ample justification for the trial court's characterization of the January, 1952, downpour.

The principal difficulty with plaintiff's argument is that she would have this court eliminate everything the trial judge saw when he viewed the area, accept the testimony of her witnesses without having it evaluated in the light of the physical facts which the judge observed upon his inspection of the locality, and draw all reasonable inferences in her favor. But under established principles we are not at liberty to do this.

Taking into consideration the trial judge's view of the area, the employment by defendants of competent engineers and contractors of good reputation to plan and develop the subdivision, their compliance with the rules and regulations of all governmental agencies, the magnitude and intensity of the storm and the other facts and circumstances, together with the inferences that may reasonably be drawn, it cannot be said, as a matter of law, that there is insufficient evidentiary support for the finding that defendants were not negligent in their subdivision operations. This finding sustains the judgment.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

126 Cal.App.2d 102

BROWNELL
v.
CITY AND COUNTY OF SAN FRANCISCO.

No. 15604.

District Court of Appeal, First District, Division 1, California.

June 21, 1954.

Hearing Denied Aug. 19, 1954.

Action by Attorney General of the United States, as successor to Alien Property Custodian, against City and County of San Francisco, to recover taxes, which had been paid under protest and which were levied upon improved real property in San Francisco which the German government owned from April, 1941, to September, 1947, when title was vested in United States. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that the tax exemption provision of 1923 treaty between Germany and United States, exempting from taxation the lands and buildings of either nation situate in territory of the other if used exclusively for governmental purposes of the owner, was neither suspended nor abrogated by declaration of war between Germany and United States in December, 1941, nor was the exemption suspended or abrogated by Trading with the Enemy Act, or by executive orders made pursuant to such act.

Judgment affirmed.

1. Treaties 🔑5

There may be such an incompatibility between a particular treaty provision and maintenance of a state of war as to make clear that the treaty should not be enforced.

2. Treaties 🔑5

In determining whether a treaty provision is suspended during time of war, courts must determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with policy or safety of the nation in emergency of war, and hence presumably intended to be limited to times of peace.

3. Treaties 🔑5

A treaty does not fall in its entirety by suspension of one portion thereof, unless it has the character of an indivisable act, and mere fact that some portions of treaty are suspended in time of war, or even abrogated, is not conclusive on issue whether another portion is so suspended.

4. Treaties 🔑5

In 1923 treaty between Germany and United States, containing provision exempting from taxation lands and buildings of either nation situate in territory of the other if used exclusively for governmental purposes of the owner, the exemption was not so incompatible with maintenance of state of war between United States and Germany as to require an inference that the contracting parties intended the abrogation or suspension of such exemption during time of war. Treaty between the United States and Germany, Dec. 8, 1923, 44 Stat. 2132, art. 19.

5. Evidence 🔑48

District Court of Appeal would take judicial notice of a communication from Secretary of State to Attorney General, as an official act of an executive department of the United States government. Code Civ.Proc. § 1875, subd. 3.

6. Evidence 🔑39

Courts take judicial notice of treaties and their interpretation by judicial and executive branches of government.

7. Treaties 🔑5, 6

Neither the Trading with the Enemy Act, nor executive orders made pursuant to such act, suspended or abrogated tax exemption provision contained in 1923 treaty between Germany and United States, which provision exempted from taxation the lands and buildings of either nation situate in territory of the other if used exclusively for governmental purposes of the owner. Treaty between the United States and Germany, Dec. 8, 1923, 44 Stat. 2132, art. 19; Trading with the Enemy Act, § 1 et seq., as amended 50 U.S.C.A.Appendix, § 1 et seq.

8. Taxation ⚿213

The custodial and protective care given property of German government in San Francisco during World War II was a "use" of that property by the owner thereof for a "governmental purpose", within tax exemption provision of 1923 Treaty between Germany and United States, exempting from taxation the lands and buildings of either nation situate in territory of the other if used exclusively for governmental purposes of the owner. Treaty between the United States and Germany, Dec. 8, 1923, 44 Stat. 2132, art. 19.

See publication Words and Phrases, for other judicial constructions and definitions of "Use For A Governmental Purpose".

9. Taxation ⚿215

Where, pursuant to 1923 treaty between Germany and United States, property in San Francisco owned by German government was exempt from taxation, the Trading with the Enemy Act did not operate to terminate such tax exemption immediately upon acquisition of title by United States through 1947 vesting order. Treaty Between the United States and Germany, Dec. 8, 1923, 44 Stat. 2132, art. 19; Trading with the Enemy Act, § 36, as amended 50 U.S.C.A.Appendix, § 36.

10. Taxation ⚿215

Property belonging to United States is exempt from taxation.

11. War and National Defense ⚿12

Title which United States acquires by a vesting order, pursuant to Trading with the Enemy Act, is absolute. Trading with the Enemy Act, § 1 et seq., as amended 50 U.S.C.A.Appendix, § 1 et seq.

Dion R. Holm, City Atty., Thomas M. O'Connor, Deputy City Atty., San Francisco, for appellant.

Dallas S. Townsend, Asst. Atty. Gen., Lloyd H. Burke, U. S. Atty., Northern Dist. of Cal., Valentine C. Hammack, Sp. Asst. to the Atty. Gen., James D. Hill, George B. Searls, Washington, D. C., Mary Eschweiler, Depart. of Justice, San Francisco, for respondent.

FRED B. WOOD, Justice.

The Attorney General of the United States, as successor to the Alien Property Custodian, brought this action against the city and county of San Francisco for the recovery of taxes for the years 1941–1948, inclusive. These taxes, which he had paid under protest, were levied upon improved real property in San Francisco which the German government owned from April, 1941, to September, 1947, when title was vested in the United States. The Treaty of 1923 between Germany and the United States exempted from taxation the lands and buildings of either nation situate in the territory of the other if used exclusively for governmental purposes of the owner. Judgment was rendered in favor of the plaintiff.

In support of its appeal defendant claims: (1) the applicable tax exemption provision of the treaty was suspended or abrogated by the outbreak of war in December, 1941; (2) said tax provision was suspended or abrogated by congressional enactment and by presidential or executive action incompatible with its enforcement; (3) a finding that the premises were used by the German government for consular purposes during 1941–1947 is not supported by the evidence, and (4) the tax exemption, if any existed theretofore, terminated when title was vested in the United States in September, 1947.

The tax exemption provision

The applicable tax provision of the treaty reads as follows: "Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited." Treaty between the United States and Germany, signed December 8, 1923, proclaimed October 14, 1925; 44 Stat. 2132, art. XIX, 2149.

The facts

The property consists of a three-story residence and the land upon which it stands. The German government acquired title April 29, 1941, and used the property as official quarters of its Consulate General in San Francisco until about July 14, 1941, when pursuant to Executive Order of the President of the United States all German consular establishments in American territory were closed.

The property was thereupon placed in charge of a caretaker for the German government who remained on the property until the outbreak of World War II between our country and Germany. The Consulate of Switzerland then took over supervision of the property as the representative of the German government and continued such supervision until June, 1945, when our Department of State assumed control pursuant to protocol entered into with the Swiss government. In July, 1947, the State Department released control to the Office of Alien Property of the Department of Justice for vesting purposes.

From the time when the consular agents left San Francisco in 1941 until the date of vesting, September 4, 1947, office equipment, furniture and materials were stored on the premises. There is evidence that until after our Secretary of State assumed control of the property, there were stored on the premises various books, documents, and files of the records and archives of the Consulate General at San Francisco.

Discussion and opinion

(1) *Was this tax exemption provision of the treaty suspended or abrogated by the declaration of war between Germany and the United States in December, 1941?*

Not necessarily, for it has already been determined that a clause of this treaty which accords to the nationals of each country the right to inherit real property in the territory of the other was not suspended or abrogated by that declaration of war nor by the hostilities which ensued. Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1631.

[1–3] In such an inquiry as this, "We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. Society for the Propagation of the Gospel v. Town of New Haven, 8 Wheat. 464, 494, 495, 5 L.Ed. 662. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. Karnuth v. United States, 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in Techt v. Hughes, supra [1920, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166], and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. Cardozo, J., speaking for the court, stated the applicable principles as follows: "'The question is not what states *may* do after the war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. * * * President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905). The treaty of peace itself may set up new relations, and terminate earlier compacts, either tacitly or expressly. * * * But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character or an indivisible act.' 229 N.Y. at pages 242–243, 128 N.E. at page 192, 11 A.L.R. 166." Clark v. Allen, supra, 331 U.S. 503, 508–510, 67 S.Ct. 1431, 1435.

[4] It does not appear that exempting the "lands and buildings" of either nation from taxation by the other is so incompatible with the maintenance of a state of war as to require an inference that the contracting parties intended the abrogation or suspension of such exemption during time of war.

How could the use[1] made of this property during 1941–1947 and the tax exemption of property so used interfere with or impair our war effort? Continued recognition of such exemption would seem no more incompatible with the maintenance of war than was our continued recognition of Germany as the owner of this property. Nor does continued recognition of such ownership and the attendant tax exemption seem any more incompatible with a state of belligerancy than the right of inheritance accorded nationals of the respective contracting parties by article IV of the same treaty. It is important to bear in mind the reciprocal aspect of this tax exemption. It is of equal benefit to the respective contracting parties. The United States benefits from the tax exemption of its "lands and buildings" in Germany just as does Germany benefit from the tax exemption of its "lands and buildings" in this country. That interest conceivably is as important in time of war as in time of peace, to the United States as well as to the German government.

Persuasive of this view is the attitude of our State Department, expressed in three communications to our Department of Justice. "The Department of State is of the view that the legal effect of these provisions [that portion of article XIX of the treaty hereinabove quoted] was unchanged by the outbreak of war between the United States and Germany. This view is in complete accord with the policy long followed by this Government, both in time of peace and in time of war, with regard to property belonging to the government of one country and situated within the territory of another country. This Government has consistently endeavored to extend to the property of other governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty. This Government, likewise, has been equally diligent in demanding that other governments accord such recognition and rights to its property in their territories.

"The history of this Government's treatment of the German diplomatic and consular properties in the United States following the outbreak of war between the United States and Germany may be of interest in connection with this matter.

"By a note dated December 12, 1941, the Swiss Minister in Washington informed the Secretary of State as follows:

" 'I have the honor to inform you that the German Government has asked the Swiss Federal Council to take charge of the German interests in the United States for the duration of the war. Subject to the American consent, the Swiss Government has declared its willingness to assume this responsibility.

" 'In consequence, I should be very much obliged to you if you would be so good as to let me knew whether the American Government is ready to give the above-mentioned consent, sought by my Government.'

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[1] For the purpose of this phase of the discussion we assume that such use was a governmental use by the owner, the German government.

"The Under Secretary of State replied on behalf of the Secretary of State by a note dated December 16, 1941, to the Minister of Switzerland as follows:

" 'In acknowledging the receipt of your note of December 12, 1941, announcing the request of the German Government that the Swiss Federal Council assume the representation of German interests in the United States for the duration of the war, I have the honor to inform you that the Government of the United States agrees to the assumption of German interests in the United States by the Swiss Government.' "

"Pursuant to these notes, the property of the German Government in the United States, including the above-mentioned property in San Francisco, was recognized by this Government as being in the custody of the Swiss Government until May 23, 1945, when, by a protocol signed at Washington on that date by the Minister of Switzerland and an Assistant Secretary of State, the Minister of Switzerland released such property to a representative of the Government of the United States of America. That protocol reads in part as follows:

" 'All respective premises, archives, and property are only transferred to the American Government

" 'First: In view of the fact that Germany has surrendered unconditionally; and

" 'Second: Inasmuch as the American Government is the trustee of the governments which will exercise authority in Germany.'

"The signature to that protocol by Assistant Secretary of State, 'J. C. Holmes', is preceded by a statement reading:

" 'I accept as of this date for the account of the American Government and under the stipulations set forth above, the premises, archives, and property described in this Protocol.' "

[5, 6] "In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien Property is advancing that the provisions of the second paragraph of Article XIX, of the treaty signed December 8, 1923 with Germany remain in effect despite the outbreak of war between the United States and Germany." (Signed for the Acting Secretary of State by Jack B. Tate, Acting Legal Adviser, addressed to the Honorable Tom C. Clark, Attorney General, and dated November 10, 1948.)[2]

Of similar import are communications of December 27, 1950, from Warde M. Cameron, Assistant Legal Adviser of the Department of State, to Harold I. Baynton, Assistant Attorney General, and of May 24, 1951, from Jack B. Tate, Deputy Legal Adviser of the Department of State, to Harold I. Baynton, Assistant Attorney General, Department of Justice, each introduced in evidence herein.

Defendant's argument which leads it to the conclusion that the tax exemption clause under consideration was suspended when war was declared, depends principally upon an erroneous assumption that the exemption was given solely to facilitate the performance of consular functions and ceases to operate during any period of cessation or suspension of consular activities. That is too narrow an interpretation. The clause under consideration does appear in a series of articles which deal with "consular officers" and their functions and privileges but as a physically separable provision which is significantly broad and general in its terms, not limited or restricted to "consular" officers, offices, or activities. Instead, it uses the expressions "lands and buildings" in the territory of either High Contracting Party of which "the other High Contracting Party" is the legal or equitable "owner." Such lands and buildings, if "used" exclusively for "governmental" purposes by that "owner," are exempt from taxation. These general terms token an intent not to limit the exemption to periods of use for any particular purpose (such as the active conduct of consular affairs) but for any use which is "governmental." Also, defendant overlooks the reciprocal feature, the benefit to our government of freedom from taxation of its property situate in German territory.

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[2] We take judicial notice of this communication from the Secretary of State to the Attorney General as an official act of an executive department of the United State government, Code of Civ. Proc. § 1875, subd. 3; Southern Pac. Land Co. v. Meserve, 186 Cal. 157, 159, 198 P. 1055, a letter of instructions from the commissioner of the land office to the United States surveyor-general in California; Southern Pacific Co. v. Lipman, 148 Cal. 480, 491, 83 P. 445, a letter of the commissioner of the general land office to the registrar and receiver of the land office at Los Angeles. See also Bourdieu v. Seaboard Oil Corp., 38 Cal.App.2d 11, at page 23, 100 P.2d 528, and Livermore v. Beal, 18 Cal.App.2d 535, at pages 540–542, 64 P.2d 987, and cases there cited. Courts take judicial notice of treaties and their interpretation by the judicial and the executive branches of government. San Lorenzo Title & Improvement Co. v. Caples, Tex. Civ.App., 1932, 48 S.W.2d 329, 331, affirmed 124 Tex. 33, 73 S.W.2d 516.

This reciprocal tax exemption clause bears no such relation to the active conduct of consular affairs by either of the contracting parties as would warrant an inference or give rise to a presumption that the parties intended its suspension during the suspension of the active conduct of consular affairs by either of them.

[7] (2) *Was this tax exemption provision suspended or abrogated by congressional enactment or by presidential or executive action incompatible with its enforcement?*

Defendant contends that the provisions of the Trading with the Enemy Act, 50 U.S.C.A.Appendix, §§ 1–40, as amended by the First War Powers Act, 50 U.S.C.A. Appendix, §§ 619–620, and certain actions taken by the President, the Secretary of State and the Attorney General of the United States evince a national policy inconsistent with the recognition or enforcement of the tax exemption provision of the treaty. Defendant especially invokes certain of the provisions of sections 2, 3, 5, 6, 32 and 39 of the Trading with the Enemy Act.

Section 3 of the Act severely restricts trading with the enemy as defined in section 2. The policy indicated by such restrictions has no apparent bearing upon or inconsistency with the policy that each of the two governments refrain from taxing the "lands and buildings" of the other.

Section 5 provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions at the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States". Section 5 is implemented by the provisions of section 6. This vesting provision is a frank recognition of alien ownership and the continuation thereof in time of war, as to each item of property so owned, until the vesting power is exercised. We fail to see how the creation of such a power evinces a congressional policy which is incompatible with the tax exemption of that very property in time of war.

Defendant says that sections 32 and 39 declare a policy never to return to an enemy alien property taken from him by the exercise of the vesting power. Such a policy, defendant argues, renders purposeless the tax exemption clause. It says there would be no conceivable benefit accruing to the German government by continuing the tax exemption of property seized. Even from such a premise that conclusion does not necessarily follow. Such property and its proceeds in the hands of our government appear to be subject to the claims of creditors of the former owner (see 50 U.S.C.A. Appendix, §§ 32–36), an element of some benefit to the former owner. More significant in the present inquiry is the fact that section 32 was not added to the statute until March 8, 1946, 60 Stat. 50; sections 33–36, not until August 8, 1946, 60 Stat. 925–930; and section 39, not until July 3, 1948, 62 Stat. 1246. Moreover, sections 32–36 do not prohibit the return of property to the former owners. They simply fail to provide for such return. It was not until the addition of section 39 on July 3, 1948, that Congress adopted the policy of no return. By that enactment it declared that "No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act (sections 1–6 and 7–39 of this Appendix), shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." 50 U.S.C.A. Appendix, § 39; enacted by 62 Stat. 1246. That occurred well after the events involved in this action. Of further significance is the fact that section 12 of the Trading with the Enemy Act has continuously provided that "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct", unless meanwhile conveyed pursuant to order of the President or of a court in accordance with the provisions of sections 9 and 10 of the act. Act of October 6, 1917, 40 Stat. 411 at 424. It happens that after World War I Congress provided for the return to Germany and certain other former belligerants of money or other property held by our alien property custodian if it had been the "diplomatic or consular property of such Government". Act of June 5, 1920, amending section 9 of the Trading with the Enemy Act; 41 Stat. 977 at 979. Accordingly, even after the vesting in September, 1947, and until the addition of section 39 to the statute in July, 1948, there was the possibility that the property here involved might ultimately be returned to the German government.

The actions of the President, the Secretary of State and the Attorney General by which, according to the defendant, the executive branch of our government evinced a policy incompatible with the recognition of this tax exemption during the war consisted, for the most part, of orders made pursuant to the provisions of the Trading with the Enemy Act, culminating in the Attorney General's vesting order of September 4, 1947. Those actions of the executive branch appear to us no more indicative of an incompatible national policy than the provisions of the statute which authorized such action.

There is some evidence that when our State Department took over from the Swiss government, in accordance with the protocol hereinbefore mentioned, consular records, papers and documents were removed from filing cabinets and put into boxes. Defendant infers therefrom that the State Department did as it pleased with those records, thereby violated the consular immunity, and thus evinced a national policy inconsistent with a continuance of the tax exemption here involved. We see no basis for such an inference. For aught that appears in this record, the removal of papers and documents from filing cabinets to boxes may have been for the better protection and preservation of those papers and documents. Even if there were a basis for defendant's inference, such action by the State Department would not necessarily indicate that it entertained a policy inconsistent and incompatible with the continuance of the tax exemption, especially in view of its explicit expression of opinion to the contrary on three separate occasions. (Communications to the Attorney General in 1948, 1950, and 1951, above cited.)

Defendant also attaches significance to the cessation or termination of consular activities by executive action taken prior to the outbreak of the war. Such action was no more incompatible with the continued existence of this tax exemption than are the provisions of sections 2 and 3 of the Trading with the Enemy Act, already discussed.

We conclude, in the words of the Supreme Court in Clark v. Allen, supra, that the Trading with the Enemy Act and the Executive Orders do not evince such hostility to ownership of property by [or exemption from taxation of lands and buildings of] alien enemies as to imply that its acquisition [or the continued recognition of the tax exemption] conflicts with national policy." At page 510 of 331 U.S., at page 1436 of 67 S.Ct.

(3) *Does the evidence support the finding that from April 29, 1941, until the vesting order in September, 1947, the property in*

question was used by the German government for governmental purposes? [3]

[8] Concerning the custodial and protective care given this property during the period in question, defendant contends that it was not throughout a use by the "owner," the German government, nor a use for "governmental purposes," nor actually a "use" of any kind within the meaning of the statute. The principal fallacy in defendant's line of reasoning inheres in its assumption that the words "used exclusively for governmental purposes by that owner" mean use by the government of Germany as the office of the German Consulate at San Francisco in the active conduct of consular affairs. This is the same fundamental fallacy which led the defendant to conclude, erroneously, that this tax exemption provision was automatically suspended or abrogated upon the declaration of war in 1941.

We are persuaded that the custodial and protective care given this property throughout the period in question was a "use" of that property, and that such use was for a "governmental purpose." The exercise of such a custodial and protective function of government owned property would seem clearly to be a governmental function.

While not precisely the same as the instant case in all respects, the decision in City of Springfield v. United States, 1 Cir., 1938, 99 F.2d 860 (petition for writ of certiorari denied by the Supreme Court, 306 U.S. 650, 59 S.Ct. 592, 83 L.Ed. 1049), is persuasive. In that case the Circuit Court of Appeals for the First Circuit held that property which was acquired and until 1933 used as a site for a post office and since that time, pending its disposal, had been leased and used by the lessee as a bus terminal, was exempt from taxation under a state statute that exempted property owned by the United States and "'constitutionally held and used by it for essential governmental functions'" 99 F.2d at page 862. "There can be no question", said the court "that the property had been constitutionally acquired and held and used for essential governmental functions up to 1933, or so long as it was used as a post office site. Upon its abandonment as a post office site, Congress (citations), it is equally clear, had power in the exercise of its governmental functions to dispose of any such property held by it. (Citations.) The right to dispose of property by the United States which is no longer needed, is an essential governmental function in the economic management of governmental affairs, and is recognized (citations); and while the government is seeking a purchaser, the leasing of such property conditioned on a thirty days' notice to terminate such lease in case a purchaser is found cannot have the effect of subjecting such property to taxation by the municipality in which it is situated (citation)." 99 F.2d at page 863. Of similar import is Security State Bank v. Dent County, 1940, 345 Mo. 1050, 137 S.W.2d 960. It held that a lot purchased by a county for a jail site but actually used to store cordwood used in county buildings and to store county road machinery, was used for governmental purposes.

The custodial care given this property during the period in question was probably the maximum "use" that could be made of it by the owner during that period. The preservation of the property, whether in the hope of again using it as a consular office or for a residence for the consul or for ultimate sale, would seem clearly to be a "use" of it and a use for "governmental purposes."

This was also a use by the "owner," the German government; directly so until shortly after war was declared, then through the medium of the Swiss government and later through the medium of our Department of State.

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[3] The finding was that the property was "used by the German government exclusively for govermental purposes, to-wit, as Office of the German Consulate General in the City and County of San Francisco, State of California, and for no other purpose or purposes whatsoever." This description of the use "as Office of the German Consulate General" was unnessarily specific. The treaty accords the exemption in respect to property used "exclusively for governmental purposes" not confining it to a use for a consular office only.

Persuasive of these conclusions are the views expressed by our State Department in its communication of May 24, 1951, to the Attorney General of the United States, above cited: "The exemption from taxation provided in Article XIX of the German treaty is applicable reciprocally to lands and buildings of which either the United States or Germany is the legal or equitable owner situated in the territory of the other, and which are exclusively used for 'governmental purposes' by that owner. The provision is not limited in its application to property used for consular purposes. An interpretation which limited the application of the provision to property used exclusively for consular purposes, or to property used only as a consular office, and not as a residence for the Consul General as well, would not be in accord with this Government's interpretation of the provision or with the evident intent of the negotiators of the German treaty.

"As you are no doubt aware, this Government has had occasion to acquire sizable amounts of property abroad to be used as embassies, legations, consulates, and other governmental establishments. In many foreign countries the United States has found it necessary or desirable to purchase or otherwise acquire property for use as residences of employees of this Government stationed abroad. It would appear that a restrictive interpretation by a court in the United States of the meaning of the phrase 'used exclusively for governmental purposes' would have an adverse effect upon the status of property owned by the United States abroad. The Department might thereafter be precluded from contending that many pieces of such property were used by the United States for governmental purposes, and should, therefore, be exempt from taxation.

"The Department is also of the view that the use of the premises after the consulate was closed for the storage of official documents and other property owned by the German government should be considered as a use of the premises for governmental purposes within the meaning of Article XIX."

(4) *Was the tax exemption, if it existed theretofore, terminated when title was vested in the United States in September, 1947?*

[9–11] Defendant contends that the following language of section 36 of the Trading with the Enemy Act terminated the tax exemption of this property immediately upon acquisition of title by the United States by the vesting order of September, 1947: "The vesting in or transfer to the Alien Property Custodian of any property or interest * * * shall not render inapplicable any Federal, State, Territorial, or local tax for any period prior or subsequent to the date of such vesting or transfer * * *." and "The Alien Property Custodian shall * * * pay any tax incident to any such property or interest * * * at the earliest time appearing to him to be not contrary to the interest of the United States. * * * Every such tax shall be paid by the Alien Property Custodian to the same extent as nearly as may be deemed practicable, as though the property or interest had not been vested in or transferred to the Alien Property Custodian * * *." This language, in its context, means simply that property which up to the time of vesting had been subject to taxation would not become exempt therefrom upon becoming property of the United States pursuant to a vesting order of the Attorney General. The clause first quoted simply says that the "vesting" does not of itself "render inapplicable" any tax otherwise applicable. It does not by its terms render applicable any tax which is otherwise inapplicable. The second clause merely directs the Alien Property Custodian to pay any tax "incident to" any property which becomes vested in him, meaning of course any tax otherwise incident. There was no city and county tax "incident to" the land and building here involved because of the exemption accorded by article XIX of the treaty. Section 36 was added to the Trading with the Enemy Act in 1946, 50 U.S.C.A.Appendix, § 36; 60 Stat. 925 at 929. It had long since been established that property belonging to the United States was exempt from taxation. Irwin v. Wright, 258 U.S. 219, 228, 42 S.Ct. 293, 66 L.Ed. 573.

It had recently been established that the title which the United States acquires by a vesting order is absolute. Cummings v. Deutsche Bank, 1937, 300 U.S. 115, 120–121, 57 S.Ct. 359, 81 L.Ed. 545. Congress doubtless deemed legislation necessary to prevent federal acquisition of title from terminating the tax liability of property which was otherwise subject to taxation.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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RUBY et al. v. DEBOVSKY.

Civ. 15943.

District Court of Appeal, First District, Division 1, California.

June 16, 1954.

Rehearing Denied July 16, 1954.

Hearing Denied Aug. 10, 1954.

Action by residential property purchasers against realty agent for agent's alleged fraud in purchasing such property and reselling it to purchasers at price higher than that paid by agent who was employed by purchasers to obtain such property at lowest price. The Superior Court, City and County of San Francisco, Preston Divine, J., entered judgment for agent, and purchasers appealed on a limited record. The District Court of Appeal, Bray, J., held that judgment in prior specific performance action by purchasers against agent was res judicata of issue of agent's liability.

Judgment affirmed.

1. Judgment ⇨217

Where, following judgment, there was not any motion for new trial, any appeal, nor any proceeding under statute providing for relief from mistake, inadvertence, surprise, or excusable neglect causing default, judgment became final. Code Civ.Proc. § 473.

2. Judgment ⇨713(2)

Issues which were or could have been litigated in prior action are res judicata in subsequent action, since law will not allow litigation to be conducted in piecemeal fashion.

3. Judgment ⇨713(2)

Prior specific performance action by residential property purchasers against realty agent was res judicata of issue whether, in subsequent action by purchasers against agent for fraud, agent was liable on ground that he, while employed by purchasers to secure residential property for them at lowest price, had purchased property sold by him to purchasers at price lower than that he charged to purchasers, since such issue could have been raised in the specific performance action.

4. Appeal and Error ⇨907(3)

Where plaintiffs contended that trial of a special issue was sua sponte by court without motion for it by defendant, but record which plaintiffs saw fit to bring up failed to disclose how matter became before the court, no error appeared on face of record, and, therefore, it would be presumed that judgment had been entered on matters which could have been presented to the trial court and which would have authorized entry of such judgment. Rules on Appeal, rule 52; Code Civ.Proc. § 597.

5. Judgment ⇨576(2)

Even if there had been any irregularity in certain procedure in one of the municipal court actions, which preceded action for fraud, and which was used as basis for asserting defense of res judicata, such claimed irregularity could only be attacked upon appeal from judgment in such action.

6. Appeal and Error ⇨907(3)

Even if prior proceedings were not before it, the District Court of Appeal would, without examination of such prior proceedings, assume that trial court's finding that such prior proceedings were res judicata was supported by the record in the trial court.

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Donovan Ruby and Helen Ruby in pro. per.

John P. Andrews, San Francisco, for respondent.

BRAY, Justice.

In an action for damages for alleged fraud, defendant's answer alleged the defense of res judicata by reason of three specified actions. Pursuant to section 597, Code of Civil Procedure, this issue was tried separately. Plaintiffs appeal from the judgment in favor of defendant upon that issue on a limited record.

Questions Presented.

Plaintiffs raise many questions, most of which, however, cannot be determined from the limited record before us. The determinable questions are primarily whether the answer properly raises the issue of res judicata, and if so, whether the prior actions are res judicata as to this action.

Pleadings.

Plaintiffs' complaint charges that on August 14, 1943, Donald E. Warner and Jean H. Warner gave defendant a written authorization to sell for them certain real property for the sum of $5,534; that on August 25th, plaintiffs employed defendant to find and secure for plaintiffs residential property at the lowest price; that on September 6th, defendant falsely and to defraud plaintiffs represented to plaintiffs that the purchase price of said property was $6,200, payable in certain monthly installments, plus a rental charge of $33.50 per month until title passed. Plaintiffs, relying upon their said agent's representations, signed an agreement to purchase said property on said terms. The agreement did not set forth the name of the seller, but was signed by defendant as agent for seller. Thereafter and on September 18th, defendant, representing himself to be plaintiffs' agent, secretly purchased said property from the Warners for $5,534 and without any rental requirement. Plaintiffs made monthly payments to defendant under their contract until $2,261 had been paid and when, under the terms of the agreement they were entitled to a deed to the property, subject to a certain mortgage. Defendant then informed them he was the owner of the property and that if they wished to occupy it further they would have to pay $60 a month rent instead of the $33.50. Thereafter "litigation followed for specific performance." At that trial plaintiffs were unaware that defendant had secretly purchased the property in his own name and paid for it out of moneys paid him by plaintiffs. At that trial defendant had falsely testified that the reason defendant did not deliver a deed to plaintiffs was because plaintiffs had borrowed $2,162.92 from defendant which they had not repaid. Plaintiffs had not borrowed any money from defendant. The court ordered plaintiffs to pay defendant $2,162.92 borrowed money before title would pass to plaintiffs. Plaintiffs did not discover the falsity of the defendant's representations which induced them to purchase the property until July 27, 1947. Plaintiffs allege additional sums paid defendant because of said alleged fraud, and claimed they were specially damaged in the sum of $14,620 special damages and in the sum of $50,000 general damages because of grievous mental and physical suffering and impairment of health. In the instant case the trial court held that the judgments hereafter mentioned were res judicata of the plaintiffs' alleged cause of action.

Answer.

Defendant denied the material allegations of the complaint, set up the statute of limitations, and then alleged that on specific dates judgments were duly given and made in favor of defendant and against plaintiffs in three different specified actions between the same parties and for the same cause of action set forth in the complaint herein. This was a sufficient plea of res judicata. See 15 Cal.Jur. p. 282, § 273. The mere fact that the words "bar" or "res judicata" were not used does not make the plea defective. There is no requirement that the judgments mentioned must be attached to the answer. Olds v. Peebler, 66 Cal.App.2d 76, 151 P.2d 901, cited by plaintiffs, contains no such requirement. Section 456, Code of Civil Procedure, provides that the facts conferring jurisdiction in those actions need not be pleaded, it being sufficient to plead that the judgments were "duly given or made."

Prior Actions.

Two prior actions were in the municipal court, one in the superior. The judgment in the latter (action No. 356301) was given June 27, 1947. As to it and its application here we adopt the following portion of the well reasoned opinion of Honorable Preston Devine, the trial judge:

"The allegations of the complaint having to do with physical and mental distress as a result of the alleged fraud may be disregarded, as was done in Newman v. Smith, 77 Cal. 22 [18 P. 791], because these are not proper elements of damage in an action upon fraud and deceit, as was held in that case. * * *

"The first action filed by plaintiffs was a suit for specific performance, No. 356301 in the Superior Court in this city and county. That action was filed on August 9, 1946. The complaint alleged that plaintiffs, the Rubys, had agreed to purchase the Victoria Street home from the Warners in 1943, and had been admitted to possession since September 6, 1943; that defendant Debovsky and his wife had purchased the property from the Warners on February 28, 1944; that all the installment payments had been made by the Rubys, but defendants, the Warners and Debovskys, had refused to deed the property. The Debovskys answered, alleging that plaintiffs had not paid in full, because plaintiffs had borrowed certain sums from defendants, and had not repaid them. The cause was tried before the Honorable Stanley Murray, assigned by the Judicial Council, and on June 27, 1947, he rendered judgment, holding that plaintiffs owed defendants the sum of $2,162.92, and decreeing that if plaintiffs paid said sum within thirty days, they should have specific performance; but that if they did not so pay, writ of possession should be issued against them under a cross-complaint which had been filed.

[1] "There was no motion for new trial, no appeal, no proceedings under Section 473, C.C.P., and the judgment has become final over five years ago.

"However, commencing on August 17, 1949, plaintiffs filed successive motions to set aside the judgment on the ground that it had been obtained by fraud, which motions were heard and denied by Judges Shoemaker (September 15, 1949), Jacks (December 8, 1949) and Devine (July 11, 1950). There was no appeal from the orders of the Court, or from any of them. * * *

"The judgment in action No. 356301 is final in all respects, and it remains to be considered to what extent that judgment bears on matters alleged in the complaint in the present case.

[2] "The fact that the form of action in this case is in tort, for damages for alleged fraud and deceit, while the former action was for specific performance, is not of moment. (Papineau v. Security First National Bank, 45 Cal.App.2d 690 [114 P.2d 629].) The test is, what issues were litigated, and what issues *could have been* litigated in that action, for the law will not allow litigation to be conducted in a piecemeal fashion. (Andrews v. Reidy, 7 Cal.2d 366 [60 P.2d 832]; Wulfjen v. Dolton, 24 Cal.2d 878 [151 P.2d 840].) Therefore, an analysis of the former action, and a comparison with the present one, must be made.

"As was said above, in the specific performance action, the issue was joined whether or not plaintiffs had paid what they were obliged to pay. The court found that they had not so paid, but in fact owed $2,162.92, and decreed that they might have specific performance on payment of that sum. That is adjudged forever, in the absence of appeal.

"Plaintiffs allege that they discovered certain new matter on July 27, 1947, some thirty days after judgment was rendered. Now, what was this new matter? And what, if anything, is new in the present action? The plaintiffs say it is this: That when the specific performance action was tried they did not know when or how Debovsky had bought the Warners' equity in the property. Of course they do not say that they did not know, during the former action, that Debovsky actually acquired the title to the property on February 28, 1944, because plaintiffs alleged this to be the fact in their specific performance action. But, they say, they thought that perhaps Debovsky had his agreement to buy and sell from the Warners before the sale to plaintiffs. However, let it be assumed that Debovsky was the agent of the plaintiffs. Then, plaintiffs knew, when they commenced the specific performance suit, that their own agent had bought the property personally, and had done so, as they said in their complaint, 'while receiving regular purchase payments from the plaintiffs.' (Par. IV, Complaint in Action 356301.) This knowledge was sufficient to put plaintiffs on inquiry; and, as an analogy to the cases involving the statute of limitations (Lady Washington Consolidated Co. v. Wood, 113 Cal. 482 [45 P. 809]; Tracy v. Muir, supra [151 Cal. 363, 90 P. 832]) it seems that in a case where one could, by inquiry, have learned such a fact as in this case, the matter must be deemed to be one which at least could have been litigated in the earlier action.

"It may be observed that in the former action, plaintiffs regarded Debovsky as the agent of the sellers. Assuming that he was their agent, too, they must have known that fact; and, indeed, in their brief, filed on October 7, 1952, they state that 'on August 25, 1943, in the home of plaintiffs, Debovsky was orally authorized by plaintiffs to find a home for them to purchase at a reasonable price.'

"It seems that they did not exploit the theory that Debovsky was their agent, or that their counsel did not, but that does not entitle them to another action. (Incidentally, plaintiffs seem not to have thought of Debovsky as their agent until demurrers were sustained in the Municipal Court action described below.)

"There seems to be some suggestion in one of plaintiffs' briefs that possibly the Rubys did not know that Debovsky was acting as their agent in the transaction, and that they were ignorant of that fact during the specific performance trial, and that they first learned of it when they were apprised that Debovsky had represented himself to the Warners as acting for the Rubys. However, if that be the fact, there would be no cause of action herein, because the whole action is based upon the proposition that the Rubys were deceived by their own agent.

"An analysis of the damages claimed by plaintiffs in Par. XI of their complaint, as set forth in Plaintiff's Exhibit 3, shows that all these damages are alleged consequences of the judgment rendered by Judge Murray. If that judgment was erroneous, the remedy was by appeal; damages may not be sought now, which damages would have been the result of such allegedly erroneous judgment."

[3] The first municipal court action (251131) ended in a judgment upon an order sustaining demurrer without leave to amend. The second municipal court action (256691) ended in a judgment declaring that the judgment in action No. 251131 was res judicata of the matters therein alleged. Neither of the judgments were appealed. While the trial court here found that both judgments were res judicata of the matters set forth in the complaint, we deem it unnecessary to discuss them, in view of our holding that the superior court judgment action No. 356301 is res judicata and hence determinative of this appeal. See Keidatz v. Albany, 39 Cal.2d 826, 829, 249 P.2d 264, for discussion of effect as to res judicata of judgments in cases where there was no trial on the merits.

Other Questions.

[4] Plaintiffs contend that the trial of the special issue was sua sponte by the court without a motion for it by defendant. Yet in their brief they state that they themselves set the matter for trial as specified in section 597, Code of Civil Procedure, because after the court had ordered the trial of the separate defense under the provisions of that section no move was made by defendant to bring the issue to trial. The record which plaintiffs saw fit to have brought up fails to disclose how the matter came before the court. If it be true that plaintiffs themselves made a motion to have the special issue tried then the action was not sua sponte by the court. Moreover, no error appears upon the face of the record before us, and under rule 52, Rules of Appeal, "'* * * If any matters could have

been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal, in support of the judgment, that such matters were so presented, and that the judgment was entered in accordance therewith.'" Utz v. Aureguy, 109 Cal.App.2d 803, 806, 241 P.2d 639, 640 quoting from Caruthers v. Hensley, 90 Cal. 559, 560, 27 P. 411.

The same rule applies to plaintiffs' contention that the court ordered plaintiff Donovan Ruby to take the witness stand and under the pretext of trying the special defense actually tried the whole case on the merits. (Incidentally, the findings are limited to the matters connected with the special defense.)

Plaintiffs contend that the court took judicial notice of the proceedings in the other action. Just what is meant by this contention is difficult to understand in view of the fact that the entire records of the other proceedings were introduced into evidence and were brought here on this appeal.

It is contended that the findings of fact are contradictory and do not support the judgment. We find no contradiction in them and find that they sufficiently support the judgment. Nor do we find any inconsistency in the statement that the judgment in action No. 356301 is both res judicata and a bar to the matters set forth in the complaint herein.

[5] Complaint is made as to the regularity of certain procedure in one of the municipal court actions. Assuming, but not deciding, that there was any irregularity, it should be noted that such claimed irregularity could only be attacked upon appeal from the judgment in that case, and no such appeal was made. Moreover, as we have heretofore pointed out, the correctness of the ruling of the trial court as to the judgments in these municipal court actions is not necessary to the validity of the judgment in this case.

Questions as to the effect of rulings by the trial judge on motions and other matters prior to final judgment in the case are not before us. Nor are evidentiary matters produced at the hearing.

[6] Subsequent to argument, plaintiffs filed "Additional Points and Authorities" in which they seem to question whether the proceedings in the former actions and the opinion of the trial judge are properly before us on this appeal. We deem that they are. Moreover, we should point out that without the former proceedings being before us we would be required to assume, without any examination of the prior proceedings, that the trial court's finding that they are res judicata in this action is fully supported by the record in the trial court. See Rule 52, Rules on Appeal; Alkus v. Johnson-Pacific Co., 80 Cal.App.2d 1, 9, 121 P.2d 72; Kuhn v. Ferry and Hensler, 87 Cal.App.2d 812, 814, 197 P.2d 792.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

PEOPLE v. HALLNER.*

Cr. 5137.

District Court of Appeal, Second District,
Division 2, California.

June 17, 1954.

Hearing Granted July 14, 1954.

Prosecution for bribery wherein defendant moved to set aside indictment. The Superior Court, Los Angeles County, William B. Neeley, J., entered order granting motion. The People appealed. The District Court of Appeal, McComb, J., held that indictment alleging offering of bribe to executive officers of municipality sufficiently charged violation of statute prohibiting offering bribe to executive officer of state.

Reversed.

1. Statutes 🔑186

In construing a statute, the judge is to ascertain or declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. Code Civ.Proc. § 1858.

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* Subsequent opinion 277 P.2d 393.

2. Statutes 🔑188

In construing a statute, words and phrases are to be construed according to context and approved usage of language. Pen.Code, § 7, subd. 16.

3. Statutes 🔑241(1)

Penal statutes that encroach on private rights of citizens must be strictly construed.

4. Constitutional Law 🔑258

A statute which forbids or requires doing of an act in terms so vague that men of common intelligence must guess its meaning and differ as to its application violates due process of law and is void.

5. Statutes 🔑241(1)

Penal statutes must be construed no further than clear intent of their words and must not be extended by inference, implication or strained interpretation.

6. Municipal Corporations 🔑67(1)

Appointment or election, tenure of office, removal and duties of president of the police commission of city of Los Angeles, the city attorney and the executive assistant city attorney are matters of strictly municipal affairs governed by municipal regulations and not subject to control by the state.

7. Bribery 🔑1(2)

Indictment alleging that defendant offered bribe to executive officers of municipality holding office pursuant to freehold charter charged violation of statute prohibiting offering bribe to "executive officer of this state". Pen.Code, §§ 67, 995; Government Code, § 460; Const. art. 11, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Executive Officer of This State".

8. Courts 🔑91(2)

Where, in case decided by District Court of Appeal, petition for hearing in the Supreme Court was denied, decision of District Court of Appeal was binding.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Simon L. Rose, Dep. Dist. Attys., Los Angeles, for appellant.

Bodkin, Breslin & Luddy and Peter E. Giannini, Los Angeles, for respondent.

McCOMB, Justice.

From an order granting defendant's motion under section 995 of the Penal Code [*] to set aside an indictment charging defendant in three counts with violating section 67 of the Penal Code in that he offered a bribe to (1) John J. Irwin, the President of the Board of Police Commissioners of the City of Los Angeles, (2) Boyd Taylor, Executive Assistant City Attorney of the City of Los Angeles, and (3) Roger Arnebergh, City Attorney of the City of Los Angeles, the people appeal.

This is the sole question necessary for us to determine:

Is section 67 of the Penal Code applicable to executive officers of a municipality of the State of California holding office pursuant to a freehold charter of such municipality?

This question must be answered in the affirmative.

Section 67 of the Penal Code reads: "Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer is punishable by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state."

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[*] Section 995 of the Penal Code reads thus:

"[When indictment or information must be set aside.] The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

"If it be an indictment:

"1. Where it is not found, endorsed, and presented as prescribed in this code.

"2. That the defendant has been indicted without reasonable or probable cause.

"If it be an information:

"1. That before the filing thereof the defendant had not been legally committed by a magistrate.

"2. That the defendant had been committed without reasonable or probable cause."

Defendant makes a most persuasive contention against the application of section 67 of the Penal Code to "executive officers of a municipality of the State of California." His argument is this: Section 67 of the Penal Code is applicable only to an "executive officer" of the State of California.

In determining who is an executive officer of the State of California these rules must be observed:

[1] 1. In the construction of a statute or instrument the office of the judge is simply to ascertain or declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. (Section 1858, Code of Civil Procedure; Dillman v. McColgan, 63 Cal.App.2d 405, 409 [2], 146 P.2d 978; Caminetti v. Pacific Mutual L. Ins. Co., 22 Cal.2d 344, 353 [3], 139 P.2d 908.)

[2] 2. Words and phrases are to be construed according to the context and approved usage of language. (Penal Code, sec. 7, subd. 16.)

[3] 3. Penal statutes that encroach on private rights of citizens must be strictly construed. (Oddo v. Hedde, 101 Cal.App.2d 375, 383 [4], 225 P.2d 929.)

[4] 4. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess its meaning and differ as to its application violates due process of law and is void. (Wotton v. Bush, 41 Cal.2d 460, 469, 473 [1], 261 P.2d 256.)

[5] 5. Crimes are not to be built up by courts with aid of inference, implication or strained interpretation, and penal statutes must be construed no further than the clear intent of their words. A person cannot be made subject to a criminal act by implication. (People v. Zimbrolt, 35 Cal. App.Supp.2d 745, 747 [2], 91 P.2d 252; DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139, 156 [11], 187 P.2d 769, 175 A.L.R. 382.

Bearing in mind the foregoing rules we find the charter of the City of Los Angeles declares the city is to have the power "to make and enforce all laws and regulations in respect to municipal affairs subject only to restrictions and limitations provided in this charter * * *." (Article I, Section 4, Los Angeles City Charter.)

The effect of the foregoing charter provision has been stated by our Supreme Court in Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 448, 166 P. 351, 354, thus: "Thereupon, according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted, and limited by the charter 'only,' and free from any interference by the state through general laws, including laws giving the Railroad Commission powers over public utilities. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it." (See also Sincerney v. City of Los Angeles, 53 Cal.App. 440, 446, 200 P. 380.)

The rule is likewise stated in Otis v. City of Los Angeles, 52 Cal.App.2d 605, 611, 126 P.2d 954, 958, thus:

"As was tersely stated in County of San Mateo v. Coburn, 130 Cal. 631, 636 (63 P. 78, 621), 'A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government.' and again, section 1 of article XI of our state Constitution provides, 'The several counties, as they now exist, are hereby recognized as legal subdivisions of this State.' It is the free consent of the persons composing them that brings into existence municipal corporations, and they are used for the promotion of their own local and private advantage and convenience, while it is the sovereign will which brings into being counties as local subdivisions of the state;

and the establishment of such political subdivisions of the state is accomplished without the solicitation, consent or concurrent action of the people residing within them. *Cities, therefore, are distinct individual entities, and are not connected political subdivisions of the state. As a matter of fact, municipalities, and particularly charter cities, are in a sense independent political organizations and do not pretend to exercise any functions of the state. They exist in the main for the purposes of local government.*" (Italics added.)

It has been held that the pay of municipal officers falls within the term "municipal affairs" and the acts of the Legislature in increasing the pay of officers in municipalities were void and unconstitutional. (Popper v. Broderick, 123 Cal. 456, 462, 56 P. 53; Trefts v. McDougald, 15 Cal.App. 584, 587, 115 P. 655 et seq.)

In Scheafer v. Herman, 172 Cal. 338, 155 P. 1084, it was held that the removal of officers of a municipality by means of a recall when provided for by charter is a municipal affair and not subject to general laws. The relationship between the state and county and the state and municipality is well expressed in Otis v. City of Los Angeles, quoted supra.

[6] The President of the Police Commission of the City of Los Angeles, the City Attorney and the Executive Assistant City Attorney are each appointed or elected, and their tenure of office, provisions for removal and duties are prescribed by the charter provisions or by ordinance of the City of Los Angeles, each of which matters are held to be strictly municipal affairs not subject to control by the State of California. The conclusion therefore appears inescapable that such officers are executive officers of the municipality and not executive officers of the State of California, hence that if defendant offered them a bribe he was not offering a bribe to an executive officer of the state, and, therefore, did not violate the provisions of section 67 of the Penal Code.

Singh v. Superior Court, 44 Cal.App. 64, 185 P. 985, relied on by appellant, as supporting its contention that section 67 of the Penal Code is applicable to the city officials involved in the present situation is not applicable to the facts in the present case for the reason that in such case the officer involved was a district attorney of a county which, by the express provisions of Article XI, section 1 of the Constitution, is recognized as a division of the state as also does section 460 of the Government Code.

Likewise our Supreme Court in Sharp v. Contra Costa, 34 Cal. 284, 290, states that a county is a portion of the state government. Therefore the discussion in Singh v. Superior Court, supra, to the effect that the clause in section 67 of the Penal Code that every officer who gives or offers any bribe to "any executive officer *of* this state," is synonymous with saying that every person who gives or offers any bribe to "any executive officer *in* this state," was pure dictum and not sound law.

"Of" and "in" are not interchangeable in their meaning. An examination of Webster's New International Dictionary, 2d Edition, 1953, Unabridged, page 1689, discloses that "of" is not in a single instance approved as synonymous with the word "in." The lack of such approval is emphasized by the designation as archaic and obsolete where the word at one time had been used in place of "in" in the phrase "to fail *of*" a matter. Thus it is apparent that the rule stated in Penal Code, section 7, subdivision 16, supra, is not followed if we say that the word "of" in section 67 is interchangeable with the word "in."

The court in the Singh case in its dictum permitted itself to presume what the Legislature intended in writing the statute, instead of following the clear language of the statute as it should have done.

In Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 365, 5 P.2d 882, 884, the correct rule is stated thus:

"This court has no power to rewrite the statute so as to make it conform to a presumed *intention* which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used." (Italics added.)

The dictum in the Singh case likewise violates the requirement in section 1858 of the Code of Civil Procedure, which declares that the office of the judge is not to insert what has been omitted or to omit what has been inserted.

Though the foregoing reasoning is most potent it has been held invalid so far as the District Court of Appeal is concerned by the ruling in People v. Mathews, 124 Cal.App.2d 67, 268 P.2d 29, 30, wherein the court held that the phrase in section 67 of the Penal Code reading "any executive officer *of* this state" means in fact "any executive officer *in* this state". In the Mathews case, Mr. Justice Doran dissents, saying, 124 Cal.App.2d at page 70, 268 P.2d 29, at page 31, "The opinion in the Singh case, by changing the preposition 'of' to 'in', in judicial legislation.

"Although in the Finkelstin case [People v. Finkelstein, 98 Cal.App.2d 545, 220 P.2d 934] the Supreme Court denied a petition for a hearing, that is not conclusive. The case is not in point. In my opinion, inasmuch as the City of Los Angeles is a chartered city, the police officer is not an 'executive officer of this state' within the meaning of the section of the code relied upon by respondent. A police officer of the City of Los Angeles is a civil service employee and is in fact and in law an 'employee' within the meaning and application of section 67½ of the Penal Code. The reason for the two sections is obvious."

[7, 8] A petition for a hearing by the Supreme Court was denied in People v. Mathews, supra. Therefore we are bound by the rule announced in such decision and must hold that section 67 of the Penal Code is applicable to defendant in this case. (Bridges v. Fisk, 53 Cal.App. 117, 122, 200 P. 71; People v. Whitaker, 68 Cal.App. 7, 11, 228 P. 376; see People v. Rowland, 19 Cal.App.2d 540, 542, 65 P.2d 1333; Hoyt v. Board of Civil Service Com'rs, 21 Cal.2d 399, 401, 132 P.2d 804.)

Reversed.

FOX, J., concurs.

MOORE, P. J., concurs in the judgment.

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126 Cal.App.2d 178

BOLTON et ux. v. MARTIN et al.

Civ. 15973.

District Court of Appeal, First District, Division 1, California.

June 23, 1954.

Rehearing Denied July 23, 1954.

Hearing Denied Aug. 19, 1954.

Action for personal injuries sustained when struck by automobile on highway. The Superior Court, Monterey County, Anthony Brazil, J., entered order granting plaintiffs' motion for new trial after verdict for defendants. Defendants appealed. The District Court of Appeal, Peters, P. J., held that instruction that doctrine of last clear chance does not apply where plaintiff was aware of approach of automobile and was guilty of negligence up to moment of impact and could have avoided accident by exercise of ordinary care was erroneous, and granting new trial did not constitute abuse of discretion.

Order affirmed.

1. Appeal and Error ⚷854(6)

Action of trial court in granting motion for new trial on ground that instruction was misleading and erroneous could be reversed on appeal only if questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused jury, regardless of whether instruction was prejudicial to complaining party.

2. Appeal and Error ⚷933(1)

On appeal from order granting motion for new trial, all presumptions favor order as against verdict.

3. Automobiles ⚷246(58)

In action for personal injuries sustained when struck by automobile on highway, wherein evidence conflicted as to position of plaintiff on highway just prior to impact, evidence justified instructing jury on doctrine of last clear chance.

4. Negligence ⚷141(9)

The trial court is justified in refusing instructions on doctrine of last clear chance only where it can be said that, as a matter of law, under no reasonable interpretation of the evidence, and regardless of conflicts, the elements of doctrine are not shown.

5. Negligence ⚷83.11

The doctrine of last clear chance does not apply if plaintiff is aware of position of danger in which he has negligently placed himself, and could extricate himself.

6. Automobiles ⚷246(38)

In action for personal injuries sustained when struck by automobile on highway, instruction that doctrine of last clear chance did not apply where plaintiff was aware of approach of automobile, was guilty of negligence up to moment of impact and could have avoided accident by exercise of ordinary care was erroneous.

7. Trial ⚷296(1)

Error in giving erroneous instruction was not cured as a matter of law by fact that jury was correctly instructed in other instructions.

Hoge, Fenton & Jones, Monterey, for appellants.

Bardin & Cunningham, Russell Scott, Salinas, for respondents.

PETERS, Presiding Justice.

This action was brought by plaintiff Letty Bolton, and by her husband, Ray Bolton, for damages for the serious injuries received by Mrs. Bolton when hit by an automobile driven by defendant George Soares, who was, at the time, acting in the course and scope of his employment with the other defendants. The pleadings presented the issues of the negligence of Soares and the contributory negligence of Mrs. Bolton. The jury returned a verdict for the defendants. Plaintiffs moved for a new trial on all statutory grounds. The trial court granted the motion by a general order that did not specify the grounds upon which it was granted. The defendants appeal. On this appeal all parties agree that the new trial was granted because the trial court was of the opinion that a particular instruction on last clear chance offered by defendants and given by the trial court was misleading and erroneous. This, and the propriety of giving any instructions at all on the doctrine of last clear chance, are the only points discussed by the parties.

The law applicable to such an appeal is clear. "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. This is especially so when the discretion is used in awarding a new trial, for this action does not finally dispose of the matter, and it is only in rare instances and on very strong grounds that the reviewing court will set aside such an order. * * *

"* * * But so long as a reasonable or even fairly debatable justification under the law is shown for the action taken, that action will not be set aside, even if, as a question of first impression, the appellate court might feel inclined to take a different view." 4 Cal.Jur.2d p. 476, § 598, citing many cases; see, particularly, Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738; Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680; Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338.

[1, 2] Thus, on this appeal, the action of the trial court in granting the motion for a new trial because of the giving of the challenged instruction can be reversed only if, assuming the facts warranted instructions on last clear chance at all, the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury. All presumptions favor the order as against the verdict. It is not necessary to find, in order to uphold the trial court, that the giving of the instruction was prejudicial to the plaintiffs. If the challenged instruction was erroneous in any degree, or even if it is only "fairly debatable" that such instruction may have been misleading, the broad discretion of the trial court may not be disturbed, even if this court, had the question been presented to it in the first instance, would have found the error minor, and would not have granted the motion. Thus, the burden on the one attacking such an order is a

very heavy burden indeed. It has not been sustained in this case.

The accident occurred on the clear, dry, sunny afternoon of May 5, 1952, on U. S. Highway 101, about a mile south of Gonzales, Monterey County. In this area the highway runs north and south, is straight and level in both directions from the point of impact, has two 12-foot lanes of macadam pavement divided with a white line, has 6-foot oiled shoulders bordering each lane, and each oiled shoulder is, in turn, bordered by a graveled shoulder at least 6 feet wide. Thus, the total width of the highway is 48 feet.

The Boltons, together with Mrs. Bolton's mother, were traveling south in this area, with Mr. Bolton driving, when they observed a head of lettuce lying on the paved highway. They decided to pick it up. Mr. Bolton parked the automobile on the right-hand side of the highway. There is a conflict in the testimony as to just where he parked. Mr. Bolton testified that his car was partly on the westerly dirt shoulder and partly on the adjoining oiled shoulder. Soares testified that the Bolton car was half on the main traveled highway and half on the oiled shoulder. Mrs. Bolton could not remember where the car was parked. There is also a direct conflict as to the location of the head of lettuce. The Boltons testified that, after they had parked, the lettuce was from four to six feet to the rear of their vehicle and in the northbound lane of the highway just across the white line. Soares, who was traveling north, did not see the head of lettuce prior to the accident, but he did see Mrs. Bolton in the act of picking it up. He fixed this point as being about in the middle of the oiled shoulder bordering the northbound lane of the highway, in other words, across the highway from where the Bolton car was parked, off the paved portion of the road, and about 15 or 20 feet behind the Bolton car.

Mrs. Bolton got out of her car on the right-hand side, walked to the rear of the car, and proceeded out onto the highway, after looking in both directions. There was no traffic at all approaching from the north, but she did see the Soares' car approaching from the south. When asked how far away the Soares' car then was, she stated: "Well, I am not very good but it looked to me like it was a mile away." On cross-examination she testified that she saw the Soares' car "A long ways away."

Soares testified that he first saw Mrs. Bolton come from behind the parked car and walk across the highway when he was about 400 feet from her; that he was then going 50 to 55 miles per hour; that she walked across the highway onto the east shoulder and picked up the head of lettuce; that when he was about 250 feet from her, she stood up and turned her body so as to face generally in his direction; that he assumed that she saw his approach; that he was then traveling at 35 to 40 miles per hour; that at this point he started to sound his horn, which he continued to do until he was within 50 feet of Mrs. Bolton, when he stopped sounding his horn. Shortly after the accident Soares made a report to the highway patrol officer, but did not then mention that he had sounded his horn. Soares also testified that after seeing Mrs. Bolton pick up the head of lettuce he continued driving straight ahead in the northbound lane about 3 feet from the center line; that he did not put on his brakes, but did release the pressure on the accelerator pedal, keeping his foot on it; that when he was about 15 feet from where Mrs. Bolton was standing, she walked or ran out on the highway into the path of his car; that at the last moment he swerved his car to his left in an attempt to avoid the accident, but Mrs. Bolton walked or ran some 3 feet onto the main highway and into the right side of his automobile. The right side of the automobile, after the accident, showed evidence of damage.

Mrs. Bolton testified that after she picked up the lettuce about in the center of the highway she turned and looked towards her automobile; that she looked in a southwesterly direction, but mainly westerly; that she then glanced to the north towards Gonzales; that she did not look towards the south, the direction from which Soares was approaching, after she picked up the lettuce; that at no time did she hear an automobile horn. She remembers nothing more prior to the accident.

Mr. Bolton did not see the actual impact because he was sitting in his car listening to the car radio and talking to his mother-in-law. The accident occurred to the rear of his car. His mother-in-law did not see any portion of the accident.

After the impact the Soares' car continued up the highway, crossed the southbound lane, crossed the two westerly shoulders, narrowly missed a telephone pole, continued on off the road and up onto a 3-foot embankment bordering the Southern Pacific Railroad right-of-way, and continued on for some 2 or 300 feet thereafter, before stopping, a total of some 4 or 500 feet after the collision. Soares testified that he did not apply his brakes at any time while approaching Mrs. Bolton or thereafter; that at the last second when she stepped out into his car he swerved left and attempted to apply his brakes, but lost control of his automobile which seemed to be going faster and faster because he apparently put his foot on the gas instead of the brakes. After his car stopped he got out and went over to where Mrs. Bolton was lying on the pavement. Admittedly, the first thing he said was "my brakes didn't hold." He also admitted reporting to the employer-defendants that the cause of the accident was that his brakes did not hold. Following the accident the brakes were checked by two garages, and each reported that they were in perfect working condition.

After the accident Mrs. Bolton was found lying 75 feet in back of the parked car and in the middle of the northerly lane of the highway. She suffered serious and permanent injuries, including the loss of one leg, a deep and long gash in her abdomen, injuring the stomach organs, and serious and permanent injuries to her right hand.

At the conclusion of the evidence the trial court gave proper instructions on the general issues involved, and, at the request of respondents, gave several correct instructions on the doctrine of last clear chance. In addition, at the request of appellants, the trial court gave a negative instruction on that doctrine, that is, an instruction stating under what circumstances the doctrine does not apply. Both sides concede that the trial judge granted the motion for a new trial because he was of the opinion that this negative instruction was misleading and erroneous.

[3, 4] The appellants argue that whether the challenged instruction was or was not correct is immaterial because, under the evidence, the doctrine of last clear chance was not applicable, so that the form of the instructions given on the doctrine, even if erroneous, could not have adversely affected respondents. This point requires but scant consideration. The doctrine was clearly applicable under respondents' evidence. According to their evidence, Mrs. Bolton was standing in the middle of the highway. She was negligent in not having kept a proper outlook, but she was oblivious to the approaching danger. If respondents' evidence is correct, Soares first saw her when he was at least 400 feet away, and saw her again after she picked up the lettuce when he was at least 250 feet away. Although Soares places her on the side of the road out of danger, respondents place her practically in the center of the highway in an obvious place of danger. Soares made no attempt to apply the brakes. There is negative evidence, sufficient to support a finding, that no horn was sounded. He proceeded ahead at what the jury could have found was an excessive rate of speed without any attempt to avoid running into Mrs. Bolton. There is evidence that his brakes were in good working order, and also evidence that they did not work. Soares, up to the moment of impact, if respondents' evidence is to be believed, had not only the last, but a clear chance to avoid the accident by sounding his horn, applying his brakes, or by turning slightly into the southbound lane, there being no traffic approaching in that lane. Thus, the jury could have found, had they believed respondents' evidence, that all of the requisite elements of the doctrine were present. Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Daniels v. City & County of San Francisco, 40 Cal.2d 614, 225

P.2d 785; Buck v. Hill, 121 Cal.App.2d 352, 263 P.2d 643, and cases therein cited. The fact that the evidence was conflicting on several elements of the doctrine is immaterial. The respondents were entitled to instructions on the doctrine as long as the factual circumstances testified to by them, if found to be true, would justify its application. Simmer v. City & County of S. F., 116 Cal.App.2d 724, 254 P.2d 185; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 255 P.2d 795; Galbraith v. Thompson, 108 Cal.App.2d 617, 239 P.2d 468; Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 93 P.2d 135. The trial court is justified in refusing such instructions only where it can be said that, as a matter of law, under no reasonable interpretation of the evidence, and regardless of conflicts, the elements of the doctrine are not shown. Daniels v. City and County of San Francisco, 40 Cal.2d 614, 255 P.2d 785; Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645. That is not this case. The jury was properly instructed on the doctrine.

We turn now to a consideration of the challenged instruction offered by the appellants. It reads as follows: "With regard to the doctrine of last clear chance, you are hereby instructed that that doctrine of law does not apply where the plaintiff is aware of the approach of an automobile and is guilty of negligence up to the very moment of the happening of the accident and by the exercise of ordinary care could have avoided the accident."

The appellants contend that this instruction in all respects correctly states the law as to when the doctrine does not apply. Respondents urge that the instruction is erroneous, misleading and confusing in several respects. The trial court believed that it was erroneous or misleading in some undisclosed respect, because it granted a new trial because of the giving of this instruction. As already pointed out, if this instruction was erroneous in any degree, or if it is "fairly debatable" as to whether such instruction may or may not have been misleading, the action of the trial court must be affirmed.

The instruction declares that if three elements exist, the doctrine is not applicable. It states that if the plaintiff was "aware of the approach of an automobile," and was negligent up to the moment of impact, and by the exercise of ordinary care could have avoided the accident, the doctrine is not applicable. Thus, if plaintiff knew of the approach of the Soares' car, regardless of where it was when such knowledge was attained, and regardless of whether or not such approaching car, to a reasonable person, would constitute a known hazard, and the other two elements existed, the jury must find for the defendants. Thus, even if the jury had found that when Mrs. Bolton saw the Soares' car about a "mile" away, or a "long ways away," such car did not constitute a danger to a reasonable person, and had also found that Mrs. Bolton was negligent in not keeping a lookout on a main highway, and could have avoided the accident had such a lookout been kept, nevertheless they were in effect directed to find for the defendants, regardless of the degree of Soares' negligence, and even if the approaching car, seen by Mrs. Bolton, would not have constituted a hazard to a reasonable person. That is not the law.

[5-7] One of the elements that must exist for the doctrine of last clear chance to apply is that, after plaintiff, by her negligence, has got herself in a position of danger, she is unable to get out of such danger either because it was "physically impossible for her through the exercise of ordinary care to escape from the danger, or she was totally unaware of impending danger in her position." That quotation is taken from one of the correct instructions given on the doctrine in this case. This limitation was stated by the Supreme Court in Daniels v. City & County of San Francisco, 40 Cal.2d 614, 619, 255 P.2d 785, 788, as follows: "An instruction stating the doctrine is proper when there is evidence showing: '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to es-

cape; * * *.' Girdner v. Union Oil Co., 216 Cal. [197] at page 202, 13 P.2d 915, at page 917". See also Buck v. Hill, 121 Cal.App.2d 352, 356, 263 P.2d 643. Thus, to state this limitation negatively, the doctrine does not apply if plaintiff is aware of his position of danger in which he has negligently placed himself, and could extricate himself. That is an entirely different concept from being "aware of the approach of an automobile," as the jury here was instructed. Awareness of danger and awareness of an approaching automobile are not necessarily synonymous terms. One may be aware of the approach of an automobile and still be totally unaware of any immediate danger. This distinction is obviously relevant in this case because the evidence of respondents is to the effect that, although Mrs. Bolton was aware of the approaching Soares' automobile, it was so far away that she did not think, and a reasonable person would not have thought, it constituted a danger. But the jury was told that if plaintiff was aware of the approaching vehicle, and was negligent, and could have extricated herself, she could not recover. Thus, even though the jury believed that Mrs. Bolton knew that the Soares' car was approaching, but she was oblivious to the fact that it was an impending danger, if the jury also believed it was negligence not to keep a constant lookout, and had she done so she could have avoided the accident, under the quoted instruction, the jury was told the doctrine of last clear chance was not applicable. This is so although in a prior instruction the jury was properly told that, even though the plaintiff had negligently got herself in a place of danger, the doctrine might apply, the other elements being present, if she was "totally unaware of impending danger." The challenged instruction amounted to telling the jury that, as a matter of law, the plaintiff could not be "totally unaware of impending danger," if she knew that the Soares' car was approaching regardless of how far away it was when such knowledge was secured. The correct and challenged instructions are certainly inconsistent. The challenged instruction did not correctly state the circumstances under which the doctrine would not be applicable. Therefore, it was erroneous. The fact that in other instructions the jury was correctly instructed would not, as a matter of law, cure this error. Lopez v. Knight, 121 Cal.App.2d 387, 263 P.2d 452; Bellows v. City and County of San Francisco, 106 Cal.App.2d 57, 234 P.2d 729. The trial court, by granting the motion for a new trial, has decided that the challenged instruction misled or at least confused the jury. In so deciding, there does not appear to have been a "manifest and unmistakable" abuse of discretion. Certainly, the correctness of the trial court's determination is at least "fairly debatable." That being so, the discretion of the trial court cannot be disturbed. This being so, it is not necessary to consider the other respects in which respondents claim the challenged instruction was erroneous.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

126 Cal.App.2d 359

AMERIO et al.

v.

CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15805.

District Court of Appeal, First District, Division 2, California.

June 30, 1954.

Proceeding was brought for injunction and writ of mandate. The Superior Court, City and County of San Francisco, Thoman M. Foley, J., entered judgment adverse to defendants, and they appealed. The District Court of Appeal, Dooling, J., held that evidence sustained determination of Civil Service Commission of City and County of San Francisco that open examination for civil service position of maintenance chief of international airport should be held rather than a promotional examination of members of crew chief class under charter provision that, whenever commission deems it to be practicable, commission shall provide for promotion on basis of promotional examination.

Judgment reversed.

1. Municipal Corporations ⚷63(1)

Determination of Civil Service Commission of City and County of San Francisco that open examination for civil service position of maintenance chief of international airport should be held rather than promotional examination of members of crew chief class under charter provision that, whenever commission deems it to be practicable, commission shall provide for promotion on basis of promotional examination, was conclusive on the courts, in absence of a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion.

2. Municipal Corporations ⚷217(3)

In determining whether Civil Service Commission of City and County of San Francisco properly determined that open examination for civil service position of maintenance chief of international airport should be held rather than a promotional examination of members of crew chief class, real question was whether duties of a crew chief were such that they reasonably prepared crew chiefs for the superior position of maintenance chief.

3. Municipal Corporations ⚷217(3)

Evidence sustained determination of Civil Service Commission of City and County of San Francisco that open examination for civil service position of maintenance chief of international airport should be held rather than a promotional examination of members of crew chief class.

4. Municipal Corporations ⚷63(1)

Where there is a fair and reasonable ground for difference of opinion among intelligent and conscientious officials on question whether civil service position should be held by an open examination or by a promotional examination, action of civil service commission should stand, even though courts may differ from the commission as to the wisdom of the commission's decision.

Dion R. Holm, City Atty, William F. Bourne, Deputy City Atty., San Francisco, for appellants.

Irving Schoenfeld, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment entered in a proceeding for injunction and writ of mandate. The judgment commanded appellants to abandon their announced intention of holding an open examination for the Civil Service position F 50 Maintenance Chief, San Francisco Airport and commanded appellants to hold a promotional examination from the class F 52 Crew Chief for such position.

Appellants are the City and County of San Francisco and more particularly the members of its Civil Service Commission, and respondents are civil service employees assigned to positions at the San Francisco International Airport. Five of the respondents are assigned to positions in the civil service classification F 52 Crew Chief and the rest are assigned to the civil service classification F 51 Airport Attendant.

The Charter charges the Civil Service Commission with the duty of providing qualified persons for appointment to the service of the city and county. Charter sec. 140. Under section 141 of the Charter the Civil Service Commission shall adopt rules governing examinations. Acting under this authority the commission set up an open examination to commence on October 5, 1951 for the position F 50 Maintenance Chief San Francisco Airport. There is only one such position in that class at the airport.

The minimum requirements necessary in order to be eligible for the examination were published by the commission some time prior to the examination. The pertinent ones in this appeal are:

"(a) Five years first-class paid experience within the last eight years in general construction work, at least one year of which must have been in a supervisory capacity; or

"(b) Three years first-class paid experience within the last eight years in construction work or maintenance operations which must have included grading and construction of roads and/or runways, and/or maintenance and operation of such installations and of various construction equipment, such as trucks, rollers and power blades, at least one year of which must have been in a supervisory capacity.

"*Note*: Completion of at least two years of a basic engineering course in an institution above the high school level may be substituted for one year of the nonsupervisory experience required under (a) or (b)."

The Civil Service Commission's classification of duties manual was introduced into evidence. It contains the following statements of duties with regard to the F 50 and F 52 classes:

"F 50 Maintenance Chief, San Francisco Airport: Under general direction: supervises the maintenance of all airport and air navigational facilities, including runways, taxiways, roadways, parking and turf areas, utility services, drainage systems, levees, automotive and maintenance equipment, fire apparatus, lighting facilities, etc.; directs the work of subordinates; requisitions materials; supervises maintenance of stores and supplies; performs inspections; prepares required reports; and performs related duties as required.

"F 52 Crew Chief, San Francisco Airport: Under direction: during an assigned tour of duty, is in full charge of airport ground facilities; supervises subordinates; is responsible for inspections and operating conditions of airport air-navigational facilities and proper marking of hazards; prepares and distributes to airmen for the manager notices regarding current field and lighting conditions as required by federal regulations; prepares accident and equipment reports; inspects and supervises operations and assists in maintenance of fire equipment; directs extinguishment of fires; operates equipment; enforces federal aeronautical and airport rules; and performs related duties as required."

One of the rules of the Civil Service Commission is that experience gained by a civil service employee by virtue of work done which is not within his classification, as such duties of his classification are prescribed in the official duty statement for his class, cannot be recognized on the question of his qualification to take an examination for another position, and none of the respondents working as Crew Chiefs met the minimum requirements for the job of Maintenance Chief as laid down by the commission.

The Crew Chiefs testified that they were thoroughly familiar with airport maintenance and with the duties of Maintenance Chief as performed by Mr. Sweet. The trial court found that all the Crew Chiefs are qualified to perform the duties of Maintenance Chief and therefore it is practicable to fill this position by means of a promotional examination.

As outlined above, the City Charter grants the commission the power to determine the method of appointments and the rules governing promotions. Section 146 applies to promotions and the pertinent part reads as follows: "Whenever it deems it to be practicable, the civil service commission shall provide for promotion in the service on the basis of such examinations and tests as the commission may deem appropriate and shall, in addition, give consideration to ascertained merit and records of city and county service of applicants. * * *"

Respondents rely on two companion cases: Allen v. McKinley, 18 Cal.2d 697, 117 P.2d 342; Rhodehamel v. Civil Service Board, 18 Cal.2d 709, 117 P.2d 349. Both these cases held that the commission abused its discretion in failing to give a promotional examination. The Allen case arose from San Francisco and involves the identical charter provision that applies here. The Rhodehamel case came up from Alameda County and involves a substantially similar section found in the Oakland City Charter. The court held in the Allen case [118 Cal.2d 697, 117 P.2d 347] that "'Section 146 of the charter, supra, constitutes a limitation on the discretion of the Commission. Where it is practicable to hold a promotional examination, such examination must be given. In determining whether it is practicable to give such an examination the Commission has not an uncontrolled discretion. If such an examination is not to be given, a valid reason why not, must exist. When the Commission's action is challenged, and the petitioner produces a prima facie case that a promotional examination is practicable, the burden is on the Commission to justify its action.' "

[1] There is an important distinction that can be made in the facts of the two cited cases, and the case before this court. In the Allen and Rhodehamel cases it was conceded that the petitioners were fully qualified to take the examinations and the court held that this showed that it was practicable to hold a promotional examination, but here both sides agree that petitioners cannot qualify for the examination under the minimum qualifications set out by the commission. Therefore, the real issue before the court is not whether the commission abused its discretion in providing that an open examination be given but whether it abused its discretion in fixing the minimum qualifications that must be met to be eligible for the examination. The determination in the first instance is one delegated by the Charter to the Civil Service Commission and its determination is conclusive on the courts in the absence of "a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion." Almassy v. Los Angeles County Civil Service Comm., 34 Cal.2d 387, 396, 210 P.2d 503, 509; Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; Maxwell v. Civil Service Comm., 169 Cal. 336, 338–339, 146 P. 869.

The duties of the occupant of the position of Maintenance Chief at the San Francisco Airport were described by Mr. Dixon, manager of the airport, as follows:

"The maintenance chief of the San Francisco Airport is responsible for the maintenance and upkeep of a $37,000,000 plant. It will be a $50,000,000 plant in two years. We have a network of utilities, meaning sewage systems, water mains, gas lines, electrical lines, high intensity light system which represents some 12 miles of lighting, about 6 miles of runways, about 4 miles of taxiways, and probably 8 or 10 miles of roads, two large drainage pumping units, one at the south end of the field and one at the north end of the field, capable of putting out 160,000 gallons a minute. That gives you some idea of the size of it.

"We have another power plant in the Pan American area. We have a standby generating unit, to take care of the high intensity lights, in the event of a power failure. Carpenter work, plumbing work, the observing and taking care of signs, ordering of materials, laying out of specifications for contractor work that may become necessary, and, above all, the laying out and assigning of specific work to be done by the personnel under him."

Mr. Dixon also testified concerning the qualifications that one should have to occupy this position: "What we are looking for is a person who has the necessary background and qualifications to take care of a terrific facility, a $50,000,000 establishment. We have millions of dollars of utilities. It is the fourth largest operation in the United States and we are merely looking for a person who is capable and qualified to take over and assume the responsibilities as a maintenance chief of a terrific utility, one of the largest in San Francisco. That is what we are looking for.

* * * * * *

"I would say a maintenance chief at a facility such as the San Francisco International Airport, where you have some six miles of runways, some four or five of taxiways, ten miles of roads, approximately, a high intensity light system around all of the runways, two standby generator units, two large pumping plants for drainage purposes, drainage canals around the whole facility, tank farm pipeline facilities, that a person at least should have some knowledge and background of knowing when and how to cause preventative maintenance, issue instructions to take care of the necessary repair work of those utilities and be qualified to work up a preliminary work order to accomplish certain types of work that would be required in the various utilities. He should have sufficient knowledge to formulate a proposed budget. He should have sufficient knowledge to program his work so as to take care of any preventative maintenance that becomes necessary in an establishment of that size."

Mr. Turner, Manager of Utilities for San Francisco, under whose general jurisdiction the operation of the airport falls, testified: "We view the airport as a small city of 10,000 population. It has all the problems of a small city: Water supply, power supply, sewage disposal, drainage, streets and roads and runways, and buildings and structures of all nature, fire protection, and it has all the problems. The maintenance chief is more or less the superintendent of the works department. * * * Your maintenance chief is the top supervisory person in full charge of the crew chiefs, and the crew chiefs work whenever the particular duties fit into that category. However, he also directs the work of and supervises the activity and controls the time of many other classifications, craftsmen of every nature employed at the airport."

Mr. Henderson, Personnel Director and Secretary of the Civil Service Commission, gave the following testimony:

"Q. Do you know the reasons why the Commission deemed it impracticable to conduct a promotional examination? A. Yes, sir.

"Q. And will you tell me what they were? A. Well, we will have to go back to the duties and responsibilities of the various classifications of employment and compare those in relation to the duties and responsibilities of the job of maintenance chief; and that is what, first, the staff did, and, secondly, what the Civil Service Commission did. In other words, the staff made a recommendation to the Civil Service Commission on this matter and the Commission reviewed the recommendation and acted upon the recommendation. Now, we did consider the advisability or practicability of a promotional examination, and in those considerations the one class which was considered was the class of crew chief; but a comparison of the duties of a crew chief with those of a maintenance chief led us, the staff and the Commission, to believe—and that was concurred in by the Commission—that the duties and responsibilities and training experience required of a crew chief did not constitute the training ground, shall we say, for promotion to the rank of maintenance chief. In other words, the Commission felt that the maintenance chief was charged with important maintenance and repair responsibilities and airport areas, airport buildings, landing fields and installations, and the crew chiefs didn't have that responsibility. For that reason, the Commission announced, after going over the reports and recommendations and after hearing the matter two or three times, decided that it was impracticable to hold a promotional examination because there was no classification in the service which provided the proper training and experience for the performance of these duties of maintenance chief.

* * * * * *

"The duties of this position, as we have understood it and as it was outlined here this morning, is that this man is responsible for the general maintenance of the structures and the installations down there, which involves planning the repairs, the inspection of the installations, the planning of precautionary maintenance work, estimating cost of work to be done, estimating the amount of materials to be used on a job, and he prepares plans and specifications and orders materials for the jobs and so on.

"Now, that is vastly different from the routine maintenance, day-to-day maintenance work which may be performed by the airport attendants or crew chiefs, as we see it.

* * * * * *

"The Commission felt that the duties of the crew chief were not sufficiently similar to those of the maintenance chief to qualify them for promotion to that rank.

* * * * * *

"What we are really looking for is a man who has had experience in construction work and in the maintenance of heavy installations. * * * It is a job superintendent, really. We call it maintenance

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SECOND SERIES

43 Cal.2d 184

VOGEL v. THRIFTY DRUG CO.

L. A. 22924.

Supreme Court of California, in Bank.

July 2, 1954.

Rehearing Denied July 28, 1954.

Action to recover for personal injuries allegedly resulting from glass present in ice cream soda served plaintiff by defendant drug company. The Superior Court, Los Angeles County, A. A. Scott, J., denied plaintiff permission to amend complaint and, on verdict of jury, rendered judgment to defendant, and plaintiff appealed. The Supreme Court, Schauer, J., held that where trial was held on issue of negligence of drug company in preparing and serving ice cream soda for customer, refusal of trial court to give instructions relevant to theory of breach of implied warranty was not error.

Judgment affirmed.

Prior opinion, 259 P.2d 450.

1. Sales 🔑274

Implied warranty of fitness of "goods" imposed by Sales Act applied to sale of ice cream soda in drug store. Civ.Code, § 1735(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Goods".

2. Sales 🔑285(2)

Provision of Sales Act requiring buyer of goods to give notice to seller of breach of any promise or warranty within a reasonable time before seller can be held liable is applicable to goods sold for immediate human consumption. Civ.Code, § 1769.

3. Sales 🔑437(3)

The burden is upon the purchaser of goods claiming a breach of warranty to plead and prove notice of breach to seller within a reasonable time. Civ.Code, § 1769.

4. Pleading 🔑229, 236(3)

Amendments should be liberally allowed so that all issues material to the just and complete disposition of a cause may me expeditiously litigated, but the question of whether filing of an amended pleading should be allowed at time of trial is ordinarily committed to sound discretion of the trial court.

5. Pleading 🔑236(3)

Where original complaint based on theory of negligence in preparing and serving ice cream soda consumed by plaintiff was filed May 23, 1951, and amended complaint based on same theory was filed August 16, 1951, and it was not until May 1, 1952, the day of trial, that plaintiff moved to file second amendment aimed at introducing a cause of action based on breach of warranty which amendment was defective in not pleading the giving of necessary notice of breach to seller within proper time or waiver thereof by seller, trial court did not abuse discretion in denying motion.

6. Trial 🔑251(2)

Where trial was held on issue of negligence of defendant in preparing and serving ice cream soda for plaintiff, refusal of trial court to give instructions relevant to theory of breach of implied warranty was not error.

◆

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff appeals from a judgment entered on a jury verdict in her action, based on alleged negligence, to recover for personal injuries assertedly resulting from glass she claims was present in an ice cream soda served to her by defendant drug company. As sole grounds for reversal, she contends that the trial court erred (1) in refusing to permit her to file an "amendment to [amended] complaint" setting forth a separate count aimed towards alleging a cause of action based upon breach of an implied warranty asserted to arise under the Uniform Sales Act (Civ. Code, § 1735, subd. (1)), and (2) in refusing to submit the issue of breach of the implied warranty to the jury. It appears, however, that (1) the proffered amendment fails to allege one of the elements essential to recovery upon such a warranty, viz., the giving of the notice of breach thereof which is required by section 1769 of the Civil Code and that (2) the requested and refused instructions were not relevant to any issue raised by the pleadings on which the cause was tried. We conclude, therefore, and for the other reasons hereinafter stated, that the trial court is not shown to have erred in respect to either of the matters complained of and that the judgment must be affirmed.

In the original complaint, filed May 23, 1951, plaintiff alleged that on December 15, 1950, she purchased from defendant, paid for, and was served a dish of ice cream; that defendant "so negligently and carelessly served and delivered to Plaintiff said ice cream that said ice cream contained a piece or pieces of glass. That by virtue of * * * [such] negligence, as aforesaid, Plaintiff, while eating the aforementioned ice cream did also eat the said pieces or piece of glass" by reason of which she sustained injuries consisting of cut and lacerated mouth and lips and internal cuts and lacerations. The only other allegations[1] of the complaint were of plaintiff's general and special damages. Thereafter, on August 16, 1951, plaintiff filed an amended complaint in all respects identical to her original complaint except that the sums alleged and prayed for as damages were increased, and it was stated that plaintiff purchased and was served an ice cream soda rather than a dish of ice cream. Such amended complaint, like the original, pleads a cause of action grounded only in negligence and avers that "as a direct and proximate result of said defendants' negligence, plaintiff sustained the * * * injuries" for which she seeks compensation.

The cause appears to have been calendared to go to trial on April 30, 1952, and on that day plaintiff served defendant with a copy of a proposed amendment to her amended complaint. On the following day, when the case was actually called for trial, plaintiff moved for permission to file the amendment. Defendant objected and after arguments the motion was denied. It is in the making of this order that plaintiff asserts the trial court primarily erred. The question before us is not whether we would affirm if the trial court had granted the motion but whether we can hold, on the record as presented to us, that as a matter of law the trial court abused its discretion.

By the amendment plaintiff sought to add to the complaint a separate count intended to plead a new cause of action based on the theory of breach of an implied warranty of fitness, upon which she relied in eating the ice cream. Such proposed amendment alleges that "defendants served and delivered to plaintiff said ice cream which contained a piece or pieces of glass. * * * That defendants in so serving plaintiff * * * warranted the same to be in all respects proper for the purpose of eating, chewing and swallowing. * * * That plaintiff relied upon such implied warranty of fitness in eating said ice cream * * * and as a proximate result of defendant's permitting said glass to be in said ice cream, plaintiff sustained the * * * injuries" enumerated. The pleading contains neither a direct allegation, nor does it aver facts from which an inference can be drawn, that the notice required by section 1769 of the Civil Code was given.

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[1] Except for an allegation concerning fictitiously named defendants, as to whom the action was dismissed when the case was called for trial.

After plaintiff's motion to file the proposed amendment was denied the case proceeded to trial upon the first amended complaint and defendant's answer thereto. Plaintiff offered three instructions based on the theory of implied warranty, which the court refused.

[1] It is settled in this state that the implied warranty of fitness imposed by subdivision (1) of section 1735 of the Civil Code applies to the sale of food of the type and under the circumstances here involved. (Mix v. Ingersoll Candy Co. (1936), 6 Cal.2d 674, 676, 680–681, 59 P.2d 144; Goetten v. Owl Drug Co. (1936), 6 Cal.2d 683, 687, 59 P.2d 142; see also Gindraux v. Maurice Mercantile Co. (1935), 4 Cal.2d 206, 208, 47 P.2d 708; Klein v. Duchess Sandwich Co., Ltd. (1939), 14 Cal.2d 272, 276, 93 P.2d 799; Whitfield v. Jessup (1948), 31 Cal.2d 826, 828–829, 193 P.2d 1.) Plaintiff urges that she should have been permitted to file her proposed amendment to separately state the implied warranty theory, and that in any event all of the facts necessary to support a recovery upon that theory as well as upon the theory of negligence were set forth in the amended complaint upon which trial was had and that she was therefore entitled to have the warranty theory submitted to the jury. But in making this argument plaintiff overlooks an element essential to stating a cause of action for breach of the implied warranty, i. e., an allegation that plaintiff gave notice of the breach to the defendant within a reasonable time.

[2, 3] Section 1769 of the Civil Code provides that "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor." This court has specifically held that the quoted section applies "to goods sold for immediate human consumption." As enunciated by Mr. Justice Carter in Whitfield v. Jessup (1948), supra, 31 Cal.2d 826, 828, 193 P.2d 1, "The rule stated by the section is the same as that stated in the American Law Institute's Restatement (Rest.Contracts, § 412) and probably the rule prevailing in California before the code section was added in 1931 (see cases cited 22 Cal.Jur. 983–988). It is the identical language of the Uniform Sales Act (Uniform Laws Annotated, Sales, § 49). One of the purposes of the provision in the Uniform Sales Act was to ameliorate the harshness of the common law rule in some states that the mere acceptance by or passage of title to the buyer of the goods constituted a waiver of any and all remedies for breach of warranty, and at the same time to give the seller some protection against stale claims by requiring notice. * * * The sales act on its face clearly applies to the sale of food * * * for immediate human use or consumption. * * * In determining that there is an implied warranty that the food is fit for human consumption under the statutes dealing with the law of the sales of goods, it is accepted that the sale of food for immediate human consumption is a sale of goods under the statute." It further appears that "The clear and practically unbroken current of authority establishes the doctrine that the requirement of notice, to be given by the vendee charging breach of warranty, is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach. [Citations.]" (W. S. Maxwell Co. v. Southern Oregon Gas Corporation (1937), 158 Or. 168, 74 P.2d 594, 597, 75 P.2d 9, 114 A.L.R. 697, 706; see also, for other statements of the rule, DeLucia v. Coca-Cola Bottling Co. of Connecticut (1952), 139 Conn. 65, 89 A.2d 749, 750, "The buyer must plead and prove the giving of notice"; Jan Ree Frocks, Inc., v. Pred (1942), 68 S.D. 356, 2 N.W. 2d 696, 697, "The giving of such notice must be pleaded and proved by the purchaser seeking to recover or defend for the breach of warranty"; 77 C.J.S., Sales, §

362, p. 1276, "Where the buyer must give notice of the breach of warranty, his plea or answer setting up a breach of warranty must allege the giving of the necessary notice within the proper time, or a waiver thereof by the seller. The giving of notice must be pleaded clearly and without ambiguity * * *"; 46 Am.Jur. 439, "[T]he burden is upon the one claiming the breach of warranty to plead and prove notice within a reasonable time"; see also Bailey Trading Co. v. Levy (1925), 72 Cal.App. 339, 345, 237 P. 408.)

[4, 5] It is a basic rule of pleading in this state that amendments shall be liberally allowed so that all issues material to the just and complete disposition of a cause may be expeditiously litigated, but "the question whether the filing of an amended pleading should be allowed at the time of trial is ordinarily committed to the sound discretion of the trial court." (Moss Estate Co. v. Adler (1953), 41 Cal.2d 581, 585, 261 P.2d 732.) In the Moss Estate case, twelve days before the trial date and more than a year after the original answer was filed, the defendant served notice of motion for leave to file an amended answer alleging a new defense based on different facts; no excuse for the delay was given; the trial court denied the motion and we affirmed. Here, the original complaint, based on the theory of negligence, was filed May 23, 1951, an amended complaint based on the same theory was filed August 16, 1951, and it was not until May 1, 1952, the day of trial, that the motion to file the amendment aimed at introducing a cause of action based on breach of warranty was presented to the court. The record shows no excuse for the tardiness in proposing the new cause of action which, though arising from the same transaction, would inject new issues of law and fact, and, more important still, as hereinabove pointed out the proffered amendment was defective in not pleading an essential element of the new theory of liability. Under such circumstances we cannot hold that the trial court abused its discretion in denying plaintiff's motion.

Plaintiff also suggests that the evidence subsequently adduced would support a finding and conclusion that at the time of the alleged occurrence she called defendant's attention to facts which could be construed as constituting compliance with the notice requirement of section 1769. But, obviously, this evidence was not before the court at the time it ruled on plaintiff's motion, the asserted facts as to the giving of notice were not incorporated in the proposed amendment, and the record discloses no request for permission to amend to conform to the proof.

[6] With respect to the trial on the merits of the issues presented by plaintiff's amended complaint on the theory of negligence and the answer thereto, there was substantially conflicting evidence which the jury resolved against plaintiff. Upon the issues so presented the trial court did not err in refusing to give the requested instructions relevant to the theory of breach of implied warranty. No other error is claimed or appears as to those issues.

For the reasons above stated, the judgment is affirmed.

SHENK, Acting C. J., EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., and BRAY, J. pro tem., concur.

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43 Cal.2d 121

LIVINGSTON ROCK & GRAVEL CO. et al.
v.
COUNTY OF LOS ANGELES.

L. A. 22991.

Supreme Court of California.
June 25, 1954.

Rehearing Denied July 21, 1954.

Action for an injunction against defendant county's interference with plaintiff's operation of a cement batching plant in an area rezoned by a county ordinance as a light manufacturing district after erection of the plant and for a declaration of the parties' rights and duties respecting the plant and determination of the construction and validity of the Regional Planning Commission's revocation of plaintiff's right to operate the plant. From a judgment of the Superior Court, Los Angeles County, J. T. B. Warne, J., granting an injunction, defendant appealed. The Supreme Court, Spence, J., held that provisions of the rezoning ordinance authorizing the Commission to revoke automatic exceptions of existing uses, are constitutional and within prescribed objectives of the police power and that plaintiff had an adequate remedy at law by certiorari or mandamus for review of the Commission's proceedings, so as to preclude injunctive or declaratory relief.

Judgment reversed.

Carter, Shenk and Schauer, JJ., dissented.

Prior opinion, 260 P.2d 811.

1. Municipal Corporations 🔑625

Zoning ordinances, when reasonable in object and not arbitrary in operation, constitute justifiable exercise of police power.

2. Municipal Corporations 🔑601(15)

Property users' rights, as existing under prevailing zoning conditions at time of adoption of rezoning ordinance, are protected, so that provision exempting existing nonconforming uses is ordinarily included in such an ordinance because of hardship and doubtful constitutionality of compelling immediate discontinuance of such uses.

3. Municipal Corporations 🔑601(18)

Zoning legislation looks to future in regulating district development and eventual liquidation of nonconforming uses within prescribed period commensurate with investment involved.

4. Municipal Corporations 🔑601(12)

The mere fact that some hardship may be experienced because of zoning regulation regulating future district development and providing for eventual liquidation of nonconforming uses within prescribed period is not controlling in determining validity of such legislation, as every exercise of police power is apt to affect somebody's property interest adversely.

5. Constitutional Law 🔑81

Incidental injury to an individual will not prevent operation of police power, as differentiated from power of eminent domain, if exercised for proper purposes of public health, safety, morals and general welfare and without arbitrary and unreasonable application in particular case.

6. Counties 🔑21½

A regional planning commission's revocation of automatic exception from restrictions of county rezoning ordinance, as authorized thereby on findings, after public hearing on notice, that excepted nonconforming use is being so exercised as to be detrimental to public health or safety or constitute a nuisance, cannot be held unconstitutional, as revocation of right to continue a previously existing lawful business because of such finding would be legitimate exercise of police power.

7. Counties 🔑21½

Provisions of county rezoning ordinance, authorizing regional planning commission to revoke automatic exception of existing uses from zoning restrictions therein, if commission finds that excepted property, if used only for purposes permitted in zone wherein it is located, would not impair any person's constitutional rights, or that use for which approval was granted is being so exercised as to be detrimental to public health or safety or constitute a nuisance, are constitutional and within prescribed objectives of police power.

8. Counties 🔑21½

A regional planning commission, authorized by county rezoning ordinance to revoke automatic exceptions of existing uses from zoning restrictions for specified reasons was a local board exercising quasi-judicial powers under ordinance in determining facts in case of parties opposing commission's proposed revocation of automatic exception of their use of leased property in light manufacturing zone for operation of cement batching plant.

9. Certiorari 🔑22

Mandamus 🔑72

Either certiorari or mandamus is appropriate remedy to test proper exercise of discretion vested in a local board.

10. Certiorari ⚷57

Mandamus ⚷172

On certiorari or mandamus to test proper exercise of discretion vested in local board, chief issues are whether person affected has been accorded a hearing and, if so, whether there is any evidence to support board's order.

11. Counties ⚷21½

Voluntary appearance by lessor of land, on which lessees erected and operated cement batching plant, at hearing before regional planning commission on question of revoking lessees' automatic exception from restrictions of county rezoning ordinance eliminated any cause for complaint by lessees of failure to give lessor notice of hearing as required by ordinance regulations.

12. Appeal and Error ⚷671(4)

The propriety of regional planning commission's findings on issues as to whether cement batching plant was so operated as to be detrimental to public health or safety or to constitute nuisance, so as to authorize revocation of automatic exception of such plant from restrictions of county zoning ordinance, cannot be determined by Supreme Court without recourse to proceedings taken before commission in manner provided by law and examination of evidence submitted thereto, and hence will not be considered where transcript of hearing before commission is in record on appeal from judgment enjoining county from interfering with operation of such plant after date of commission's revocation of right to operate plant.

13. Declaratory Judgment ⚷129

Injunction ⚷76

Operators of cement batching plant in light manufacturing district were not entitled to injunctive or declaratory relief against county's interference with operation of plant after date of regional planning commission's revocation of operators' automatic exception from restrictions of county rezoning ordinance, as they had adequate remedy at law by certiorari or mandamus for review of commission's proceedings.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, Long Beach, for respondents.

SPENCE, Justice.

Plaintiffs sought to enjoin the county of Los Angeles from enforcing against them certain zoning ordinance provisions which would prohibit them from conducting a cement mixing plant in a rezoned district. They recovered judgment upon the premise that the ordinance provisions in question could not be constitutionally applied to require the removal of their existing business as a nonconforming use, and therefore "any action purportedly taken under * * * such provisions [was] invalid and [had] no effect as to * * * plaintiffs." Defendant challenges the propriety of this judgment on these grounds: (1) the ordinance provisions are not constitutionally objectionable in application to plaintiffs' business; and (2) plaintiffs' remedy is by writ of certiorari or mandamus, precluding injunctive or declaratory relief. Settled principles of law sustain defendant's position.

The Pacific Electric Railway Company owned a parcel of land in an area in Los Angeles County known as the Artesia Industrial District. The area was used exclusively for industrial and manufacturing purposes. Over Pacific Electric's land there passed a main double track railway line with two separate spur tracks to serve the neighboring commercial and industrial plants. On January 31, 1950, Pacific Electric leased 20,000 square feet of its land to plaintiffs. At that time all of this area was in an M-3 zone (unlimited), under ordinance No. 1494 (new series) of the county of Los Angeles, permitting any building structure or improvement to be erected, established or maintained thereon without restriction as to use or occupancy.

Plaintiffs erected on the leased property a batching plant for the loading of ready-mix concrete mixer trucks with concrete aggregates, a use then permissible in any M-3 zone in the county. The plant was erected pursuant to a building permit issued by the county building department and was completed prior to March 21, 1950. Plaintiffs complied with all the smog control and air pollution ordinances of the county, and they secured a permit authorizing the operation of their plant and certifying that after inspection, it had been found to be complying with these requirements. The plant cost $18,000 to build; $80,000 worth of mixer trucks were purchased; and both the plant and trucks have been in continuous operation.

On March 21, 1950, after the erection and operation of the plant and purchase of the trucks, the county adopted an urgency ordinance (No. 5508) rezoning the Artesia Industrial District into an M–1 zone (light manufacturing). Upon such rezoning, existing uses were protected as automatic exceptions (§ 531) with such structure as plaintiffs' plant allowed twenty years for continued use unless such time period should be extended or the automatic exception should be revoked as provided in the amending ordinance. Section 533 provided for the revocation of an automatic exception "if the [Regional Planning] Commission finds: (a) That the condition of the improvements, if any, on the property are such that to require the property to be used only for those uses permitted in the zone where it is located would not impair the constitutional rights of any person; (b) That the nature of the improvements are such that they can be altered so as to be used in conformity with the uses permitted in the zone in which such property is located without impairing the constitutional rights of any person." Section 649, as here material, authorized the planning commission, after a public hearing as therein provided, to "revoke or modify any permit, exception or other approval which has been granted either automatically or by special action of either the Board of Supervisors or the Commission, pursuant to * * * the provisions of [the] ordinance [where] (e) * * * the use for which the approval was granted is so exercised as to be detrimental to the public health or safety, or so as to be a nuisance."

On November 25, 1950, plaintiffs received a notice through the mail that a hearing would be held December 1, 1950, before the Regional Planning Commission with reference to the revocation of their exception. Pacific Electric, owner of the property, was never given notice of the hearing. Following the scheduled public hearing and on December 6, 1950, the planning commission notified plaintiffs that their "use of the property with a cement batching plant thereon" was "being exercised in such a manner as to be detrimental to public health, and so as to be a nuisance"; and that their right to operate their plant was therefore revoked "effective as of January 31st, 1952." On January 16, 1951, plaintiffs appealed to the county board of supervisors, which affirmed the planning commission's decision. In August, 1951, the board added to the basic zoning ordinance (No. 1494) section 404 of ordinance No. 5800, expressly confirming the expiration date on plaintiffs' exception as "January 31, 1952." Thereafter plaintiffs brought this action seeking (1) to enjoin defendant county from "interfering with" the operations of the cement batching plant "after January 31, 1952" and (2) to have the court "declare the rights and duties of plaintiffs and defendant with respect to the property and batching plant * * * and determine the construction and validity of the purported action taken by [the] Regional Planning Commission * * *"

Defendant admitted in its answer that its proceedings against plaintiffs were not taken under the provisions of section 3491 of the Civil Code relating to the abatement of a public nuisance but rather were instituted under authority of sections 533 and 649 of the zoning ordinance, supra, providing for the "revocation of automatic exceptions." The trial court determined that these sections, as well as section 404, supra, affirming the expiration date on plaintiffs' exception, were "invalid" in permitting "unconstitutional encroachments" upon plaintiffs' property rights and therefore "any action * * * taken" by the Regional Planning Commission "under * * * such provisions [was] invalid and [would] have no effect as to * * * plaintiffs." Upon such premise the court expressly refrained from making "any findings as to what occurred at the hearing before the Regional Planning Commission on December 1, 1950, or whether or not there was any competent evidence at said hearing to prove any cause for revocation." Plaintiffs accordingly were granted the injunctive relief sought. Defendants attack the propriety of such judgment upon the merits as well as upon the procedural phases.

[1] It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of the police power. Miller v. Board of Public Works, 195 Cal. 477, 487, 234 P. 381, 38 A.L.R. 1479; Acker v. Baldwin, 18 Cal.2d 341, 344, 115 P.2d 455; Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 337, 175 P.2d 542. Plaintiffs concede the general validity of the zoning ordinance here as a whole but they contend that the rezoning amendment may not be constitutionally applied to require the removal of their existing business from the rezoned district. They maintain that their unlimited right to operate their cement batching plant in the district, a lawful use of the property as originally zoned, could not be curtailed or limited by subsequent rezoning without violating the constitutional guarantee of due process of law. They rely on Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14, wherein the court refused to apply retroactively, so as to destroy a valuable sanatorium business, an ordinance which prohibited such institutions in areas rezoned as residential. Under the particular circumstances of that case, showing "substantial injury" to be involved, 211 Cal. at page 321, 295 P. 14, it was deemed unreasonable and arbitrary to destroy the established enterprise. But each case must be determined on its own facts. Cf. Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 560, 254 P.2d 865.

Moreover, the ordinance under consideration in the Jones case differed materially from the one here involved. There the ordinance, cast in the form of a penal statute rather than in the form of a comprehensive zoning law, prohibited the maintenance of sanitariums of a certain type in designated districts. By its terms the ordinance, unlike the ordinary zoning laws, purported to have both a retroactive as well as a prospective effect, thereby automatically prohibiting the continued maintenance of several established sanitariums representing large investments. In other words, no provision was made for any automatic exception for existing nonconforming uses. In the present case, the zoning ordinance does provide for automatic exceptions of reasonable duration for existing nonconforming uses, subject, however, to earlier revocation of the automatic exception if the use for which approval was granted is so exercised "as to be detrimental to the public health or safety, or so as to be a nuisance" (§ 649, supra); and the power to determine, upon notice, the question of whether the property was being so used was vested in the Regional Planning Commission. As a result of these distinctions, plaintiffs may not urge that the remedy of injunction which was sought in the Jones case is the appropriate remedy in the present case. It is apparent that the only remedy available to plaintiffs in the Jones case was preventive, by way of an action for injunctive relief; whereas, as will hereinafter appear, other remedies were available in the present case to review the action taken by the planning commission in revoking plaintiffs' automatic exception.

[2-5] The rights of the users of property as those rights existed under prevailing zoning conditions are well recognized and have always been protected. Edmonds v. County of Los Angeles, 40 Cal. 2d 642, 651, 255 P.2d 772. Accordingly, a provision which exempts existing nonconforming uses is ordinarily included in rezoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses. (Ibid.) Protection of an undertaking involving the investment of capital is akin to the protection of a nonconforming use existing at the time that rezoning conditions become effective. County of San Diego v. McClurken, 37 Cal.2d 683, 691, 234 P.2d 972. However, zoning legislation looks to the future in regulating district development and the

eventual liquidation of nonconforming uses within a prescribed period commensurate with the investment involved. Ibid., 37 Cal.2d at page 686, 234 P.2d 972. The mere fact that some hardship may thereby be experienced is not controlling, for "Every exercise of the police power is apt to affect adversely the property interest of somebody." Zahn v. Board of Public Works, 195 Cal. 497, 512, 234 P. 388, 394. Implicit in the theory of the police power, as differentiated from the power of eminent domain, is the principle that incidental injury to an individual will not prevent its operation, once it is shown to be exercised for proper purposes of public health, safety, morals, and general welfare, and there is no arbitrary and unreasonable application in the particular case. Wilkins v. City of San Bernardino, supra, 29 Cal.2d 332, 338, 175 P.2d 542, Beverly Oil Co. v. City of Los Angeles, supra, 40 Cal. 2d 552, 557, 254 P.2d 865.

[6, 7] Here the rezoning permits plaintiffs to continue their nonconforming use of the property for twenty years as an "automatic exception" to the rezoning restrictions, § 531, supra; Edmonds v. County of Los Angeles, supra, 40 Cal.2d 642, 651, 255 P.2d 772, but authorizes revocation of such exception where it can be done without the impairment of "constitutional rights" (§ 533, supra). Manifestly, care has been taken in such rezoning regulations to refrain from the interference with constitutional guarantees, and in the light of such express language it would be a contradiction in terms to hold that the regulations are nevertheless unconstitutional. Likewise, there can be no constitutional objection to the authorized revocation by the planning commission of an automatic exception where after a public hearing, upon notice, it is found that the nonconforming use is "so exercised as to be detrimental to the public health or safety, or so as to be a nuisance." § 649, supra; Ricciardi v. County of Los Angeles, 115 Cal.App.2d 569, 577, 252 P.2d 773. Revocation of the right to continue a previously existing lawful business because of such finding would be a legitimate exercise of the police power. Ex parte Quong Wo, 161 Cal. 220, 230, 118 P. 714; Jones v. City of Los Angeles, supra, 211 Cal. 304, 316, 295 P. 14; In re Jones, 56 Cal.App.2d 658, 663–664, 133 P.2d 418; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 477, 197 P.2d 218. It therefore follows that the rezoning regulations authorizing the revocation of "automatic exceptions" are constitutionally valid as a whole and come within the prescribed objectives of the police power. There now remains the question of whether in application to plaintiffs' existing cement plant there has been an unconstitutional impairment of property rights.

[8–10] The Regional Planning Commission was a local board exercising quasi-judicial powers under the ordinance in determining the facts in plaintiffs' case. Greif v. Dullea, 66 Cal.App.2d 986, 1009, 153 P.2d 581; North Side etc. Ass'n v. Hillside etc. Park, 70 Cal.App.2d 609, 616, 161 P.2d 618; Cantrell v. Board of Supervisors, supra, 87 Cal.App.2d 471, 475, 197 P.2d 218. Either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board. Walker v. City of San Gabriel, 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383; La Prade v. Department of Water & Power, 27 Cal.2d 47, 53, 162 P.2d 13. Under such review, the chief issues are whether the person affected has been accorded a hearing, and if so, whether there is any evidence to support the order of the local board. (Ibid.)

[11–13] In the present case, the transcript of the hearing before the planning commission is not a part of the record. Plaintiffs allege that there was "no competent evidence to prove any cause for revocation" in their case, and that Pacific Electric, owner of the property, was never given notice of the hearing as required by the ordinance regulations. In answer to this latter point, defendant asserts that "Pacific Electric * * * was represented at the hearing," a voluntary appearance which eliminates any cause for complaint in failing to give the required notice, see Hopkins v. MacCulloch, 35 Cal.App.2d 442, 451, 95 P.2d 950, and that in any event the presence of Pacific Electric was of no concern to plaintiffs in the determination of their case before the planning commission. Although plaintiffs admittedly did comply with smog and air pollution regulatory requirements, their plant might be still so operated "as to be detrimental to the public health or safety, or so as to be a nuisance." (§ 649, supra.) The propriety of the planning commission's finding on these issues cannot be determined without recourse to the proceedings taken before it "in the manner provided by law". Ricciardi v. County of Los Angeles, supra, 115 Cal.App.2d 569, 580, 252 P.2d 773, 780, and examination of the evidence there submitted. The validity of section 404 of the ordinance, supra, affirming the expiration date of plaintiffs' right to continue the operation of their cement plant in the rezoned district, would necessarily depend on whether the planning commission's action was unreasonable, arbitrary or oppressive in ordering revocation in plaintiffs' case. Under all the circumstances, plaintiffs have an adequate remedy at law for review of the planning commission's proceedings, and therefore they are not entitled to injunctive or declaratory relief. North Side etc. Ass'n etc. v. Hillside etc. Park, supra, 70 Cal.App.2d 609, 615, 161 P.2d 618; Hostetter v. Alderson, 38 Cal.2d 499, 500, 241 P.2d 230.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

The ordinance in this case changed the zone in which plaintiffs' business (concrete aggregates loading plant) was then established to embrace only "light manufacturing" to which class plaintiffs' business did not belong. As is customary, the ordinance excepted from its operation for a period of 20 years, existing uses such as plaintiffs'. Yet in the next breath it provided that any exception could be revoked if the planning commission found that that could be done without violating the constitutional rights of the existing user or where the existing use was detrimental to the "public health or safety" or was a "nuisance." For all practical purposes, therefore, no exception was granted for existing uses because the exception could be taken away at any time, and in the case at bar, was taken away from plaintiffs with impunity.

It is settled in this state as elsewhere that a zoning ordinance which requires the discontinuance of nonconforming uses existing when the ordinance was adopted is a deprivation of property without due process of law contrary to the federal and state constitutions. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 254 P.2d 865; Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542; Clemons v. City of Los Angeles, 36 Cal.2d 95, 222 P.2d 439; Price v. Schwafel, 92 Cal.App.2d 77, 206 P.2d 683; Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455; Yokley, Zoning Law & Practice, § 133; 58 Am.Jur.Zoning, § 148; McQuillin, Municipal Corporations (3rd ed.) § 25.181. In Village of Terrace Park v. Errett, 6 Cir., 12 F.2d 240, a zoning ordinance was held invalid which prohibited plaintiff from operating his gravel processing plant which was operating when the ordinance was passed. In In re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.,N.S., 796, it was held that an ordinance could not validly prohibit the maintenance of a rock quarry in the city. In Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, reversing our court's decision in Dobbins v. City of Los Angeles, 139 Cal. 179, 72 P. 970, the court held an ordinance unconstitutional which prohibited a gas works as applied to an existing gas works.

As a zoning ordinance which does not exempt existing non-conforming uses is invalid it necessarily follows that an ordinance, like the one here, which excepts such uses but authorizes a planning commission to revoke those exceptions where the public safety or health is involved, is also invalid. If public health and safety (police power), the basis for the zoning, cannot justify the destruction of existing uses, an administrative agency cannot be given such power. Those uses cannot be eliminated unless they inherently, or as exercised, are nuisances. Jones v. City of Los Angeles, supra, 211 Cal. 304, 295 P. 14.

Assuming the commission could be given the authority to determine that an existing non-conforming use was a nuisance, and hence not under the exception for such uses, it is difficult to see how the plaintiffs' business could be a nuisance. It is in an area zoned for light manufacturing. Hence there is no question of disturbing the residents in a residential area. Plaintiffs obtained a permit to conduct its business and it complied with all "smog control and air pollution" ordinances.

In the disposition of the case the majority reverses the judgment granting an injunction in an action for preventive and declaratory relief and in so doing states that plaintiffs cannot review the action of the commission in a proceeding for declaratory relief or injunction. In effect the trial court is told to dismiss the action. Although it is said in Hostetter v. Alderson, 38 Cal.2d 499, 241 P.2d 230, that a determination by a local administrative agency cannot be reviewed in a declaratory relief action, it has been done. See Edmonds v. County of Los Angeles, 40 Cal. 2d 642, 255 P.2d 772; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 126 P.2d 954; Hoyt v. Board of Civil Service Com'rs, 21 Cal.2d 399, 132 P.2d 804; 15 Cal.Jur.2d Declaratory Relief, § 63; 2 Cal. Jur.2d Administrative Law, § 199. In any event, the declaratory relief action may be treated as mandamus, a proper remedy for review, Hostetter v. Alderson, supra, 38 Cal.2d 499, 241 P.2d 230; 2 Cal.Jur.2d Administrative Law, § 200, and it was alleged by plaintiffs that the commission had no competent evidence to prove any cause for revocation of its exemption from the ordinance. This should be pointed out to avoid a dismissal of the action.

I am convinced that the trial court correctly applied the law to the facts of this case, and the judgment should be affirmed.

SHENK and SCHAUER, Justices.

We dissent.

In our view the opinion prepared for the District Court of Appeal by Justice McComb and concurred in by Presiding Justice Moore and Justice Fox (reported in 260 P.2d 811) adequately discusses and correctly resolves the questions presented on this appeal. For the reasons therein stated we would affirm the judgment of the trial court.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

43 Cal.2d 147

BRADNER v. VASQUEZ et al.

L. A. 22715.

Supreme Court of California.
In Bank.
June 29, 1954.

Action to recover compensation allegedly due under written contract by which plaintiff was employed to handle defendants' business affairs for 10% of income from oil property for life of plaintiff. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment for defendants, and plaintiff appealed. The Supreme Court held that evidence was sufficient to raise statutory presumption that contract was entered into by defendants under undue influence and that controverting evidence did not as a matter of law dispel such presumption.

Judgment affirmed.

Schauer, J., and Shenk, Acting C. J., dissented.

Prior opinion, 264 P.2d 54.

1. Attorney and Client 🔑123(1)

In action to recover compensation allegedly due under written contract by which plaintiff was employed to handle defendants' business affairs for 10% of income from oil property for life of plaintiff, evidence was sufficient to raise statutory presumption that contract was entered into by defendants under undue influence and was therefore voidable. Civ.Code, §§ 2219, 2235; Code Civ.Proc. §§ 1957, 1961.

2. Attorney and Client ⟹123(1)

In action to recover compensation allegedly due under written contract by which plaintiff was employed to handle defendants' business affairs for 10% of income from oil property for life of plaintiff, evidence sustained finding that statutory presumption that contract was entered into by defendants under undue influence was not overcome by controverting evidence. Civ. Code, §§ 2219, 2235; Code Civ.Proc. §§ 1957, 1961.

◆

Thomas A. Wood and Michael F. Shannon, Los Angeles, for appellant.

Burke, Williams & Sorensen and Landon Morris, Los Angeles, for respondents.

SPENCE, Justice.

B. J. Bradner, an attorney at law, commenced this action against defendants for money alleged to be due on a contract of employment entered into during the existence of the attorney-client relationship. On a prior appeal, it was held that the second amended complaint stated facts sufficient to constitute a cause of action. Bradner v. Vasquez, 102 Cal.App.2d 338, 227 P. 2d 559. Bradner died prior to trial and his wife, as executrix, was substituted as plaintiff. Judgment was entered for defendants, from which plaintiff appeals. The trial court found, among other things, that the contract was procured without sufficient consideration and by undue influence, in that at the time of its execution the relationship of attorney and client existed and Bradner obtained an advantage by it. A review of the record and applicable legal principles sustain the judgment of the trial court.

On November 14, 1941, Bradner and the defendants entered into the following written agreement:

"November 10, 1941

"Mr. and Mrs. Anselmo M. Vasquez
3161 Winter Street
Los Angeles

"Dear Mr. and Mrs. Vasquez:

"Relative to our conversation of recent date, it is my understanding that we agreed as follows:

"I am to attend to all of your business affairs connected with the Ohio Oil Company and Havenstrite Operator, together with preparing income tax returns and advice as to investments, for 10% of all the moneys received by you from the Ohio Oil Company and Havenstrite Operator for oil and from casinghead gasoline and dry gas.

"It is realized by me that my compensation in the near future will be rather small, but as more wells are developed, I will be more adequately compensated.

"It is understood that this arrangement shall cease and determine upon my death.

"Will you kindly sign the duplicate copy of this letter and return it to me.

"Very truly yours,
B. J. Bradner
B. J. Bradner

"Accepted
Anselmo M. Vasquez
Anselmo M. Vasquez
Bertha R. Vasquez
Bertha R. Vasquez"

In August 1949, defendants discharged Bradner from his employment and notified him that they would no longer make any payments pursuant to the contract. Up to the time of discharge, Anselmo and Bertha Vasquez had paid to Bradner all sums of money provided to be paid under the terms of the agreement.

From 1924 to November 14, 1941, the time the agreement was entered into, Bradner had performed all legal services that defendant had required. In 1937, defendants entered into a lease with the Ohio Oil Company. Bradner represented defendants in this transaction and also represented defendants in connection with the sale of some oil royalties. Ohio started to drill in 1940 and brought in one well in late 1941. Mrs. Vasquez testified that in November, 1941, she and her husband went to Bradner's office to discuss with him matters relative to compensation in handling their affairs. According to her testimony, Bradner asked them how they wanted to compensate him. He asked if they wanted to give him a percent of their interest in the wells, or to pay him ten per cent of the total income from the oil property. Defendants told him, "We will pay you 10%. That way you will take more interest in seeing that more wells are drilled on the property." It is not certain from the testimony whether defendants or Bradner first suggested ten per cent of the oil income as the amount of compensation, but in any event, this arrangement was agreeable to Bradner. Mrs. Vasquez further testified that Bradner did not say anything to them about going to see another lawyer or tell them to get advice from anyone else about signing the agreement. Nor did Bradner at any time before the signing of the agreement say anything about what would be the reasonable value of the services which he agreed to perform.

Mrs. Bradner was secretary for her husband from 1929 until his death. She testified that she was present at the conversation referred to by Mrs. Vasquez. At this conversation, which took place on November 7, 1941, Mr. Vasquez told Bradner that he was very well satisfied with the work he had done. The Vasquezes hoped they could work out an arrangement whereby Bradner would handle all legal and financial problems in connection with the Ohio leases and would be paid out of the proceeds from the oil property. Bradner said that in some cases his clients had assigned to him a one per cent royalty. To this, Mrs. Vasquez said, "Mr. Bradner, we don't want to do that because if you died we don't want a stranger in there." Bradner said, "Well, suppose that you give me ten per cent for life of all the oil, gas, and casinghead gasoline, and that would amount to just about the same thing." Bradner continued, "Of course, I realize at first I won't be very well paid for my work but as more wells are developed, I will be better paid." The agreement in dispute was dictated and mailed by Bradner a few days after the above conversation with the Vasquezes. Shortly thereafter, Mr. and Mrs. Vasquez signed a copy and returned it to Bradner, retaining a copy for themselves.

Civil Code, § 2235, provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Civil Code, § 2219, provides that everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee. Section 2235 has often been applied to contractual dealings between attorney and client because it is recognized that this relationship is one of a strict fiduciary and confidential nature. Cooley v. Miller and Lux, 156 Cal. 510, 523–524, 105 P. 981; Metropolis Trust and Savings Bank v. Monnier, 169 Cal. 592, 598, 147 P. 265; 6 Cal.Jur.2d 306, section 137. If the specified basic facts are established the contract is voidable. Magee v. Brenneman, 188 Cal. 562, 571, 206 P. 37; Brydonjack v. Rieck, 5 Cal.App.2d 219, 223, 42 P.2d 336. In order to bring the presumptions of insufficient consideration and of undue influence into operation it is necessary to show that a confidential relationship existed and that this relationship was used by the fiduciary to gain an advantage.

It is plaintiff's contention that the advantage gained by the fiduciary must be an unfair advantage before the presumptions of section 2235 are properly in the case. We find no language in this section which imposes such an additional requirement. There are certain cases which apparently do require an unfair advantage. Dimond v Sanderson (husband and wife), 103 Cal. 97, 37 P. 189; Patterson v. Davis (husband and wife), 121 Cal.App.2d 152, 262 P.2d 601; Donovan v. Security First Nat. Bank of Los Angeles (trustee and beneficiary), 67 Cal.App.2d 845, 853, 155 P.2d 856; In re Estate of Roberts (business advisor), 49 Cal.App.2d 71, 80, 120 P.2d 933; In re Estate of Mallory (attorney and client), 99 Cal.App. 96, 278 P. 488; Cole v. Wolfskill (physician and patient), 49 Cal.App. 52, 192 P. 549. Certain other decisions use the words advantage or advantageous as synonymous with the phrases unfair advantage or inequitable transaction. In re Estate of

Witt (attorney and client), 198 Cal. 407, 419, 422, 245 P. 197; Carlson v. Lantz (attorney and client), 208 Cal. 134, 138–139, 280 P. 531. There are, however, numerous cases which have discussed virtually all types of fiduciary and confidential relationships and which properly require only an advantage. We believe that these cases, of which the following are illustrative, are in accord with the language of section 2235. Weil v. Weil (husband and wife), 37 Cal.2d 770, 788, 236 P.2d 159; Fish v. Security-First Nat. Bank (advisor), 31 Cal.2d 378, 384, 189 P.2d 10; Marlenee v. Brown (attorney and client), 21 Cal.2d 668, 680, 134 P.2d 770; Johnson v. Clark (sisters), 7 Cal.2d 529, 534, 61 P.2d 767; Smith v. Lombard (husband and wife), 201 Cal. 518, 524, 258 P. 55; Clark v. Millsap (attorney and client), 197 Cal. 765, 783, 242 P. 918; Magee v. Brenneman (attorney and client), supra, 188 Cal. 562, 206 P. 37; In re Estate of Cover (husband and wife), 188 Cal. 133, 143, 204 P. 583; McDonald v. Hewlett (attorney and client), 102 Cal.App.2d 680, 686, 228 P.2d 83, 4 A.L.R.2d 1281; Jorgenson v. Pardee (husband and wife), 101 Cal.App.2d 96, 97, 224 P.2d 884; Plxweve Aircraft Co. v. Greenwood (attorney and client), 61 Cal.App.2d 21, 24, 141 P.2d 933; In re Estate of De Barry (attorney and client), 43 Cal.App.2d 715, 728, 111 P.2d 728; Shahabian v. Najarian (attorney and client), 14 Cal.App.2d 435, 444, 58 P.2d 396.

When a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained. To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by section 2235.

[1] There was evidence from which the court could reasonably conclude that Bradner obtained an advantage from the Vasquezes by the contract at the time it was made. From 1924 to the date of the agreement, Bradner had been the Vasquezes' attorney. Because they did not have a great deal of money during this period, "he charged then the minimum, or just enough to cover the overhead." Bradner did some work for which no charges at all were made. Under the agreement, however, Bradner was to receive 10 per cent of all moneys received by the defendants from the Ohio and Havenstrite lease for the remainder of his life. At the time the agreement was entered into, the Vasquezes were receiving $300 or $400 per month and there was every prospect that this amount would increase over the years. Prior to the making of the contract, the Vasquezes could dismiss Bradner as their attorney at any time, with or without cause. After the agreement, the defendants could discharge Bradner only for legal cause. Since this evidence establishes the existence of an advantage, it follows that the presumptions specified in section 2235, that is, the presumptions of insufficient consideration and undue influence are present in this case.

Plaintiff therefore cannot prevail in her contention that judgment for defendants is not supported by the evidence. It is true that there was no direct evidence of intentional undue influence. However, the presumption of undue influence is evidence and it is sufficient to sustain the judgment although there may be direct evidence contrary to the presumption. Code Civ.Proc. §§ 1957, 1961; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. Section 1957 of the Code of Civil Procedure states that presumptions are indirect evidence; and section 1961 of the Code of Civil Procedure states that a disputable presumption may be controverted by other evidence, direct or indirect, but unless so controverted the jury must find according to the presumption.

[2] Plaintiff presented evidence tending to show that there was no undue influence, but we cannot say as a matter of law that the presumption of undue influence was overcome by such evidence. Plaintiff's evidence indicated that the Vasquezes had suggested the long term agreement which the parties executed. Plaintiff testified that Mr. Vasquez had said, "In time this [ar-

rangement] will give you something more for the work you have done in the past, as well as for work to come." The evidence in the case also indicated that the Vasquezes were completely satisfied with the agreement at the time it was made, since it would mean that Bradner would take a greater interest in the property because of his financial concern. Such evidence of plaintiff, tending to show that there was no undue influence, conflicts with the presumption of undue influence. The fact that defendants never had any independent advice is also a circumstance of undue influence. Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 599, 289 P. 613; Burnham v. Witt, 217 Cal. 397, 398, 18 P.2d 949; Munfrey v. Cleary, 75 Cal.App.2d 779, 785, 171 P.2d 750. Thus the record presents the familiar picture of conflicting evidence upon the disputed issues which were to be determined. The trial court found that there was undue influence, and since this finding is supported by the evidence, it will not be disturbed on appeal.

Since the judgment may be sustained solely upon the above basis, we need not discuss the effect of an apparent conflict between the presumptions of sufficiency and insufficiency of consideration. Code Civ. Proc. § 1963(39); Civ.Code, § 2235.

The judgment is affirmed.

CARTER, J., and BRAY, J. pro. tem., concur.

TRAYNOR, Justice.

[1, 2] I concur in the holding of the majority opinion that the evidence of an advantage gained by plaintiff's testate is sufficient to give rise to the presumptions of undue influence and insufficient consideration mentioned in section 2235 of the Civil Code and that the evidence considered as a whole does not as a matter of law dispel the presumption of undue influence. I cannot agree, however, with the statement, and the implications flowing therefrom, that these presumptions are evidence. See dissenting opinions in Speck v. Sarver, 20 Cal.2d 585, 590, 128 P.2d 16, and Scott v. Burke, 39 Cal.2d 388, 402, 247 P.2d 313.

EDMONDS, J., concurs.

SCHAUER, Justice.

I dissent.

In my view the theory under which the presumption stated in section 2235 of the Civil Code is applied in this case is unsound and I fear that the apparently unfair and inequitable results which it leads to here may be paralleled many times among honorable members of an honored profession. I would apply the presumption only where it is shown, i. e., is at the least inferable from the circumstances, that the attorney obtained an "advantage" over the client as distinguished from the normal benefits of a fair transaction. See In re Estate of Witt, 1926, 198 Cal. 407, 419–422, 245 P. 197; Carlson v. Lantz, 1929, 208 Cal. 134, 138–139, 280 P. 531.

The declaration of the statute (Civil Code, § 2235) is that "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." The operation of the presumption is thus by its specific language made dependent upon the obtaining of an "advantage," not the obtaining of a profit or benefit. Unless the words "advantage," "profit," and "benefit" are synonymous—or this court enlarges the meaning of "advantage" to make it synonymous with "profit" and "benefit"—I think the statute can have no operation in this case.

Webster's New International Dictionary, Second Edition, defines "advantage" as meaning "1. The condition of being in advance or superior; superiority of state or position; * * * 4. That which is gained from superiority of state or position * * *." To me, the definitions quoted, and the usage of that particular word, exclusively, in the statute suggest that the legislature intended—if, as is hereinafter mentioned, it intended at all that this section should be applied to the relationship of attorney and client—that the "advantage" upon which the presumption would become operative in respect to the dealings between an attorney and his client should be something more than the mere benefit of a fair profit, i. e., something more than an enforceable promise to pay a fair consideration for services faithfully rendered.

Certainly the relationship of attorney and client, when established, becomes fiduciary in character, but nevertheless realism requires that we recognize that there are actual differences between the carrying on of the private practice of law, which presumptively is for the benefit of the lawyer in all cases as well as for the benefit of his clients in their respective cases, and the administration of a trust estate by the trustee who holds legal title to property and has the duty of managing it exclusively for the benefit of the cestuis que trust. Every act of the trustee, including the fixing of his compensation, is subject to authorization or approval by the court and he can be removed or replaced by the court. The meaning of "advantage" as applied to the act of one who is both historically and technically a trustee may well be different in scope or at least as to occasions of application from its proper meaning when applied to a lawyer practicing his profession.

Law is a profession, but to successfully practice law one must successfully engage in business—business conducted upon the lofty standards and conforming to the ethical principles of the profession, but nonetheless business engaged in for profit. The services of a competent lawyer fairly engaged and faithfully rendered should benefit and profit both lawyer and client. It is unfair to the fine men and women of the profession and it tends to open, not to close, the door to fraud, to hold that a presumption of unfairness, fraud and undue influence arises from a fair transaction merely because a lawyer gains the benefit of compensation for his services.

In this country with its traditions of private initiative and free enterprise it is contemplated that, as is only natural and just, every business transaction is entered into by each party for the purpose of benefiting himself, i. e., of obtaining a commodity or some form of wealth, whether it be goods or services or other benefit, which he wishes to receive in exchange for whatever he himself has to offer in return. Here the attorney, Bradner, on proper request, offered and gave his services in return for a stipulated payment to be made by defendants; each party was to obtain a benefit from the other. There is no contention that the contract was not understood or that it did not state correctly the terms the parties intended. Defendants received the full benefit of their bargain, and it was only when their affairs had prospered and Bradner began to be compensated "more adequately"—as had been expressly contemplated when the contract was executed—that they sought to escape performance of their own obligations.

Under the circumstances which have been related, and in the total absence of a showing that the defendants did not freely and knowingly enter into the contract or that Bradner did not perform the services contemplated, I think the presumption of section 2235 should be held inapplicable, and the judgment reversed.

SHENK, Acting C. J., concurs.

43 Cal.2d 157

PARR-RICHMOND INDUSTRIAL CORP.
v.
BOYD et al.

Nos. 18625, 18626.

Supreme Court of California.
In Bank.
June 29, 1954.

Actions, consolidated for trial, to recover taxes paid by plaintiff under protest, brought on theory that tax was illegal because it was levied against a greater property interest than plaintiff allegedly owned, that is, the whole ownership interest rather than the limited possessory interest for which plaintiff admitted liability. The Superior Court, Contra Costa County, Thomas F. Keating, J., assigned by Chairman of the Judicial Council, entered judgments for plaintiff, and defendants appealed. The Supreme Court, Spence, J., held, inter alia, that evidence sustained finding that at no time prior to or during the tax year was plaintiff the legal or equitable owner of the property in question, and that the challenged assessments could not be supported under doctrine of equitable conversion.

Judgments affirmed.

Carter, J., dissented.

Prior opinion, 262 P.2d 573.

1. Taxation 🔑493(5)

Where owner of property rights claims that tax assessment overvalued what he owned, he may not attack determination of board of equalization in court unless he has fully and fairly presented question of value of his property to board, but where taxpayer attacks assessment as void because he does not own the property on which tax demand was made, there is no question of valuation which must be presented first to board for correction as a condition for judicial relief. Revenue and Taxation Code, § 1607.

2. Taxation 🔑493(5)

Where taxpayer's theory of relief was that tax was illegal because it was levied against a greater property interest than taxpayer allegedly owned, that is, the whole ownership interest and not the limited possessory interest for which taxpayer admitted liability, taxpayer was not required to make prior application to board of equalization before recourse to court. Revenue and Taxation Code, § 1607.

3. Conversion 🔑1

The doctrine of "equitable conversion" is a mere fiction resting upon the principle that equity regards things which are directed to be done as having actually been performed, where nothing has intervened which ought to prevent such performance.

See publication Words and Phrases, for other judicial constructions and definitions of "Equitable Conversion".

4. Conversion 🔑11
Vendor and Purchaser 🔑54

An unconditional contract for the sale of land, of which specific performance would be decreed, grants purchaser equitable title, and equity considers him the owner, but there is no equitable conversion where the contracting parties demonstrate an intention to the contrary.

5. Taxation 🔑543(7)

In action by taxpayer to recover taxes paid under protest, brought on theory that the tax was illegal because it was levied against a greater property interest than taxpayer allegedly owned, that is, the whole ownership interest rather than the limited possessory interest for which taxpayer admitted liability, evidence sustained finding that at no time prior to or during the tax year was taxpayer the legal or equitable owner of the property taxed. Revenue and Taxation Code, §§ 104, 107.

6. Taxation 🔑80

Where purchaser, during escrow period, was not in position of conventional purchaser but was waiting to see if it was to get any title, situation was not such as exists between ordinary vendor and purchaser, in which purchaser holding equitable title is taxable as if vested with full legal title.

7. Taxation 🔑80

As between vendor and purchaser, real estate is ordinarily taxable to the vendor where the sale is conditional, and fact that contract of sale may have specifically provided that purchaser should pay the taxes is immaterial.

8. Taxation 🔑80

For doctrine of equitable conversion to apply in measure of tax liability, there must be a contract for sale and purchase of the land which is specifically enforceable at time rights of parties are fixed, and if vendor does not have at that time the title which he contracts to convey, there is no conversion.

9. Taxation 🔑80

Where vendor, at time of execution of contract, did not have the merchantable title which it was to convey, although it was bound to exercise reasonable diligence in clearing the title, vendor had no right to specific performance at time of contract's execution, and hence there was no equitable conversion which would support tax assessments against purchaser during period intervening between execution of contract and delivery of deed.

10. Taxation ⚷543(8)

In action by taxpayer to recover taxes paid under protest, brought on theory that tax was illegal because it was levied against a greater property interest than taxpayer allegedly owned, that is, the whole ownership interest rather than the limited possessory interest for which taxpayer admitted liability, recovery was properly limited to difference between tax paid and that which properly should have been paid. Revenue and Taxation Code, § 107.

11. Taxation ⚷543(9)

In action by taxpayer to recover taxes paid under protest, brought on theory that tax was illegal because it was levied against a greater property interest than taxpayer allegedly owned, that is, the whole ownership interest rather than the limited possessory interest for which taxpayer admitted liability, taxing authorities, who made no objection in trial court as to mathematical accuracy of court's computation of tax due if taxpayer had only a possessory interest in the property, but instead adhered to correctness of challenged tax assessments, were in no position on appeal to challenge correctness of trial court's finding of what was actually due from plaintiff based on approved valuation formula for possessory interests. Revenue and Taxation Code, § 107.

◆

Thomas M. Carlson, City Atty., Frederick Bold, Jr., Sp. Asst. to City Atty., Richmond, Francis W. Collins, Dist. Atty. of Contra Costa County, and Charles L. Hemmings, Deputy Dist. Atty., Martinez, for appellants.

Bronson, Bronson & McKinnon and John F. Ward, San Francisco, for respondent.

SPENCE, Justice.

Plaintiff brought two actions to recover taxes paid under protest on certain property in Richmond for the tax years 1948–1949 and 1949–1950. Revenue & Taxation Code, §§ 5136–5143. The cases were consolidated for trial, and it was stipulated that evidence would be produced only in the first case and that the judgment therein would govern the second case. The tax assessments by the county of Contra Costa and the city of Richmond followed the same pattern, the levy in each instance resting on the premise that title to the real property was vested in plaintiff on the first Monday in March of both years. Plaintiff, on the other hand, has consistently claimed that all it had on the respective tax dates was, as the trial court found, "a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession"; that the assessment should have been made only against such possessory right, and not as if it held the whole beneficial interest. In line with plaintiff's admitted tax liability on its possessory interest in the property, respective judgments were entered against the county and the city reflecting the offset between the taxes paid by plaintiff under protest and the amounts assessable because of plaintiff's limited possessory right. From such judgments defendants appeal.

As grounds for reversal, defendants argue these points: (1) plaintiff's failure to seek relief from the board of equalization on the alleged improper assessments as preliminary to judicial review; (2) plaintiff's possession of equitable title in the property on the respective dates as justifying its liability for the full fee tax assessments; and (3) plaintiff's adjusted tax liability as a matter referable to the taxing authorities for determination in new assessment proceedings rather than subject to computation by the trial court in effecting an equitable offset. In the light of the record and applicable legal principles, defendants' objections are not well taken.

The property involved is known as Parcels 2 and 5 of the Richmond Shipyards, consisting of about 115 acres improved with various buildings, wharves, shipways, and other structures used as part of a government shipyard during World War II. At the end of the war this property was placed under the control of the War Assets Administration for disposal as surplus property, and that agency on August 15, 1947, listed it with other property for sale and invited bids. The invitation required the bidder to declare the purpose for which he intended to use the property and stated that title would be conveyed by quitclaim deed without warranty express or implied. It also provided that the successful bidder shall "assume responsibility for and agree to pay his share, prorated from * * * [the date of assumption of possession or the delivery of the formal instruments of conveyance], of all general and special real and personal property taxes which may have been or may be assessed thereon." It further stipulated that a minimum of 20% of the purchase price should constitute the down payment; that the successful bidder could not make any sale or lease of the property for three years after the "date of conveyance" without the government's consent; and that the invitation and bid under it should constitute the agreement between the parties, to be succeeded only by the formal instruments of transfer.

On August 15, 1947, Parr-Richmond Terminal Corporation, an affiliate of plaintiff, submitted conditional bids for both parcels, separately stating the amounts offered for the realty and the personal property thereon. Inasmuch as the tax issue here relates wholly to the realty ownership, only the bids relating thereto need be noted—$320,000 for Parcel 2 and $125,000 for Parcel 5. One condition was that each parcel should be treated "as a unit as to lands and buildings and personal property." Another condition (Rider D) specified: "This bid is also subject to the ability of bidder to procure a policy of title insurance in its name or in the name of its nominee * * as of the date of the completion of this transaction, in the event of acceptance hereof, showing good and merchantable title to said property free and clear of any lien or encumbrance which would substantially affect its value." Before bidding Parr had learned from a preliminary title report that the title was not then merchantable. It was also stipulated that the three-year restriction on sale or lease of the property, as stated in the invitation to bid, supra, would have to be waived or removed (Rider A).

The bids were rejected, not because of the conditions attached thereto but solely because the prices offered were not acceptable. The government made a counterproposal of higher amounts, and after further negotiations the parties agreed on $500,000 for both parcels. The government's approval of the original bids, amended only as to the stated price, was expressed in its letter of September 23, 1947, and Parr indicated acceptance by signing a copy of the latter.

On January 21, 1948, the government's formal acceptance was communicated to Parr in a so-called "letter of intent," stating that "under date of September 23, 1947, the War Assets Administration approved the sale to the Parr-Richmond Industrial Corporation of Parcels Nos. 2 and 5 * * * together with certain buildings, improvements, and personal property * * * in accordance with the terms and conditions of your offer of August 15, 1947, as amended * * *. The quitclaim deed as prepared will convey title as of 12:01 a. m. September 23, 1947." This letter gave "consent to the Parr-Richmond Industrial Corporation and/or the Parr-Richmond Terminal Company, as the case may be, to enter upon and use the land, buildings, improvements, and personal property, the title to which is being conveyed to you as of 12:01 a. m. September 23, 1947, for its account * * *" and also "the immediate right to resell or lease, subject to the terms and conditions as specified in your offer of August 15, 1947, any or all of the land, buildings, improvements and/or personal property located on Parcels 2 and 5 without prior authorization from the War Assets Administration." The letter also provided for the escrowing of the down payment: "Your Company, in accepting this Letter of Intent, agrees, prior to entering into possession, to deposit with the * * * Title Company * * * the agreed upon initial payment of * * * $122,412.42 * * *" On January 30, 1948, Parr delivered a check in the stated amount to the title company, accompanied by a letter of instructions reading in part as follows: "* * * whichever corporation does take title, you are authorized to deliver to the War Assets Administration the sum of * * * $122,412.42 * * * upon their depositing with you a Quitclaim Deed duly executed by said War Assets Administration, which will vest merchantable title in favor of either Parr-Richmond Industrial Corporation or Parr-Richmond Terminal Company as such determination shall be made * * *. Upon receipt of this letter and the check enclosed herewith * * * will you please acknowledge receipt of same upon the copy enclosed herewith so that we may in turn hand it to the War Assets Administration as evidence of the fact that this money has been deposited with you in the above-numbered escrows."

On January 31, 1948, Parr acknowledged and accepted the "letter of intent." During that same month Parr had taken possession of both parcels in accord with the letter's authorization, and on the first Monday in March of both 1948 and 1949 held possession thereunder. It was not until June 1, 1949, that title passed pursuant to two quitclaim deeds executed as of that date, acknowledged and delivered by "the United States of America, acting by and through War Assets Administration," to plaintiff as grantee—one deed for each parcel. Each deed concluded with the statement "This Quitclaim Deed, executed this 1st day of June, 1949, shall be considered effective as of the day and year first hereinabove written," which was June 1, 1949—the date the government actually conveyed title, not September 23, 1947, as recited in the "letter of intent." The title company thereupon delivered to the government two deeds of trust dated and acknowledged on June 1, 1949—one for each parcel—securing the balance of the purchase price. Thus the down payment was in escrow from January 30, 1948, to June 1, 1949—sixteen months.

As above noted, the government's invitation to bid required each bidder to specify the purposes for which he intended to use the property. The Parr bids stated that its purpose was development of the property as an industrial area, bringing in new industries by long-term leases and by sale. These declarations, plus Parr's insistence on the removal of the three-year restrictions against sales and leases, make it clear that a merchantable title was an indispensable requisite of Parr's intended purchase. To that point the trial court found that "plaintiff's bid contemplated the long-term lease or sale of part or all of said realty to industrial firms desiring to locate in the city of Richmond, and * * * that purpose could not be achieved unless and until plaintiff could obtain a merchantable title to said realty; Rider D of plaintiff's bid recited the express condition of merchantable title, and went to the essence of plaintiff's conditional bid and the conditional agreement subsequently entered into between the U.S.A. and plaintiff."

The trial court found also that under the "letter of intent" Parr agreed to purchase the property if, as and when the government could convey a good and merchantable title, and that the government agreed on its part to convey such title if, as and when it could do so; further, that during all of the year 1948 the "contemplated sale or conveyance was wholly executory, and at all of said times there were clouds, encumbrances and adverse claims upon the title to said realty which adversely affected said title to a substantial degree, and which rendered said title unmerchantable." The trial court further found that on the first Monday in March, 1948, there was uncertainty as to whether the government "would be able to convey * * * [a] good and merchantable title" and if so, when, and that on that date Parr's "only interest, right or title" to the property "was a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession, the reasonable duration of" which was found to be a "period of one year."

The trial court further found that "As of the first Monday of March, 1948, for the tax year 1948–1949, defendant county * * * assessed all of said realty against plaintiff in the same manner and with the same effect as though plaintiff were the owner in fee of said realty with full beneficial ownership and use thereof. Said realty was * * * assessed * * * [at] $229,090.00 for real estate, and $335,000.00 for improvements, together with an assessment of $25,500 for certain personal property then situated on said realty; said assessment * * * was * * * charged to plaintiff upon the assessment roll of the county as an assessment against real estate, improvements, and personal property, and not as an assessment against plaintiff's said possessory interest. In said assessment defendant county * * * did not segregate the plaintiff's qualified and contingent possessory interest in said realty from the fee ownership of the United States, and did not assess said possessory interest to plaintiff, but instead erroneously assessed the entire fee ownership of said realty to plaintiff; a proper segregation of plaintiff's qualified and contingent possessory interest in said realty and a proper assessment of said interest * * * would have resulted in an assessed value * * * of $71,581.00 * * *." The trial court also found and concluded that the assessments when made by both county and city were illegal and void for the reason that the United States was the owner in fee of the property taxed against Parr, and that Parr's possessory interest had not been assessed at all.

The trial court concluded that under the terms of the conditional agreement "plaintiff was not obligated to purchase said realty unless and until said condition [good and merchantable title] was met, and unless said condition was met within a reasonable time plaintiff was not obligated to purchase said realty, and the U.S.A. was not obligated to sell said realty in any event, and said conditional agreement would terminate; said conditional agreement did not effect an equitable conversion as to said realty on the first Monday in March, 1948, or at any time during the tax year 1948–1949, and at no time prior to or during said tax year was plaintiff the legal or equitable owner of said realty by virtue of said conditional agreement or otherwise."

The trial court deducted the taxes which it found Parr should have paid on its possessory interest from the amount paid under protest and entered judgment for the difference against the respective county and city defendants. Defendants attack this judgment on both procedural and substantive grounds.

Defendants first claim that plaintiff's protest of tax assessment raises a question of valuation which should have been presented to the board of equalization before a judicial review was sought. Revenue & Taxation Code, § 1607. Plaintiff alleged that in July of each of the two tax years it filed "a duly verified petition for cancellation of erroneous and illegal assessments and for reduction in assessments" with the respective board of supervisors and the city council, each sitting as a board of equalization, and that the petitions were denied. Copies attached to the complaint show that the ground of plaintiff's protest was not a claim of overvaluation of an owner's property calling for "A reduction in an assessment on the local roll", Revenue & Taxation Code, § 1607, but rather was a claim of illegality against the assessments *in toto* as based on an erroneous ownership—the fee interest in Parr, not its revocable possessory interest in the property, a separate taxable item which was not recognized and assessed at all. During the trial plaintiff stipulated that the allegations of "demand and refusal" of relief by the respective boards of equalization were "set up as a part of the background" but "are in no way essential to plaintiff's cause of action and * * * may be stricken as surplusage."

[1, 2] Plaintiff is correct in its distinction as to the necessity for recourse to the board of equalization prior to resort to the court. Where the owner of property rights claims that the tax assessment overvalued what he owned, he may not attack the determination of a board of equalization in court unless he has fully and fairly presented the question of the value of his property to the board. Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 168–169, 121 P. 384, 9 A.L.R. 1277; Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235, 241, 285 P.

896; Eastern-Columbia, Inc. v. County of Los Angeles, 61 Cal.App.2d 734, 745, 143 P.2d 992. But where the taxpayer attacks the assessment as void because he does not own the property on which the tax demand was made, there is no question of valuation which must be presented first to the board of equalization for correction as a condition for judicial relief. 24 Cal.Jur. § 283, p. 313; Brenner v. City of Los Angeles, 160 Cal. 72, 76, 116 P. 397. As was said in Associated Oil Co. v. County of Orange, 4 Cal.App.2d 5 at page 9, 40 P.2d 887 at page 889: "While in one sense it is true that almost any mistake which results in an excessive assessment amounts to an overvaluation of the property of a taxpayer, we think there is a real and distinct difference between those cases in which it may properly be said that the error is one of overvaluation and those cases in which the overvaluation is a mere incidental result of an erroneous assessment of property which should not have been assessed." So here plaintiff's theory of relief—from an illegal tax because it was levied against a greater property interest than it allegedly owned, the whole ownership interest, and not against its limited possessory interest for which plaintiff admitted liability—did not require its prior application to the board of equalization before recourse to the court. See United States v. Allegheny County, 322 U.S. 174, 187, 64 S.Ct. 908, 88 L.Ed. 1209; Gottstein v. Adams, 202 Cal. 581, 584–585, 262 P. 314; City of Los Angeles v. Board of Supervisors, 108 Cal.App. 655, 664–665, 292 P. 539.

[3, 4] There now remains the principal issue of whether the challenged tax assessments may be supported under the doctrine of equitable conversion. Defendants contend that while the government may have held legal title to the property, plaintiff held equitable title under an executory contract of sale, an interest assessable on the basis of the full value as "real property", Revenue & Taxation Code, § 104, rather than a mere segregable "possessory interest", Revenue & Taxation Code, § 107. The doctrine of equitable conversion "is a mere fiction resting upon the principle that equity regards things which are directed to be done as having actually been performed where nothing has intervened which ought to prevent such a performance." 19 Am. Jur. § 2, p. 2. An unconditional contract for the sale of land, of which specific performance would be decreed, grants the purchaser equitable title, and equity considers him the owner. 1 Tiffany on Real Property [3rd ed.], § 307, p. 528; 2 Pomeroy's Equity Jurisprudence [5th ed.], § 372, p. 33; In re Estate of Dwyer, 159 Cal. 664, 675, 115 P. 235. But there is no equitable conversion where the contracting parties demonstrate an intention to the contrary. 19 Am.Jur. § 4, p. 4; In re Estate of Pforr, 144 Cal. 121, 128, 77 P. 825; In re Estate of Gracey, 200 Cal. 482, 488–489, 253 P. 921; McCaughna v. Bilhorn, 10 Cal.App.2d 674, 678–679, 52 P.2d 1025.

[5] The trial court resolved the question of the vesting of equitable title by holding that "at no time prior to or during said tax year was plaintiff the legal or equitable owner * * *." The record clearly supports that conclusion: (a) Parr knew before it bid that a variety of matters—including uncompleted proceedings in eminent domain—rendered the title unmerchantable; (b) the government accepted the conditional bid which called for a merchantable title; (c) the escrow provisions in the "letter of intent" were tacit admissions by the government that it needed time to make the title good; and (d) the sixteen-month delay before execution of the quitclaim deeds accentuated the time consideration required for the removal of all clouds and encumbrances on the title. Defendants argue that the government's letter of September 23, 1947, which was accepted by Parr in conclusion of the parties' negotiations as to the price to be paid for the property, constituted their contract. That letter made no reference to Parr's offer and its conditions as to merchantable title. However, it was followed by the government's formal acceptance in the "letter of intent," and the trial court properly concluded that this latter document, later in point of time—January 21, 1948—and incorporating the government's invita-

tion for bids along with the terms of Parr's conditional bids, constituted the conditional agreement between the parties. The "letter of intent" contained the escrow provisions above quoted, which thereby became part of the parties' contract. Any doubt as to the parties' intentions was settled by the recital in both quitclaim deeds that they became effective as of their date, which was June 1, 1949. As so executed, the deeds themselves superseded and nullified the provisions in the earlier writing to the effect that title would be conveyed "as of 12:01 a. m. September 23, 1947," and made it clear that title vested on June 1, 1949, and not before.

[6] Defendants rely on S. R. A., Inc. v. State of Minnesota, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851, but the facts found by the trial court and above discussed clearly distinguish the present situation. The two cases have one point in common in that the property in both instances was surplus real estate, the legal title to which was vested in the United States. However, there are several points of difference which are material: (1) In the S. R. A. case the contract was the normal vendor-vendee contract, where the government retained legal title only as security for the balance of the purchase price and "in substance it [was] in the position of a mortgagee." 327 U.S. at page 565, 66 S.Ct. at page 754. Here the vendor-vendee contract, as modified in writing by the escrow instructions, provided for the transfer of title only if and when the government could convey a merchantable title, pending which uncertain event the down payment itself was held in escrow. The government was retaining title not for security but during the time allowed for its agreed performance, and then appropriate deeds were to be executed and notes, secured by deeds of trust, were to be and were given for the balance of the purchase price. (2) Here the whole transaction centered on acquisition of a merchantable title, a matter not at all involved in the S. R. A. case, where "[a]ll obligations due under the contract had been met." 327 U.S. at page 560, 66 S.Ct. at page 751. (3) In the S. R. A. case the buyer was "in possession * * * under a contract of sale with uncompleted conditions for execution and delivery of the muniments of title" when the purchase price was paid in full, 327 U.S. at page 561, 66 S.Ct. at page 752, while here the buyer occupied the property under what the trial court found to be "a gratuitous and revocable right to possession" granted by the "letter of intent," an arrangement covering the interval for clearing a good and merchantable title, at which time the muniments of title were to be delivered out of escrow and deeds of trust given back. (4) During that interval Parr did not occupy the status of a normal vendee as in the S. R. A. case, where the vendee had made the down payment and nothing remained to be done by the parties except payment of the balance of the purchase price and execution of the formal conveyance. Here the fact that Parr was not in the position of the conventional vendee during the sixteen-month escrow period but was waiting to see if it was to get *any* title, alone serves to distinguish this case from the ordinary vendor-vendee situation where, as plaintiff agrees, the vendee holding equitable title is taxable as if vested with full legal title. Accordingly, in the S. R. A. case the state of Minnesota had the power to tax the property within its borders, though the legal title remained in the United States but simply for security purposes under the unconditional contract between the parties.

[7-9] As between the vendor and vendee, real estate is ordinarily taxable to the vendor where the sale is conditional. (2 Cooley on Taxation [4th ed.], § 603, p. 1274.) The fact that the contract of sale may have specifically provided that the purchaser should pay the taxes is immaterial; the vendor remains liable where the sale is not absolute, for property must be assessed to the owner. Robertson v. Puffer Mfg. Co., 112 Miss. 890, 73 So. 804, 805. For the doctrine of equitable conversion to apply in measure of tax liability, there must be "a contract for the sale and purchase of the land which is specifically enforceable at the time the rights of the parties are fixed." McClintock on Equity, § 102, p. 182; see, also, In re Estate of Dwyer, supra, 159 Cal. 664, 675, 115 P.

235. Thus, "[i]f the vendor did not have at that time the title which he contracted to convey, there is no conversion." McClintock on Equity, § 106, pp. 182–183; see, also, Amundson v. Severson, 41 S.D. 377, 170 N.W. 633, 634. Here the contract bound Parr to purchase the property if the government within a reasonable time conveyed a merchantable title. At the time of the contract's execution the government did not have such a title. It was bound, however, to exercise reasonable diligence in clearing the title. But not then having that which it contracted to convey, the government had no right to specific performance at that time. Therefore there was no equitable conversion to support the tax assessments against plaintiff, and its protest thereof must be sustained.

[10] Defendants finally contend that the trial court erred in itself determining plaintiff's tax liability rather than remanding the matter to the tax authorities for appropriate assessment proceedings. Plaintiff has conceded throughout this litigation that its possessory interest was taxable, Revenue & Taxation Code, § 107, and therefore that it would be "inequitable" for it "to seek to recover taxes which in equity it should pay." In such cases the rule applies that recovery should be limited to the difference between the tax paid and that which properly should have been paid, De Fremery v. Austin, 53 Cal. 380, 382–383, and that rule was followed here.

[11] In determining the tax on plaintiff's possessory interest the trial court followed the formula similarly used in Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879, which was a valuation method theretofore judicially approved in cases presenting analogous considerations affecting possessory rights. Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 478–479, 14 P.2d 512, 84 A.L.R. 1304; Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, 244–245, 285 P. 896. The tax as so computed was then deducted from the amount of tax claimed by defendants, and the judgments herein were entered for the difference. In the trial court defendants made no objection to the mathematical accuracy of the computation of the formula's application if Parr had only a possessory interest in the property, but they adhered to the correctness of the challenged tax assessments based on plaintiff's equitable title to the property for the respective tax years. The trial court had authority here to so proceed in effecting an equitable adjustment on the tax assessments and to enter judgments accordingly. Revenue & Taxation Code, § 5141. Under these circumstances, defendants are in no position now to challenge the correctness of the trial court's finding of what was actually due from plaintiff based on the approved valuation formula for possessory interests.

The judgments are affirmed.

SHENK, Acting C. J., EDMONDS, TRAYNOR and SCHAUER, JJ., and PEEK, Justice pro tem., concur.

CARTER, Justice.

I dissent.

It appears that the plaintiff taxpayer should have first pursued his remedy before the board of supervisors sitting as a local board of equalization before court action and in such action the court is limited to a review of the evidence before the board.

The factual situation should first be clarified. The majority opinion indicates that this is a case where taxes were assessed against property plaintiff did not own. That is not the case. Taxes on real property are not assessed against a person. They are assessed against the property. Property may be assessed to an unknown owner. Revenue & Taxation Code, § 611. "A mistake in the name of the owner or supposed owner of real estate does not render invalid an assessment or any tax sale." Revenue & Taxation Code, § 613. In the case at bar while the entire interest in the property was assessed to plaintiff as owner it was assessed against the property and it is conceded that plaintiff has an interest in the property albeit it is only a possessory interest. The only question is, therefore, whether too great a value was placed on that interest. It is not a case of assessing a tax on exempt property or property in which plaintiff had no interest. He owned a possessory interest and that was assessed and is taxable. In Fall v. Mayor, etc., of City of Marysville, 19 Cal. 391, the tax was against a bridge, a reversionary interest in which was owned by the city, but which the taxpayer had the right to use. The court said in 19 Cal. at page 393: "There is no doubt, therefore, that the plaintiff has a taxable estate in the property, and so far as his right to maintain this suit is concerned, *it is immaterial that the property has been assessed at its full value. The objection on that ground does not go to the validity of the tax, but to its amount,* and an application for its reduction was the only remedy. The property was not taxable beyond his interest in it, and in legal effect, the tax upon it amounted to nothing more than a tax upon his interest." (Emphasis added.) In S. & G. Gump Co. v. City & County of San Francisco, 18 Cal.2d 129, 114 P.2d 346, 135 A.L.R. 595, it was held that where property was assessed to a bailee as owner when he merely had a possessory right, he could not recover taxes paid under protest where he had not applied to the local board of equalization for a modification of the assessment and show who was the owner of the property. The court cited for its holding, Title Guaranty & Trust Co. v. Los Angeles County, 3 Cal.App. 619, 86 P. 844, where property was assessed to an agent who held possession for the owner and the court said, 3 Cal.App. at page 621, 86 P. at page 845: "Nor are we prepared to hold that, under the circumstances, the failure of the assessor to designate the plaintiff's principals or beneficiaries was sufficient to invalidate the assessment. It had the opportunity of correcting the defect, if in any way harmful to it, by application to the assessor while the assessment roll was still under his control, or afterwards by application to the board of equalization, which had power to correct the plaintiff's assessment, either by adding the names of the parties ultimately liable or by transferring the whole amount taxed to the assessments of the several parties interested in the fund." See, also, S. W. Straus & Co. v. Los Angeles County, 128 Cal.App. 386, 17 P.2d 757.

The general rule with regard to the necessity for first applying to the board of supervisors as a board of equalization is stated in Security-First Nat. Bank v. County of Los Angeles, 35 Cal.2d 319, 320, 217 P.2d 946, 947: "It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error. * * * An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. * * * But resort to the board of equalization is not rendered unnecessary by the fact that, as in the present case, the error is one in the classification of property * * * and the tax is assailed as being discriminatory in violation of constitutional mandates * * *.

"Plaintiff contends, however, that its bank vault doors and counterlines were 'exempt' from taxation under constitutional principles, and that consequently prior application to the board of equalization was not a prerequisite to the maintenance of this action. The contention cannot be sustained. The vault doors and counterlines admittedly were located within the county, city and district in which they were assessed. Clearly, they were property of a nature taxable by defendants. * * * The fact that similar property of others had been systematically misclassified as personalty and therefore relieved of the burden of special assessment district taxes would ordinarily require that plaintiff also be excused from paying such taxes. * * * It does not follow, however, that plaintiff's vault doors and counterlines were tax exempt as claimed. A somewhat similar problem was presented in Los Angeles Shipbuilding & Dry Dock Corp. v. Los Angeles County, 22 Cal.App.2d 418, 71 P.2d 282. That case involved the assessment of a leasehold interest in tidelands owned by the city. *Plaintiff contended that since the leasehold had no taxable value, the tax was one on nonexistent* *property and resort to the board of equalization was not necessary.* In rejecting that contention, the court there said, 22 Cal. App.2d at pages 423–424, 71 P.2d at page 285: 'But it does not follow that if the property belongs to a class which is subject to taxation, it is nonexistent property because under the peculiar circumstances existing it is without taxable value. * * *'" (Emphasis added.) The same rule is stated in Bank of America Nat. Trust & Savings Ass'n v. Mundo, 37 Cal. 2d 1, 229 P.2d 345. Similarly in the instant case the property was taxable. At least plaintiff's conceded possessory interest was taxable, and the question is not whether it was exempt property or outside the taxing jurisdiction.

There is no tenable distinction between this case and the rules set forth in the Security Bank case. The cases relied upon by the majority do not support the statement that resort need not be had to the local board of equalization where the person who is named as owner of the property assessed is not the owner. In Brenner v. City of Los Angeles, 160 Cal. 72, 116 P. 397, the claim was that all of the property against which the assessment was made was exempt from taxation. In Associated Oil Co. v. County of Orange, 4 Cal.App.2d 5, 40 P.2d 887, the assessment was on nonexistent property and the holding is doubtful in view of the Security Bank case. In Gottstein v. Adams, 202 Cal. 581, 262 P. 314, and City of Los Angeles v. Board of Supervisors, 108 Cal.App. 655, 292 P. 539, there was no question of exhausting the administrative remedy.

In any event it would appear that the matter should have been remanded to the local board of equalization to ascertain the value of the possessory interest and reduce the assessment accordingly, because it is that board, rather than a court, which has jurisdiction over valuation questions. Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746; La Grange Hydraulic Gold Mining Co. v. Carter, 142 Cal. 560, 76 P. 241; Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277.

I would therefore reverse the judgment.

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43 Cal.2d 92

PALMQUIST v. MERCER et al.

L. A. 22604.

Supreme Court of California.
In Bank.
June 25, 1954.

Equestrian brought action against operator of riding academy, from whom equestrian had rented a horse, against oil company, which maintained a trestle across realty of flood control district pursuant to permission of district, and against oil company which maintained pipe on trestle, to recover for injuries sustained by equestrian when horse ran away and under trestle and equestrian struck his head on understructure of trestle. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment adverse to equestrian, and equestrian appealed. The Supreme Court, Spence, J., held that question whether operator of riding academy was negligent was for jury, but that evidence was insufficient to sustain equestrian's claim against oil companies.

Judgment reversed in part and affirmed in part.

Prior opinion 263 P.2d 341.

1. Trial ⚷139(1)

Motion for nonsuit may properly be granted when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Trial ⚷142

Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal, or trial court to set it aside as a matter of law, trial court is not justified in taking case from jury.

3. Contracts ⚷93(2)

Generally, when a person with capacity of reading and understanding an instrument signs it, he is, in absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding.

4. Release ⚷58(3)

In action by equestrian against operator of riding academy to recover for injuries sustained when horse rented at academy ran away, question of validity of release signed by equestrian when he rented the horse should have been submitted to jury as a factual issue to be determined in light of circumstances surrounding execution of release.

5. Livery Stable Keepers ⚷11

In absence of any notice to the contrary, there is an implied warranty to rider in contract for rental of horse for riding purposes that rider knew or had exercised reasonable care to ascertain the habits of the horse and that the horse was safe and suitable for the purpose for which the renter rented the horse.

6. Livery Stable Keepers ⚷11

A stablekeeper has the duty to inform himself of the habits and disposition of horses which he keeps in his stable for hire, and, if he knows that they are dangerous or unsuitable, or by exercise of reasonable care, could ascertain the fact, he is liable for any injuries sustained by a customer because of vicious propensities of horses.

7. Livery Stable Keepers ⚷11

In action by equestrian against operator of riding academy to recover for injuries sustained when horse rented at academy ran away, whether horse was unsafe or unsuitable for the purpose for which it was hired was for jury.

8. Livery Stable Keepers ⚷11

In action by equestrian against operator of riding academy to recover for injuries sustained when horse rented at academy ran away, whether equestrian was contributorily negligent was for jury.

9. Livery Stable Keepers ⚷11

In action by equestrian against operator of riding academy to recover for injuries sustained when horse rented at academy ran away, question whether equestrian assumed risk was for jury.

10. Livery Stable Keepers ⚷11

In action by equestrian against operator of riding academy to recover for injuries sustained when horse rented at academy ran away, question whether there was fraud or misrepresentation on part of operator of academy in causing equestrian to sign release absolving academy from all liability when operator knew of the equestrian's inexperience and dangerous propensities of horse was for jury. Civ.Code, §§ 1572, 1574, 1668.

11. Negligence ⚷134(1)

In action by equestrian against oil company which maintained a trestle across realty of flood control district pursuant to permission of district and oil company which maintained pipe on trestle, to recover for injuries sustained by equestrian when his horse ran away and under trestle and equestrian struck his head on understructure of trestle, evidence was insufficient to establish negligence on part of oil companies.

12. Nuisance ⚷61

Trestle maintained across realty of flood control district by oil company pursuant to permission of district was not a "public nuisance" within meaning of statutes dealing with nuisances on public streets or highways. Civ.Code, §§ 3479, 3480.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Nuisance".

13. Negligence ⚷32(1)

Oil company, which maintained a trestle across realty of flood control district pursuant to permission of district owed equestrian who rode under the trestle only the duty of refraining from wanton or wilful injury.

14. Negligence ⚷32(2.2), 33(2)

Fact that equestrian, who had rented horse from riding academy, entered on realty of flood control district at suggestion of riding academy's attendant would not alter equestrian's status as a trespasser or licensee or change duty of oil company, which maintained a trestle across the realty pursuant to permission of the district, only to refrain from wanton or wilful injury.

15. Negligence ⚿32(1)

Equestrian who rode on realty of flood control district where oil company had constructed a trestle pursuant to permission of the district was obliged to take the premises as he found them in so far as any alleged defective condition thereon might exist.

Fred N. Howser, Arcadia, Russell H. Pray and Eric A. Rose, Long Beach, for appellant.

Parker, Stanbury, Reese & McGee, Richard E. Reese, Los Angeles, Ball, Hunt & Hart, Clarence S. Hunt, Long Beach, Moss, Lyon & Dunn, Sidney A. Moss, Henry F. Walker, Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff sought damages for personal injuries sustained by him while riding a horse which he had rented from a riding academy. At the close of plaintiff's case, the court granted defendants' motions for nonsuit, and plaintiff appeals from the judgment subsequently entered. Upon consideration of the record, we have concluded that plaintiff's evidence was sufficient to require submission of the case to the jury as to defendant Mercer, who was the owner of the riding academy, but that the nonsuit was properly granted as to the other defendants.

[1, 2] A motion for nonsuit may properly be granted "* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191, see also, Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 229, 209 P.2d 1; Golceff v. Sugarman, 36 Cal.2d 152, 153, 222 P.2d 665. "Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, 769; see, also, Raber v. Tumin, 36 Cal.2d 654, 656, 226 P.2d 574.

On October 10, 1950, plaintiff and his wife visited defendant Mercer's riding academy at 223rd Street and Golden Avenue in the city of Long Beach. Plaintiff told the attendant that they would like to rent two horses and asked for "a couple of old nags." He explained that he had not been on a horse in six or seven years, that his companion had never previously ridden at any time, and that they would like "tame and gentle horses." The attendant said that he would "fix them up" and asked plaintiff to come into the office. Plaintiff there signed the register pad, as requested, and then followed the attendant out of the room. He was in the office approximately fifteen seconds. He did not read the paper that he signed, a printed form which was introduced at the trial as Exhibit D and which contained a general release of the academy from any liability. Plaintiff was not requested to read the form nor were its provisions called to his attention, but neither was he prevented from reading it.

After again discussing plaintiff's need for "gentle" horses, the attendant chose a horse named "Doc" for plaintiff and another horse for plaintiff's wife. At the time plaintiff mounted "Doc," the horse was feeding at a trough. When plaintiff tried to get the horse to move away, it refused to respond to his reining, and it was necessary for the attendant to lead the horse from the trough. The attendant told plaintiff to go north on Golden Avenue, west on 223rd Street, and then north again under a pipe trestle. The horses proceeded out of the driveway and at Golden and 223rd Street, the horses, of their own accord, turned east. After going some thirty feet, plaintiff and his wife succeeded in turning the horses west. They continued a short distance, when the horses, again of their own accord, turned into a stable, walked to a water trough, began drinking, and for a time could not be guided away as plaintiff pulled on the left rein. Finally, the horses, plaintiff's mount in the lead, left the trough of their own volition and retraced the way to the riding academy. Plaintiff told the attendant that they were having trouble managing their horses. Upon reassuring them that "there was nothing wrong with the horses," the attendant gave a demonstration of how to direct the horses by use of the reins. He then accompanied them back to the intersection of Golden and 223rd Street, and then west on 223rd Street until they were opposite a pipe line trestle located on the north side of the street. There was a road going west under the trestle and then making a bend and proceeding in a northerly direction. The attendant told them to bend over going under the trestle and then to ride as far as they liked.

The trestle traverses the Los Angeles River in an east-west direction and carries oil pipe lines of defendants Union Oil Company of California and Tidewater Associated Oil Company. It was built and maintained with permission from the Los Angeles Flood Control District, on public property under the control of the district.

Plaintiff and his wife rode under the trestle along the indicated road, with plaintiff's horse in the lead. After proceeding about four hundred feet to the north at a walk, plaintiff turned his head to the left and called to his wife. As he made this movement, plaintiff's horse suddenly reeled about to the left and began racing back on the road toward the trestle, gaining speed as it went. Plaintiff attempted in vain to control or stop the horse by pulling back on the reins as hard as he could with both hands, but the horse kept going faster, passed plaintiff's wife and ran around the bend in the road towards the trestle. Immediately before the accident and at a distance of some eight to ten feet from the trestle, plaintiff noticed some underhanging beams stretching over the traveled area at a height of about six feet. Plaintiff was then lying flat in the saddle, with his head held down as far to the right as he could get it and his left shoulder pointing upward. His left shoulder and neck hit a stationary object such as the understructure of the pipe trestle, and plaintiff blacked out. When he regained consciousness he was lying immediately to the south of the pipe trestle, approximately five feet from the nearest substructure of the trestle and immediately south of the traveled area under the trestle. As a result of the accident, plaintiff is permanently paralyzed from the waist down.

Plaintiff, who was twenty-one years of age when the accident occurred, sought damages from defendants Mercer, owner of the riding academy and stables; the Union Oil Company, owner of the trestle; and Tidewater Associated Oil Company, which maintained a pipe line upon the trestle. Plaintiff's complaint rests on two theories of recovery: breach of warranty and negligence. The breach of warranty cause of action is directed only against defendant Mercer and is based on the alleged unsuitability of the horse rented to plaintiff in view of plaintiff's disclosed inexperience in riding. The negligence cause of action is directed against all three defendants: against Mercer in assigning to plaintiff a horse allegedly known to be both dangerous and unmanageable, and in telling plaintiff to ride along what appeared to be a public road whereon a hazardous condition existed; and against the two oil companies in maintaining a hazardous condition, the trestle, without providing reasonably effective safeguards. By separate answer defendant Mercer denied plaintiff's charges of breach of warranty and negligence, and he pleaded as an affirmative defense that plaintiff failed to exercise ordinary care in the control of his horse and in observing the route over which he was traveling. Upon stipulation of the parties, defendant Mercer filed an amendment to his answer setting up as a second affirmative defense the written release of the riding academy signed by plaintiff. The oil companies in their answers denied plaintiff's charges of negligence and pleaded that any injuries sustained by plaintiff were caused by his own lack of ordinary care. At the close of plaintiff's case, the respective defendants successfully moved for a nonsuit; Mercer on the ground that the release of the riding academy constituted a bar to plaintiff's recovery from him as a matter of law; and the two oil companies on the ground of insufficiency of the evidence to impose liability upon them.

[3] In support of the nonsuit exonerating him from liability, defendant Mercer relies on the release signed by plaintiff at the time of hiring the horses. It stated that plaintiff did "fully and forever release and discharge the Equestrotel Riding Academy and the operators thereof from any and all claims, demands, damages, rights of action or causes of action on account of either known or unknown, concealed or hidden, external or internal, personal, physical injuries, damages or causes, or otherwise, or damages or injuries of every kind and character resulting from or which may result from or during the rental time therein provided, either directly or indirectly * * *. I expressly rent the horse at my own risk and assume full responsibility for all matters resulting from or that may occur by reason thereof and agree to pay the rental charges on demand." Admittedly plaintiff was not prevented from reading the release, and whether he did or not would be immaterial. As stated in Smith v. Occidental etc., Steamship Co., 99 Cal. 462, at pages 470–471, 34 P. 84, 86: "The general rule is that, when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding". See also, Nichols v. Hitchcock Motor Co., 22 Cal.App.2d 151, 153 et seq., 70 P.2d 654.

[4] Plaintiff maintains that the question of validity of the release should have been submitted to the jury as a factual issue to be determined in the light of the circumstances surrounding its execution. His theory of recovery against Mercer sustains his position.

[5, 6] "[I]n a contract of hiring with one who rents horses for riding purposes, in the absence of any notice to the contrary there is contained an implied warranty to the rider that the renter of the animal knew or had exercised reasonable care to ascertain the habits of the horse and that the animal was safe and suitable for the purpose for which the keeper hired the horse to the renter thereof." Kersten v. Young, 52 Cal.App.2d 1, 6, 125 P.2d 501, 503. It is the duty of a stablekeeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire, and if he knows that they are dangerous or unsuitable, or by the exercise of reasonable care could ascertain the fact, he is liable for any injuries to a customer resulting from their vicious propensities. Dam v. Lake Aliso Riding School, 6 Cal.2d 395, 399–400, 57 P.2d 1315; O'Brien v. Gateway Stables, 104 Cal.App.2d 317, 320, 231 P.2d 524; Conn v. Hunsberger, 224 Pa. 154, 73 A. 324, 326, 25 L.R.A.,N.S., 372.

[7–9] Here there was evidence that Mercer knew that the horse "Doc," when rented to plaintiff, was not "tame and gentle" but was high-spirited, headstrong, difficult to control, had a "tough mouth," and was not suitable for an inexperienced rider. The manager of the academy at the time "Doc" was acquired in June, 1950, and until the following September, testified that on several occasions during that period he had told Mercer these facts in reporting the accounts of various riders in their attempts to handle "Doc"; that he had also told Mercer that "Doc" was "barn sour" (i. e. disliked leaving the stable and when away, had a tendency to return quickly of his own volition) and he had advised Mercer to get rid of the horse, that "Doc" should not be on the rental string because he wasn't trustworthy. There was further evidence that on a number of occasions prior to plaintiff's accident (October 10, 1950) "Doc" had bolted with his riders, one person testifying that she suffered severe injuries as the result of being thrown from the saddle and another witness, an experienced rider, testifying that she had considerable difficulty in keeping the horse under control. The various riders reported these incidents to the manager of the riding academy. In such circumstances, the matter of whether at the time and place in question the horse "Doc" was unsafe or unsuitable for the purpose for which he was hired would be for the jury to determine. Likewise for determination of the jury as questions of fact under all the circumstances were the matters of plaintiff's contributory negligence and assumption of risk. Kersten v. Young, supra, 52 Cal.App.2d 1, 8, 125 P.2d 501.

[10] Plaintiff properly maintains that the evidence presents the further issue of whether there was fraud or misrepresentation on the part of Mercer in causing plaintiff to sign a release absolving the academy from all liability when Mercer knew of plaintiff's inexperience—as plaintiff had so advised the attendant at the academy in asking for "tame and gentle horses", Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 321, 50 P. 373,—and of the dangerous propensities of the horse "Doc," which nevertheless was assigned to plaintiff. "All contracts which have for their object, directly of indirectly, to exempt anyone from responsibility for his own fraud * * * are against the policy of the law." Civ. Code, § 1668. The failure to disclose material facts affecting the essence of the agreement may constitute "actual fraud," vitiating the contract, Civ.Code, § 1572; see Rest. Contracts, § 471. Mercer unavailingly argues that the release signed by plaintiff is binding as a matter of law under the decision in Werner v. Knoll, 89 Cal.App.2d 474, 201 P.2d 45, 47, recognizing that "contracts seeking to relieve individuals from the results of their own negligence are not invalid as against the policy of the law". 89 Cal.App.2d at page 476, 201 P.2d at page 47. The record there presented no question as to the effectiveness of a release purporting to exempt one from liability "for his own fraud". 89 Cal.App.2d at page 477, 201 P.2d at page 47. Actual fraud is a question of fact, Civ.Code, § 1574, and like any other fact, it may be proved by circumstantial evidence. 12 Cal.Jur. sec. 78, p. 829. The record here contains ample evidence to sustain a finding of fraud on the part of defendant Mercer, and the trial court erred in withdrawing that issue from the jury. See Wilson v. San Francisco-Oakland Terminal Railways, 48 Cal.App. 343, 349–350, 191 P. 975.

[11] However, there is no evidence which would sustain plaintiff's claim against the two defendant oil companies, and the nonsuits were properly granted as to them. Plaintiff argues these theories of liability on this phase of the case: that the place of the accident was a public roadway and the trestle maintained thereon by the oil companies constituted a public nuisance; but in any event, they were chargeable with the consequences of any injuries allegedly caused by their negligent maintenance of the trestle.

Plaintiff concedes that the accident occurred on property controlled by the Los Angeles Flood Control District. The trestle was constructed in 1922 by defendant Union Oil Company pursuant to permission of the flood control district. A variance in construction from the plans originally approved by the district resulted in an overhang of some two feet four and one-half inches lower than authorized. This was known to the district and apparently the trestle had been accepted as constructed. Thus during the following years and prior to the date of the accident (October 10, 1950), Union Oil Company had from time to time notified the district of the necessity of repairing the trestle and had so proceeded upon receiving permission from the district contingent upon the work not changing the then existing clearance so as to impede or obstruct the run-off of flood waters. For some twelve years or more preceding plaintiff's accident, people had indiscriminately entered the general area of the flood control channel, riding about on horseback, crossing underneath the trestle at various points, and there was a well-defined path at the place where the accident happened. Other accidents had occurred there and the Union Oil Company had knowledge thereof. In fact, in 1941, upon being notified of one such incident, it had posted signs on the trestle: "Warning to Horseback Riders, Low Clearance."

[12] Plaintiff argues that the trestle obstructed the public's "free passage or use, in the customary manner," of the crossing beneath and therefore constituted a "public nuisance." But it indisputably appears that the trestle was not on a public street or highway, as required by the statutory sections cited by plaintiff. Civ.Code, §§

3479–3480. The trestle therefore could not be characterized as a nuisance. Barrett v. Southern Pacific Co., 207 Cal. 154, 160, 277 P. 481; Gerberich v. Southern Calif. Edison Co., 5 Cal.2d 46, 50, 53 P.2d 948.

[13–15] Nor does it appear that Union Oil Company breached any duty owing to plaintiff by reason of its maintenance of the trestle. In exercising its right to maintain the trestle, Union Oil Company was acting by express permission of the flood control district, like the holder of a franchise. See City of Oakland v. Hogan, 41 Cal.App.2d 333, 346–347, 106 P.2d 987. As such, its status was akin to that of the legal possessor of property, having no greater duty or obligation than the landowner with respect to the condition of the property in relation to a person coming on the property either as a trespasser or licensee. Lindholm v. Northwestern Pac. R. R. Company, 79 Cal.App. 34, 40, 248 P. 1033; 65 C.J.S., Negligence, § 35, p. 501. In other words, Union Oil Company was using the premises as a matter of right as against plaintiff's use by sufferance; and whether plaintiff be viewed as a trespasser or a licensee, the Union Oil Company owed him only the duty of refraining from wanton or wilful injury. Oettinger v. Stewart, 24 Cal.2d 133, 137 et seq., 148 P.2d 19, 156 A.L.R. 1221; Demmon v. Smith, 58 Cal.App.2d 425, 432, 136 P.2d 660. The fact that plaintiff entered upon the property in question, crossing under the trestle at the suggestion of the riding academy's attendant Giannini v. Campodonico, 176 Cal. 548, 550–551, 169 P. 80; Powers v. Raymond, 197 Cal. 126, 131, 239 P. 1069, or assumed, contrary to the fact, that he was traveling a public road in proceeding under the trestle, Kirkpatrick v. Damianakes, 15 Cal.App.2d 446, 449, 59 P.2d 556; Flick v. Ducey & Attwood Rock Co., 70 Cal.App.2d 70, 78, 160 P.2d 569, would not alter his status nor change the rules governing the duty owed by Union Oil Company to plaintiff with respect to the condition of the premises. Plaintiff was obliged to take the premises as he found them insofar as any alleged defective condition thereon might exist. Oettinger v. Stewart, supra, 24 Cal. 2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221.

Plaintiff relies upon numerous cases in support of his claim that since the Union Oil Company had knowledge of prior accidents in the general area where plaintiff was injured, it was obligated to correct any dangerous or defective condition there existing. However, the cases cited by plaintiff are not in point, for in the main they concern dangerous conditions in structures over or on public streets and highways. E. g. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Sandstoe v. Atchison, T. & S. F. Railway Co., 28 Cal.App.2d 215, 82 P.2d 216; Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119; Postal Telegraph Cable Co. v. Young, 172 Ky. 576, 189 S.W. 707.

Plaintiff argues the further point that the alleged negligent maintenance of the trestle was a question for the jury to decide, citing Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536, and Davis v. Pacific Power Co., 107 Cal. 563, 40 P. 950. Both cases are clearly distinguishable on their facts. In the Davoust case plaintiff, a licensee walking along a path across a vacant lot, was killed upon coming in contact with a live wire from an electric plant belonging to defendant, a trespasser on the property. There was no discussion of liability between the parties had defendant been using the property as a matter of right, 149 Cal. at page 74, 84 P. 760. In the Davis case the trial court submitted to the jury the question of whether or not defendant, erector of a revolving shaft which caused injuries to plaintiff, had permission from the lessee, the admitted possessor of the premises, to be on the premises. The evidence was in conflict, and the jury awarded damages to plaintiff based upon the finding that defendant had no such permission. Furthermore, defendant there was chargeable with active negligence in the operation of the dangerous machinery which caused plaintiff's injuries. See Prosser on Torts [1941] 630, quoted with approval in Oettinger v. Stewart, supra, 24 Cal.2d 133, 138, 148 P.2d 19. Here defendant Union Oil Company constructed and maintained the trestle under express permit of the flood control district, and there was no evidence whatever of any active negligence on its part. Under the principles of liability above discussed, it owed no greater duty to plaintiff than did the district, the owner of the property, with respect to the condition of the premises. Accordingly, the nonsuit was properly granted as to defendant Union Oil Company.

Similarly, the record furnishes no support to plaintiff's claim of liability against defendant Tidewater Associated Oil Company. In 1936 Union Oil Company gave Tidewater Associated permission to place and maintain one pipe line upon the trestle. Under their agreement, cost of maintaining the trestle was divided between the two oil companies, but all control over maintenance, operation and repair of the trestle was retained by Union Oil Company. In view of our conclusion that the evidence was insufficient to impose liability upon defendant Union Oil Company, it necessarily follows that such evidence was likewise insufficient to impose liability upon defendant Tidewater Associated Oil Company.

The judgment of nonsuit is reversed as to defendant Mercer but affirmed as to defendants Union Oil Company and Tidewater Associated Oil Company.

SHENK, Acting C. J., and EDMONDS, J., and BRAY, J. pro tem., concur.

TRAYNOR, J., concurs in the judgment.

CARTER, Justice.

I concur in the judgment of reversal. However, the rule applicable to grantuitous licenses should not be as stated in the majority opinion.

It is not good law nor in keeping with the modern trend of decisions, to say, as does the majority, that the owner of property is liable only for wanton and wilful conduct as to gratuitous licensees (persons who are on the property with implied or express consent of the owner but not as business visitors in whose presence he has an economic interest) with respect to the dangerous condition of his property as distinguished from activity thereon by him, even though he had actual knowledge of the dangerous condition. Where an owner has *actual knowledge* of a dangerous condition on his property, his duty should be ordinary care toward gratuitous licensees and he would have to at least warn of the danger. Such licensee would still be in a category different than a business visitor, because as to the latter, the owner must not only guard against known dangers but also those which would have been revealed by reasonable inspection, that is, those he should have known of in the exercise of ordinary care. This is the rule in the Restatement. "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he

> "(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and
>
> "(b) invites or permits them to enter or remain upon the land, without exercising reasonable care
>
> "(i) to make the condition reasonably safe, or
>
> "(ii) to warn them of the condition and the risk involved therein."

Rest. Torts, § 342. Also our statutes read: "Everyone is responsible, *not only* for the result of his *willful acts*, but *also* for an injury occasioned to another *by his want of ordinary care* or skill *in the management of his property* or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." (Emphasis added.) Civ.Code, § 1714. And the District Court of Appeal has said: "The law in reference to the duty owed to trespassers, licensees and invitees has largely developed in reference to the duty of an owner or occupier of real property or structures thereon. The statutes of this state do not provide that a different duty is owed to persons in the three named categories. The only relevant statute is section 1714 of the Civil Code, which provides: 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.' In spite of this code section, which has been in our law unchanged since 1872, and which states a civil law and not a common law principle, Code Napoleon, § 1383; Louisiana Code 1808, § 2215, our courts, in some cases at least, and in apparent disregard of the section, have followed the common law rule, which purports to make precise and rigid distinctions as to the duty owed by the owner or occupier to invitees, licensees and trespassers. Thus, it has been stated that towards a trespasser the owner or occupier only owes a duty to refrain from wilful or wanton conduct; towards a licensee a similar duty, plus the affirmative duty to warn of unusual dangers, while towards an invitee there is the duty to exercise ordinary care and prudence. See cases collected in 13 Cal.L.Rev. 72, 73, footnotes 5, 6 and 7. Such an approach requires a court to first determine the precise status of the visitor, which is sometimes a most difficult task, and then to determine from the cases whether the owner has violated any duty owed to a member of such a class. Such an approach is unrealistic, arbitrary, and inelastic. The point where the duties towards members of each of the classes begins or ends, or where it should begin or end, or where the duty not to act becomes supplemented by the duty to act, is almost impossible of perception. It is no wonder that exceedingly fine distinctions have been developed so that the law is most confused in this field. See note 13 Cal.L.Rev. 72. Many cases, and particularly the more recent ones, have in fact applied the general doctrine of negligence embodied in section 1714 of the Civil Code rather than the common law rigid categories test. For a good discussion of these problems see Boucher v. American Bridge Co., 95 Cal.App.2d 659, 667, 213 P.2d 537, et seq.

"Thus, while there are many cases holding that a land owner is only required to refrain from inflicting wanton or wilful injuries on a trespasser or licensee, see many cases collected 19 Cal.Jur. p. 616, § 52, fn. 13, there are many cases also holding that after 'a trespasser is seen in a position of danger, due care must be exercised to avoid injuring him, and it is negligence not to do so.' 19 Cal.Jur. p. 616, § 52 at p. 617; see cases collected in fn. 17 on p. 618. This duty of reasonable care not only extends to situations where the land owner knows of a trespasser's presence, but also to situations where he should know of his presence. Thus, the Restatement of Torts, Vol. 2, § 336, declares that if the possessor of land does not know of a trespasser's presence, but 'from facts known to him should know or believe that another is or may be' trespassing, he is 'subject to liability for bodily harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.' Many California cases are cited as being in accord in the California annotation to this section.

"Many courts, in imposing this duty of reasonable care towards trespassers and licensees, have drawn a distinction between active and passive negligence, and have limited the reasonable care test to overt acts of negligence. See annotation 49 A.L.R. 778. California has quite clearly adopted this distinction and imposed a duty to exercise reasonable care towards known licensees or trespassers so far as active operations are concerned. In the well-reasoned case of Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, cases to the contrary were expressly overruled. See, also, Herold v. P. H. Mathews Paint House, 39 Cal.App. 489, 493, 179 P. 414; Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 194, 99 P.2d 650; Yamauchi v. O'Neill, 38 Cal. App.2d 703, 708, 102 P.2d 365; Hamakawa v. Crescent Wharf etc. Co., 4 Cal.2d 499, 503, 50 P.2d 803. This rule imposing a duty to exercise reasonable care towards known trespassers so far as affirmative acts are concerned, is in accord with the modern trend of authorities." Fernandez v. Consolidated Fisheries, Inc., 98 Cal.App.2d 91, 95, 219 P.2d 73, 76. The real factor is whether the person is known by the owner to be on the premises and in case of a licensee or even a trespasser, he may have that knowledge. See Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19. In the case of licensees the landowner knows they are there and when he also knows there is a dangerous condition which they will encounter it is not unreasonable to impose upon him the duty of taking some measure to protect the licensee from the danger, see 38 Am.Jur., Negligence, § 106, and that is the modern trend. James, Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees, 63 Yale L.J. 605.

It is not necessary in this case to state that a property owner is liable to a gratuitous licensee only for wanton or wilful conduct with reference to the condition of his property for there are other reasons why plaintiff has not made a case here. This court has not announced such a rule for many years and Oettinger v. Stewart, supra, 24 Cal.2d 133, 148 P.2d 19, casts doubt upon it. This court should re-examine such a rule in line with the discussion in Fernandez v. Consolidated Fisheries, Inc., quoted supra, 98 Cal.App.2d 91, 219 P.2d 73.

126 Cal.App.2d 311

KEANS, SPRINGMANN & STIPEK, Inc.
v.
ALPHONZO E. BELL CORP.

Civ. 19095.

District Court of Appeal, Second District,
Division 3, California.

June 29, 1954.

Rehearing Denied July 15, 1954.

Hearing Denied Aug. 26, 1954.

Oil and gas broker brought suit against oil company for specific performance of oil contract under which broker was to receive an overriding royalty for securing for oil company certain oil and gas leases, which oil company secured for itself. The Superior Court of Los Angeles County, Stanley N. Barnes, J., entered judgment adverse to broker, and broker appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that contract of employment of broker was special and not general and that employment terminated when broker did not obtain a lease on terms indicated by oil company.

Judgment affirmed.

1. Brokers ⇨86(1)

In suit by oil and gas broker against oil company for specific performance of oil contract under which broker was to receive an overriding royalty for securing for oil company certain oil and gas leases, which oil company secured for itself, evidence sustained finding that contract of employment of broker was special and not general and that the employment terminated when broker did not obtain leases on terms indicated by oil company.

2. Brokers ⇨86(4)

In suit by oil and gas broker against oil company for specific performance of oil contract under which broker was to receive an overriding royalty for securing for oil company certain oil and gas leases, which oil company secured for itself, evidence sustained finding that broker was not the procuring cause of assignments of oil and gas leases to oil company.

3. Jury ⇨13(14)

Where complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained on issues raised by the legal cause.

4. Trial ⇨4

Where complaint states two complete rights of action, one legal and one equitable, the equitable issues are tried first and then, if any legal issues remain, jury may be called.

5. Jury ⇨13(14)

Where the first four causes of action presented equitable issues, and the remaining three causes of action raised legal issues, and court, in determining the equitable issues, obviated a trial by jury of the legal issues, court did not err in trying the case without a jury.

6. Brokers ⇨43(2)

Proposed oil and gas lease for three years and so long after the three year period as oil or gas or other hydrocarbon substances were produced from the property, was an agreement relating to "realty" within meaning of provision of the statute of frauds that an agreement authorizing or employing an agent or broker to purchase or sell "realty" for compensation or commission is invalid unless it, or some note or memorandum thereof, is in writing and is subscribed by the party to be charged or by his agent. Civ.Code, § 1624, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Realty".

7. Brokers ⚷43(3)

Where deposition of president of oil company admitting oral agreement of company employing broker was not voluntarily made by him and was not presented in evidence by company in action against it by broker, the deposition, though signed by the president, was not a sufficient memorandum to satisfy requirements of statute of frauds. Civ.Code, § 1624, subd. 5.

◆

Leonard Horwin and Krystal & Paradise, Los Angeles, for appellant.

Overton, Lyman, Prince & Vermille, Donald H. Ford, and Carl J. Schuck, Los Angeles, for respondent.

PARKER WOOD, Justice.

The complaint is titled, "Complaint for Specific Performance of Contract and to Enforce a Trust and Accounting and, in the Alternative, for Damages and for Other Relief." Plaintiff sought a decree as follows: declaring that defendant holds in trust for plaintiff one-half of one per cent of all oil and gas produced from certain land under a leasehold interest of defendant; compelling defendant to perform a certain agreement, set forth in the complaint, by conveying to plaintiff an overriding royalty interest; requiring defendant to account for receipts from said royalty interest; or, in the alternative, for damages. Judgment was for defendant. Plaintiff appeals.

Plaintiff corporation, which is licensed as a real estate broker and as an oil and gas broker, is in the business of obtaining oil leases for oil companies. Defendant corporation is in the oil production business.

On October 13, 1947, Rodman Cross, an independent consulting geologist, and defendant entered into a written agreement whereby defendant employed Cross for six months to render services of a geologic nature for defendant with respect to land designated by defendant—it being understood that Cross would make available for defendant 50 per cent of his time, and that Cross would be permitted to devote his other time in behalf of himself or others in developing areas of potential oil land. On March 15, 1949, defendant and Cross agreed to modify said agreement as to the matter of compensation.

In the early part of 1948 oil was discovered in the Cuyama Valley, which is in Santa Barbara and San Luis Obispo Counties. The valley covers an area that is approximately 10 miles wide and 30 miles long.

In June, 1948, the Humble Oil Company employed plaintiff to determine what lands in the Cuyama Valley were not leased for oil production and to acquire oil leases thereon. Thereupon, pursuant to that employment, Ray Stipek, vice president of plaintiff, and several employees of plaintiff, made an investigation of that valley for approximately three months. During that time Stipek and the employees investigated, and negotiated for the lease of, the Johnston property which was about 10 miles southeast of the discovery well and in an area later known as the South Cuyama Field. The Johnston property consisted of 2 parcels—in one parcel there were about 325 acres, and in the other about 160 acres. In November, 1948, Mr. Johnston indicated to plaintiff that he would be willing to lease his land to the Humble Oil Company for $25 an acre a year; but Stipek refused the offer because, at that time, the oil company was not interested in the property.

On March 18, 1949, Cross went to the office of plaintiff and told Stipek that he (Cross) was interested in having plaintiff examine lands, in three designated sections of the area that later became the South Cuyama Field, for the purpose of determining the availability of such lands for oil leases. Stipek replied that plaintiff was available for that assignment, and that plaintiff had done work in that area. Then Stipek brought out a map and some of plaintiff's records covering that area. He told Cross that substantial portions of those lands were under lease to Richfield Oil Company, but it appeared that the Johnston land was open. Cross inquired as to the basis upon which plaintiff would undertake the work, and he (Cross) suggested that the work be done upon the same basis that plaintiff was then doing work in the Santa Cruz area, in which area Cross was interested. Stipek replied that plaintiff would do the work for its out-of-pocket expenses, which covered $25 a day, plus travelling and living expenses and 10 per cent interest in any benefits accruing to Cross or his client. Cross told Stipek (on Friday, March 18) to go to Cuyama Valley and see if he could get a three-year lease on the Johnston land for $10 an acre a year, and then to check plaintiff's records as to the availability of other lands. Cross said that he would be in Santa Maria the following Monday (March 21) and that Stipek could reach him there regarding further investigation of such lands. Cross then wrote upon a piece of paper, as follows: "Cuyama Valley (1) Obtain names and addresses of lessors in * * * [description of three sections] (2) Lease the E. L. Johnston property as described: * * * [description of Johnston land] (3 yr. lse, 1st yr. pd. $10.00/ac, 1/8, 90 days between wells & offsetts, 330′ offset, 10 ac. spacing.)." That writing was then delivered to Stipek. Stipek testified that Cross did not say anything about representing a principal; and that Cross stated that the leases were to be taken in plaintiff's name as lessee. Stipek also testified that Cross advised him that the leases were for an undisclosed principal. Cross testified that the undisclosed principal was not the defendant.

After that Friday and before the following Monday, Stipek checked plaintiff's records regarding the availability of other lands, and on Monday he telephoned Cross at Santa Maria and told him that the only lands available were the Johnston lands. In that telephone conversation, Cross told Stipek to proceed with the employment. The next day Stipek went from Los Angeles to the Johnston land, and in the evening of that day or the morning of the following day he told Mr. and Mrs. Johnston that plaintiff had a client who was interested in leasing the Johnston land for three years at $10 an acre a year and one-eighth royalty. Mr. Johnston said that the offer was of no interest to him, because he had a better offer from a Bakersfield concern. Mr. Johnston did not state the name of the concern but said that its offer was $25 an acre and one-eighth royalty. He also said that the offer was open for his acceptance until the end of March; that, in order for plaintiff to obtain a lease from him, plaintiff would have to meet those terms; he expressed confidence in plaintiff. Stipek said that he would develop the matter further with plaintiff's client and get in touch with Mr. Johnston later.

Stipek returned to Los Angeles, and on March 24 he telephoned Cross (at Santa Maria) and said that he had contacted Mr. Johnston and that Mr. Johnston had a pending offer from a Bakersfield concern for a lease for $25 an acre and that the offer was open for acceptance until the end of March; and that he (Stipek) believed that the term was for three years and that the royalty was one-eighth. According to the testimony of Stipek, Cross told Stipek to await further instructions. According to the testimony of Cross, he did not say anything to Stipek about waiting for further instructions; and at that time he was not acting on behalf of defendant.

About March 28, Cross telephoned Mr. Bell, president of defendant corporation, and "went into the matter of the Johnston property" for the defendant, and told him that the property was available for $25 an acre. Then (on March 28 or 29) Cross went to the office of Bell and they discussed the Johnston property. He told Bell that Stipek had said that the Johnstons had an offer from a Bakersfield concern for $25 an acre and one-eighth royalty. Cross also told Bell that an oil well (later known as Homan well) was about to be drilled. Bell told Cross that he was willing to pay $25 an acre for the property. Cross urged Bell to have Stipek approach the Johnstons for a lease on the property. Within a day or two after that conversation, Bell told Cross to tell plaintiff to contact Johnston and try to obtain a lease for $25 an acre and one-eighth royalty. The Homan well, which was about one and one-half miles from the Johnston land, was spudded in on April 2.

On Friday, April 8, Cross went to the office of plaintiff and asked Stipek and Keans (an officer of plaintiff) if plaintiff would be available to attempt again to get a lease on the Johnston land. Cross said that the Bell Corporation (defendant) was interested in getting a lease on the property for $25 an acre a year and one-eighth royalty, and that the lease was to be for defendant. He asked Stipek as to the basis upon which plaintiff would perform the work. Stipek replied that he thought it should be similar to the terms under which plaintiff had done previous work for defendant in the Santa Ynez Valley, which would be out-of-pocket expenses including $25 a day and travelling and living costs and one per cent overriding royalty. According to the testimony of Stipek, Cross said that defendant would object to paying plaintiff more than one-half of one per cent overriding royalty; Stipek then suggested one-half of one per cent overriding royalty, and Cross assented thereto but stated that he wanted to confirm it with Bell. Then the representatives of plaintiff went out of the room, and Cross telephoned Bell and told him that plaintiff would expect a fee of one per cent overriding royalty plus $25 a day. After said telephone call, Cross told Stipek that the arrangement was agreeable with Bell.

On the morning of April 9, 1949, Stipek went to the Johnston ranch. Johnston told him that he had signed a lease with Stansbury, Inc., that the lease was for a term of three years for $25 an acre and one-eighth royalty, and that the lease was in escrow at the Bank of America at Santa Maria. Stipek then (April 9) telephoned Cross at Long Beach and told him that the Johnston property had been leased to Stansbury, Inc., a drilling contractor in Bakersfield, and that the lease was for $25 an acre and one-eighth royalty and was for a term of three years. According to the testimony of Stipek, Cross then told him "to return to Los Angeles and await further instructions." According to the testimony of Cross, Stipek asked Cross what he should "do now," and Cross replied that if defendant "wanted anything done further" that either he (Cross) or Bell would contact Stipek.

The following day (April 10) Cross telephoned Bell and reported the information which he had obtained from Stipek in said telephone conversation. Cross told Bell, at that time, that he thought the Johnston property should be obtained if possible, and that he (Cross) should see whether Stansbury, Inc., would assign its lease to defendant corporation.

After that conversation Cross went to Bell's office, and Bell suggested that Cross go to Stansbury, Inc., in Bakersfield and see if a deal could be made with it. On the following morning (April 11), Cross went to the office of Stansbury, Inc., in Bakersfield and asked Bert and Curly Stansbury if they were willing to make a deal on the Johnston property. They replied that they were willing to make a deal if the terms were correct. Curly than left the office. After further negotiations at that time, Bert said that it was agreeable with him to assign the lease on the parcel of 325 acres for $50 an acre and one-sixth royalty. Cross telephoned Bell from the Stansbury office and reported the conversation which he had with Bert Stansbury, and Bell replied that the terms were satisfactory with him. Cross told Bell that he should have his attorney prepare an assignment immediately. Cross then told Bert that Bell had approved the deal. On April 12, defendant's attorney prepared an assignment of the lease and, after talking with the attorney for Stansbury, Inc., mailed the assignment to Stansbury, Inc.

That proposed assignment recited a consideration of $16,250 and a royalty of 4⅙ per cent. On April 18, defendant's attorney talked with the attorney for Stansbury, Inc., and on April 19 defendant's attorney redrafted the assignment and sent copies of it to Stansbury, Inc.

On April 20 about midnight, Cross received information regarding "interesting showings" that were developed in drilling the Homan well. About 6 a. m. he telephoned Bell and told him that he had received a reliable report that the Homan well had cored oil sand. On April 22, defendant's attorney sent another copy of the assignment to the attorney for Stansbury, Inc. On April 25, Cross, Bell, and defendant's attorney went to Bakersfield to try to get the Stansburys to execute the assignment. At a meeting in the office of the Stansburys, the Stansburys (three brothers, Bert, Curly, and Milton) said that they had heard the news about the Homan well and that they could get a lot more for their lease now—they wanted to wait until the well was on production before they made a deal. The various proposed assignments, above referred to, were not executed.

On May 4, 1949, the Homan well produced oil. On May 6, Cross, Bell, and defendant's attorney went to Bakersfield and met the Stansburys. At that time the defendant and Stansbury, Inc., entered into an agreement whereby Stansbury, Inc., assigned a part of the Johnston lease, namely, 245 acres to defendant corporation for $121,875 and a royalty of 12½ per cent. (This was a part of the parcel of 325 acres previously involved in their negotiations.) The agreement also provided that defendant would drill a well within 90 days. Defendant's attorney prepared the agreement in the office of the Stansburys. On said day the assignment was signed by the Stansburys, Bell wrote a check for $121,875, and "the deal was closed."

On June 14, 1949, the defendant and the Stansburys entered into negotiations relative to an assignment of the remainder of the Johnston lease to defendant. (The remainder covered 240 acres—being the remaining 80 acres of the first parcel and the 160 acres in the second parcel.) On June 27, said remainder of the lease was assigned to defendant by the Stansburys for $100,000 and a royalty of 17½ per cent.

After April 9 (when Stipek told Cross that the Johnston land had been leased), and during the time defendant was obtaining the assignments from Stansburys, Cross and Stipek had various conversations regarding other transactions, such as the Santa Cruz matter and the Temblor leases, but nothing was said respecting the Johnston land transaction. About April 29, Cross asked Mr. Keans, an officer of plaintiff, to submit bills for the employments on March 18 and April 8. On April 29, plaintiff sent a bill to Cross for services from March 21 to March 23. That bill for $112.07 was paid by Cross. On June 9, plaintiff sent a bill to defendant for services on April 8 and 9 in negotiating for an oil lease on the Johnston land. That bill for $96.75 was paid by defendant corporation. There was no reference in those bills to "stand-by instructions."

After the Stansburys had information that cores from the Homan well showed good oil sands, they tried to sell their Johnston lease. Also other companies, which were associated with the Stansburys in acquiring the Johnston lease, tried to sell the lease. Those companies were Crown Drilling Company and Hoover Drilling Company. Also one Bender, who had an interest in the lease, tried to sell it. Offers to sell or offers to buy the lease were made to or received from several oil companies, including Standard Oil, Union Oil, Superior Oil, Humble Oil, and General Petroleum. It thus appears that it was generally known that the Johnston land had been leased to the Stansburys and that the lease might be purchased from the Stansburys if their purchase price demands were met.

Stipek testified that about the middle of June, 1949, he learned that the lease on the Johnston property had been assigned to defendant. On July 15, 1949, plaintiff sent a letter to defendant in which it was stated that while plaintiff was awaiting further instructions regarding a lease on the Johnston land it learned that defendant had acquired the leasehold rights on the Johnston property, and that "As you elected to conclude such negotiations yourself for the Johnston lands, we assume that it is your intention to convey to us an undivided ½ of 1% overriding royalty interest therein pursuant to our understanding." On July 19, 1949, defendant replied thereto by letter stating that plaintiff was never retained or requested by defendant to negotiate with Stansbury, Inc., for an assignment of the lease, and that defendant therefore rejected plaintiff's claim.

The court made findings, as shown in the following 12 paragraphs:

On April 8, 1949, plaintiff and defendant entered into an oral agreement under which plaintiff was to act as defendant's broker (a) to negotiate for an oil and gas lease with the owners of the Johnston property; and (b) to obtain from the owners an oil and gas lease of all the property. It was agreed therein that said lease should contain the following provisions: the name of defendant as lessee; the period within which drilling operations must be commenced to be 3 years; the term of the lease to be so long after said three-year period as oil or gas or other hydrocarbon substances are produced from the property; the rental to be $25 per acre per year; and the landowner's royalty to be 12½% of all production of oil and gas. Such oral agreement also provided that, for the services rendered by plaintiff in attempting to negotiate such a lease, defendant would pay $25 a day and would reimburse plaintiff for all out-of-pocket expenses, and if plaintiff obtained such a lease from the owners of said property on the terms thereinabove found to have been authorized by defendant, the defendant would, in addition, convey to plaintiff an overriding royalty of ½ of 1% of all production of oil and gas.

Plaintiff did not perform any of the things to be performed by it under the said oral agreement of April 8, 1949, except that it did attempt to negotiate for an oil and gas lease on said property but was unable to obtain such lease. Plaintiff did not at any time state to defendant that it stood ready to negotiate for a leasehold interest in said property from Stansbury, Inc., and plaintiff did not at any time stand ready to so negotiate. Defendant did not, on April 9, 1949, or at any other time, give plaintiff any order that it should await further instructions from defendant, or that plaintiff should do anything further for defendant in connection with obtaining any assignment to defendant of any interest under either lease to Stansbury, Inc. The employment of plaintiff by defendant under said oral agreement terminated on April 9, 1949. About June 9, 1949, plaintiff billed defendant for its services on the basis of "two days per diem" plus out-of-pocket expenses, and defendant paid the bill.

On May 6 and June 27, 1949, defendant, exclusively by its own efforts, obtained from Stansbury, Inc., the said assignments of its rights under the leases on the Johnston land. Defendant did not employ plaintiff to render any services of any nature in connection with said assignments of the leases.

Defendant did not negotiate and obtain said assignments for the purpose of depriving plaintiff of a broker's fee. Defendant acted in good faith in obtaining said assignments and fully performed everything required to be performed by it under its agreement with plaintiff. Plaintiff did not render any services to defendant which entitled plaintiff to any overriding royalty.

Plaintiff was not at any time after April 9, "*1951* [1949]" prevented from attempting to negotiate, on its own behalf or on behalf of any of its clients, any assignment of any leasehold interest held in any of said property by Stansbury, Inc.

Defendant has drilled several wells upon said property and produced large quantities of oil, the exact amount of which is unknown to plaintiff. The value of an overriding royalty interest of ½ of 1% of the production under said assignments is unique and not susceptible of exact computation.

It is not true that there was any understanding of the parties that plaintiff had the exclusive right to negotiate and obtain said leasehold interest for defendant.

The information received by plaintiff from Johnston on April 9, 1949, and reported on said date by plaintiff to defendant, was not on said April 9 a matter of public knowledge. Said information was not given to plaintiff by Johnston in confidence and said information was not intended by plaintiff to enable, and did not in fact enable, defendant to obtain said assignments.

The agreement of April 8, 1949, was one employing an agent or broker to purchase real estate for compensation or a commission; said agreement was not in writing and there is no note or memorandum thereof subscribed by defendant or its agent.

The agreement of April 8, 1949, was one for the sale of an interest in real property by defendant to plaintiff; said agreement was not in writing and there is no note or memorandum thereof subscribed by defendant or its agent.

The agreement of April 8, 1949, was for the sale of an interest in real property and it was made by an agent of defendant; there is no writing subscribed by defendant stating the authority of such agent to make the agreement for defendant; and by reason of the foregoing the alleged agreement is invalid.

In view of the findings, the necessity for trial of the issues at law, alleged in the fifth and seventh causes of action, is obviated.

Appellant contends that the court erred (1) in determining in effect that the contract of employment (of plaintiff by defendant) was special and not general, and that the employment terminated on April 9, 1949, when plaintiff did not obtain a lease from the Johnstons upon the terms indicated by defendant; (2) in finding that defendant acted in good faith in obtaining the assignments from Stansbury, Inc.; (3) in finding in effect that defendant was free to accept the benefit of plaintiff's work and to deal directly with Stansbury, Inc., for the "same object"; (4) in denying plaintiff's request for a jury trial; (5) in determining that the contract of employment was within the statute of frauds; (6) in determining that writings in evidence, including the signed depositions of Bell and Cross, were not sufficient memoranda to satisfy the requirements of the statute of frauds; (7) in determining that defendant was not estopped to plead the statute of frauds.

[1] As to the first contention, namely, that the court erred in finding in effect that the contract of employment was a special contract, appellant argues that defendant did not indicate to plaintiff that its offer of $25 an acre for a three-year lease was its maximum offer, or the only basis on which it would deal, or that plaintiff's authority would cease if it could not conclude a lease on that basis; that Bell told Cross that defendant would want to reconsider the matter of rental if "it was any more"; that the price of $25 an acre was merely a "guide to negotiations" rather than a special limit imposed by defendant. The evidence shows that on March 18, 1949, Cross, acting for himself or an undisclosed principal (not defendant), employed plaintiff to locate land in Cuyama Valley which was available for leasing, and told Stipek to see if he could get a three-year lease on the Johnston property for $10 an acre. At that time Cross gave Stipek a memorandum which in substance directed Stipek to lease the Johnston land for three years for $10 an acre and one-eighth royalty; on March 24 (after Stipek had talked to the Johnstons), Stipek told Cross that Johnstons had an offer of $25 an acre from a Bakersfield concern and the offer was open for acceptance until the end of March. The evidence shows further that on April 8 Cross, acting as agent for defendant, told representatives of plaintiff that defendant would like to get a lease on the Johnston property for $25 an acre and one-eighth royalty, and he asked Stipek as to the basis upon which plaintiff would perform the work. Stipek replied that plaintiff would do the work for $25 a day, and out-of-pocket expenses, and one-half of one per cent royalty. Cross told Stipek that the arrangement was agreeable with Bell. The court found that under the oral agreement of April 8, 1949, between plaintiff and defendant the plaintiff was to obtain from the owners of the Johnston property an oil and gas lease of all the property; that the lease should contain certain specified terms including a provision for rental at $25 an acre a year and a landowner's royalty of 12½ per cent. That finding was supported by the evidence.

The evidence also shows that Stipek called upon the Johnstons on April 9 and ascertained that the land had been leased to Stansbury, Inc.; and on that day Stipek told Cross that the land had been so leased. There was a conflict in the evidence as to what was said by Cross after Stipek reported that the land had been leased—Stipek testified that Cross told him to await further instructions; Cross testified that he told Stipek that Cross or Bell would contact Stipek if defendant wanted anything further. The court found that defendant did not give plaintiff any order that it should await further instructions or that plaintiff should do anything further for defendant. Also, the court found that the employment of plaintiff under said oral agreement was terminated on April 9, 1949. Those findings were supported by the evidence. It cannot be said that the provision in the oral agreement specifying $25 an acre for a lease from the Johnstons was a mere guide for negotiation and was not a special limitation imposed by defendant.

[2] Appellant contends further, as above stated, that the court erred in finding, in effect, that defendant was free to accept the benefit of plaintiff's work and deal directly with Stansbury, Inc. It argues that the evidence shows that plaintiff imparted to defendant, in confidence, information regarding the availability of the Johnston land which information resulted in the eventual assigning of the Stansbury leases to defendant; that the information, at the time it was reported to defendant, was not a matter of public knowledge; that defendant received benefits from the employment of plaintiff and it cannot deprive plaintiff of its contingent fee by dealing directly with Stansbury, Inc. The court found (1) that plaintiff did not perform any of the things to be performed by it under the oral agreement, except that it did attempt to negotiate for a lease and did not obtain it, and except that it did report to defendant that Johnston had leased the land to Stansbury, Inc., for certain rental and royalty; (2) that defendant obtained the assignments by its own efforts; (3) that the information given by Johnston to plaintiff was not given in confidence. The evidence shows that the oral statement of Bert Stansbury, made on April 11, to the effect that he was willing to assign a part of the lease for $50 an acre was not approved by the two other Stansbury brothers or other persons who had interests in the lease; that the assignments were not obtained until May 6 and June 27, and the assignments were not obtained for $25 an acre (the amount to be paid Johnston under the agreement of April 8) or $50 (the amount stated by Bert Stansbury) but were obtained by paying about $450 an acre or a total of approximately $221,000 and by permitting Stansbury, Inc., to reserve a royalty of 12½ per cent as to one assignment and a royalty of 17½ per cent as to the other. It thus appears that the assignments were ultimately obtained for a price that was vastly different from the price stated in the oral agreement with plaintiff, and that the assignments also pertained to another kind of interest and to other owners. About the middle of April, or a few days after the unsuccessful negotiation with Bert Stansbury, many persons in the oil business knew that Johnstons had leased to Stansbury, Inc. Various persons who had interests in Stansbury, Inc., were trying to sell the lease, and several of the major oil companies made offers to buy it. The trial judge stated in his memorandum of opinion that the preponderance of the evidence was clearly against the contention that plaintiff was the procuring cause of the assignments to defendant; that plaintiff may have been in a favorable position to deal with Johnston but the ultimate contract was not with him; that Stansbury, Inc., was willing to deal with any one who would pay the biggest price, and that such willingness was known to the world of oil; and that the real procuring cause was the defendant's willingness to meet competitive prices. It cannot be said that there was any substantial benefit to defendant from the oral contract of employment of plaintiff, and it cannot be said that defendant was unjustly enriched by the information furnished by plaintiff that the Johnston land had been leased to Stansbury, Inc.

Appellant also contends, as above stated, that the court erred in denying appellant's request for a jury trial. It argues that issues of law presented by the complaint should have been tried first by a jury; that some of the issues of law, so referred to, were: What were the terms of the agreement? Did plaintiff perform the agreement? Did defendant breach its agreement?

In the first cause of action there were allegations regarding the making of the alleged oral agreement, the discovery that the Johnston land had been leased to Stansbury, Inc., and the report thereof to defendant; that defendant told plaintiff to stand by and await instructions; that defendant refused to convey the royalty interest to plaintiff; that said interest is unique and not susceptible of exact computation and damages; that defendant holds such interest in trust and should be required to specifically convey the interest to plaintiff. The second cause of action included the allegations of the first cause of action and alleged further that plaintiff had an exclusive right to negotiate for the lease. The third cause of action included the allegations of the preceding causes of action and alleged further that defendant "confirmed said agreement, in writing signed by defendant," except that defendant denied that the scope of plaintiff's agency extended to obtaining a leasehold interest from Stansbury, Inc. The fourth cause of action included the allegations of the preceding causes of action and alleged further that defendant, in ordering plaintiff to stand by, precluded plaintiff from acting for other clients, and the information that Stansbury, Inc., was a party to the escrow enabled defendant to beat competitors, and hence defendant was estopped to deny plaintiff's claim and therefore holds the royalty interest in trust for plaintiff. The fifth cause of action alleged that plaintiff was damaged in the amount of $200,000 as the proximate result of defendant's refusal to convey the royalty interest to plaintiff.

On the second day of the trial, plaintiff amended its complaint by adding a sixth and a seventh cause of action. The sixth cause of action alleged that about March and April, 1949, at the request of defendant, plaintiff investigated the possibility of acquiring oil leases in the South Cuyama Field; the said services to be in consideration, in part, of a conveyance to plaintiff of a ½ of 1 per cent royalty under such lease as might be acquired by defendant; and that plaintiff be compelled to perform said agreement by conveying to plaintiff said royalty interest. The seventh cause of action alleged that plaintiff has been damaged in the amount of $200,000 as a proximate result of defendant's refusal to convey the royalty interest to plaintiff.

The defendant alleged as a second affirmative defense that the agreement mentioned in the complaint purports to employ plaintiff, a broker, to purchase real estate for a commission; that said agreement was not in any writing subscribed by defendant or its agent, and there was no memorandum thereof subscribed by the defendant or its agent. When the case was called for trial defendant filed its third and fourth affirmative defenses. In such third defense it was alleged that the agreement mentioned in the complaint is one for the sale of an interest in real property, and that said agreement is invalid since it was not in any writing subscribed by defendant or its agent. In such fourth defense it was alleged that the agreement mentioned in the complaint was for the sale of interest in real property, and that the agreement was made by the agent of defendant; that the authority of the agent was not in writing subscribed by defendant, and that said agreement is invalid.

[3–5] When the case was called for trial, the defendant objected to a trial by jury upon the ground that the issues were exclusively within the equity jurisdiction of the court, and defendant made a motion that the case be tried without jury. Plaintiff argued that the issue in the case was primarily the legal issue. The court ruled that the first four causes of action would be tried without a jury, and the fifth cause of action, if the case proceeded that far, would be tried by a jury. (It is to be noted that when said ruling was made there were only five causes of action—the sixth and seventh causes of action were added during the second day of the trial.) In summary, the first four causes of action presented equitable issues—to declare a trust and for specific performance; the fifth cause of action was for damages; the sixth was for specific performance; and the seventh was for damages. In Peterson v. Peterson, 74 Cal.App.2d 312, it was said at page 321, 168 P.2d 474, at page 478: "In Connell v. Bowes, 1942, 19 Cal.2d 870, 871, 123 P.2d 456, the court points out that 'It is now established in this state * * * that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause.' In such circumstances, however, 'the equitable issues are tried first and then, if any legal issues remain, a jury may be called.' (Citation) The practical reason for this procedural rule is that the trial of the equitable issues may obviate the necessity of a trial of legal issues. (Citation.)" The trial court did not err in its ruling regarding a jury trial. In determining the equitable issues the court determined issues which obviated a trial by jury of the legal issues.

[6] Appellant also contends that the court erred in determining that the oral agreement of employment was within the statute of frauds. The allegations in the three affirmative defenses were to the effect that the oral agreement was invalid under the statute of frauds. Section 1624 of the Civil Code, statute of frauds, provides in part: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged; 5. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission; 6. * * *." A question arises as to whether, under said subdivision 5, the oil lease referred to in the agreement was real property. In Dabney v. Edwards, 5 Cal.2d 1, at page 11, 53 P.2d 962, at page 963, 103 A.L.R. 822, it was held that an oil lease which provides in addition to a definite fixed term an indefinite term—that the lease is to continue "'so long thereafter as gas or oil or either of said substances is produced therefrom in quantities sufficient to pay to pump'"—is included in the term "real estate" and must be deemed to be real property within the meaning of said section 1624. In the present case the express words regarding the term of the lease, used in the oral agreement and in the memorandum made by Cross, were "three-year lease." Stipek testified that if a client tells him that he (client) wants an oil lease for "$25 an acre, one-eighth overriding royalty, three-year lease," he (Stipek) would believe that the client means that he also wants "a so-long-thereafter clause" included in the lease. The proposed lease, which Stipek took with him when he went to see the Johnstons, had such "so long thereafter" provision in it. The court found that the period within which drilling operations must be commenced was three years, and the term of the lease was to be so long after said three-year period as oil or gas or other hydrocarbon substances are produced from the property. That finding is supported by the evidence. The oil lease was real property within the meaning of the statute of frauds. The court also found that the allegations in the three affirmative defenses (regarding invalidity under the statute of frauds) were true. Those findings to the effect that the oral agreement was invalid under the provisions of the statute of frauds are supported by the evidence.

[7] Appellant contends further that the signed deposition of Mr. Bell, president of defendant corporation, was a sufficient memorandum to satisfy the requirements of the statute of frauds. In his deposition, Mr. Bell admitted the oral agreement. The deposition was taken by plaintiff under the provisions of section 2055 of the Code of Civil Procedure. Section 2006 of that Code provides that a deposition "must" be subscribed by the witness. It thus appears that it was mandatory that Mr. Bell sign the deposition. Appellant cites Kellogg v. Peddicord, 181 Ill. 22, 54 N.E. 623, wherein it was held that a deposition was a sufficient writing to satisfy the statute of frauds. It is to be noted, however, that the deposition in that case was voluntarily made and signed by the defendant and produced in evidence by him in his own behalf. Appel-

lant also cites Garnsey v. Gothard, 90 Cal. 603, at pages 607–608, 27 P. 516, at page 517, wherein it was held that a declaration in a verified answer that real property was conveyed to defendant in trust was sufficient to satisfy the requirements of section 852 of the Civil Code (which provided that no trust in relation to real property is valid unless declared by written instrument subscribed by the trustee). It is to be noted that in that case the answer did not allege that the purported trust was invalid under the provision of said section 852. Respondent (defendant) herein cites Jamison v. Hyde, 141 Cal. 109, 74 P. 695, wherein the answer admitted the oral contract and also alleged the statute of frauds as a defense. It was held therein 141 Cal. at page 112, 74 P. at pages 695, 696, that the signed answer was not a waiver of the right to rely upon the statute of frauds. It was also stated therein, 141 Cal. at page 112, 74 P. at page 695, that: "'[I]f a defendant sought to be charged upon a contract within the statute of frauds admits the contract in his answer, and does not claim the benefit of the statute, he is considered as waiving its protection and as furnishing by his answer the very proof which the statute requires. But, if the admission is coupled with a claim to the protection of the statute, the rights of the party stand as though the admission had not been made. (Citation.)'" In the present case, the answer alleges three affirmative defenses based upon the statute of frauds. Furthermore in the present case, the deposition was not voluntarily made, nor was it presented in evidence by the defendant; on the contrary, as above stated, it was mandatory that Mr. Bell give and sign his deposition. The deposition herein was not a sufficient memorandum to satisfy the requirements of the statute of frauds.

If a detailed discussion were made regarding the other writings referred to by plaintiff as being sufficient to satisfy the statute, this opinion would be prolonged unnecessarily. Those writings were not sufficient memoranda to satisfy the requirements of the statute of frauds.

The findings to which we have referred are sufficient to show that defendant was not estopped to rely upon the statute of frauds.

By reason of the above conclusions, it is not necessary to discuss other contentions on appeal.

The judgment is affirmed.

SHINN, P. J., concurs.

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126 Cal.App.2d 367

PEOPLE v. WALTERS.

Cr. 5148.

District Court of Appeal, Second District,
Division 1, California.
June 30, 1954.

Defendant, charged with forgery of fictitious name and a prior felony conviction, pleaded guilty to forgery count. At the time of sentencing on the forgery count, the Superior Court, Los Angeles County, Walter S. Gates, J., revoked the probation on the prior felony conviction and directed that sentences should run concurrently. Defendant appealed from the sentence on the forgery count and contended that the two cases were part of one and the same proceeding. The District Court of Appeal, Doran, J., held that the two prosecutions were two separate proceedings and appeal from judgment in one would not open up the merits of the other.

Judgment affirmed.

Criminal Law 🔑1134(10)

Where defendant was sentenced on a charge of forgery of fictitious name and at the same time the court revoked the probation granted in a prior case, and directed that sentences should run concurrently, there were two separate and distinct judgments, and appeal from one judgment did not open up for review the merits of the other separate proceeding. Vehicle Code, § 503.

Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

DORAN, Justice.

In an information filed October 7, 1953, the appellant was charged with three counts of forgery of fictitious name in reference to the passing of certain fictitious checks, with intent to cheat and defraud named victims as follows: Count One, Maurice Karz, California Surplus Outlet and Pasadena First National Bank, $59.06; Count Two, M. G. Gusty, Sundries Fountain and Pasadena First National Bank, $59.06; Count Three, Mrs. Beulah Lailey and the same bank, $59.06. Appellant was further charged with a prior felony conviction of violation of Section 503, Vehicle Code.

The Public Defender was appointed as counsel for defendant who entered pleas of guilty to the first count and not guilty to the other two counts. Application for probation was denied and appellant was sentenced to the State Prison. The other counts were dismissed. On February 10, 1954, a petition to fix bail on appeal was filed and denied; a petition for rehearing was likewise filed and denied.

In denying the petition to fix bail on appeal, this court stated: "At the time the last-mentioned judgment [i. e., the instant judgment] was pronounced, the court revoked the probation in the case first above mentioned and sentenced appellant to state prison, the sentences to run concurrently. * * * No appeal was taken from the judgment pronounced in the first case. Appellant contends, however, that 'the proceedings in the appealed case and the termination of the probation in said action 149810 were all substantially one proceeding * * *.' With this contention we cannot agree. Two separate judgments were pronounced and an appeal taken from only one of them. Since no appeal was taken from the [first] judgment * * * this court is without power to fix bail or to order the release of appellant". People v. Walters, 123 Cal.App.2d 184, 266 P.2d 563.

Appellant contends that "The trial court erred in denying probation in Case No. 159317 (the present action) and in holding that its revocation of probation in Case No. 149810 (previous motor vehicle prosecution) were not one and the same proceeding, and reviewable on appeal from the judgment". This contention is devoid of merit. The case of People v. Robinson, Cal.App., 266 P.2d 78, and other opinions cited in support thereof, bear no resemblance to the factual situation here presented and cannot be deemed authority for appellant's contention.

As hereinbefore noted, there was no appeal from anything save the judgment in the instant case. The two prosecutions were not, as appellant contends, "substantially" the same proceedings but were and are entirely separate and distinct. It would do violence to all the tenets of appellate procedure if an appeal from one judgment should be held to open up for review the merits of another and separate proceeding. The propriety of an order revoking probation granted in a prior case is therefore not properly reviewable on this appeal. And, as noted in the respondent's brief, "there is nothing in the instant record to show that the judgment was not properly rendered".

A survey of the record indicates that customary and proper steps were taken by the trial court in respect to the matters about which appellant now complains. There is no merit in any of the contentions made.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

126 Cal.App.2d 245

MARKWELL v. SWIFT & CO. et al.

Civ. 20052.

District Court of Appeal, Second District,
Division 1, California.
June 24, 1954.

Action by car hop for personal injuries sustained when she stepped back and fell over the sill of a window in a drive-in restaurant from which the glass had been temporarily removed. From adverse judgment of Superior Court of Los Angeles County, A. A. Scott, J., the car hop appealed. The District Court of Appeal, White, P. J., held that where car hop momentarily forgot the danger created by removal of a window and she fell over the window sill as she stepped back to permit a patron to pass on sidewalk surrounding the restaurant, the car hop was guilty of contributory negligence when the momentary forgetfulness was not induced by some sudden and inadvertent disturbing cause.

Judgment affirmed.

1. Appeal and Error 🔑927(3)

On appeal from judgment of nonsuit, the reviewing court must view the evidence in the light most favorable to the plaintiff.

2. Torts 🔑1

A "tort" consists of a violation of the duty imposed by general law or otherwise upon persons occupying the relation to each other which is involved in a given transaction.

See publication Words and Phrases, for other judicial constructions and definitions of "Tort".

3. Negligence 🔑52

Notice or warning is not necessary where the danger is obvious, or the person injured has actual notice thereof.

4. Negligence 🔑52

Where a danger is so apparent that an invitee can reasonably be expected to notice it, and protect against it, or where an invitee is admittedly aware of the existing condition, there is adequate warning.

5. Master and Servant 🔑234(1)

Where car hop momentarily forgot the danger created by removal of a window in the drive-in restaurant where she worked, and she fell over the window sill as she stepped back to permit a patron to pass on sidewalk surrounding the restaurant, the car hop was guilty of contributory negligence when the momentary forgetfulness was not induced by some sudden and inadvertent disturbing cause.

6. Trial 🔑139(1), 142

Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact, but where from a review of the evidence in light most favorable to plaintiff there is not sufficient evidence to support a verdict in favor of plaintiff, a reviewing court must affirm judgment of nonsuit.

7. Release 🔑37

A mere covenant not to sue one or more joint tort-feasors does not operate to relieve other joint tort-feasors.

8. Dismissal and Nonsuit 🔑42

Before a voluntary dismissal as to one defendant will operate as a release of a codefendant, it must appear that the defendants are joint tort-feasors and that plaintiff has received some satisfaction for such dismissal.

9. Dismissal and Nonsuit 🔑29, 42

Where a judgment of dismissal was entered against two tort-feasors pursuant to parties' stipulation for consideration, the judgment operated as a retraxit and relieved the remaining joint tort-feasors of liability to the plaintiff.

10. Dismissal and Nonsuit 🔑42

Where, during the course of trial, a judgment of dismissal was entered against two joint tort-feasors on plaintiff's motion pursuant to stipulation for consideration, it was unnecessary for remaining joint tort-feasors to request leave to amend to set up the affirmative defense of retraxit.

11. Appeal and Error 🔑170(1)

Where plaintiff at no time objected to remaining joint tort-feasors' position that dismissal of suit against two joint tort-feasors amounted to a retraxit and was a defense to action against remaining tort-feasors, plaintiff could not urge for first time on appeal that defense of retraxit was not available to defendants.

12. Dismissal and Nonsuit ⟹42

Where the evidence in proceedings before the trial court show a retraxit, the defense may be availed of, even though not affirmatively set up by a defendant.

◆

Manasse & Crowley, Herbert Manasse, Hollywood, for appellant.

Harry C. Cogen, Los Angeles, for respondent, George Markley.

Moss, Lyon & Dunn, Gerold C. Dunn, Henry F. Walker, Los Angeles, for respondent, P. R. Terrey.

WHITE, Presiding Justice.

This is an action for personal injuries allegedly received by plaintiff when she stepped back and fell over the sill of a window in a drive-in restaurant, from which window the glass had been temporarily removed. In her complaint for damages plaintiff named four defendants whose negligence she alleged was the direct and proximate cause of her accident and the resulting injuries. After the cause had been called for trial, and before the first witness took the stand, plaintiff in open court dismissed as to the defendants, Swift & Company and Ralph Chilton.

The trial proceeded against the two remaining defendants, P. R. Terrey and George Markley. At the conclusion of plaintiff's case, the last two named defendants moved for a nonsuit which motion was granted as to each of them.

From the judgment of nonsuit entered in favor of the last named defendants, plaintiff prosecutes this appeal.

In her complaint, plaintiff named as defendants Swift & Company, a corporation, George Markley, P. R. Terrey, Ralph Chilton, and two "Does." By the complaint it was alleged that on March 25, 1952, the defendants, and each of them, were engaged in removal of certain old ice cream equipment from a drive-in restaurant in Los Angeles and also engaged in installing new ice cream equipment; that in order to provide ingress and egress, it was found necessary by defendants, and each of them, to remove a pane of glass from the restaurant premises; that defendants, and each of them, thereafter moved out the old equipment and moved in the new. That after the new equipment had been installed in the restaurant premises, "defendants and each of them, did negligently, carelessly and recklessly fail to barricade or guard the opening left by the removal of the pane of glass, thereby causing an extremely unsafe condition on the premises for patrons and employees of the restaurant." It was alleged that plaintiff was an employee of the restaurant and as such was standing on the private sidewalk (on the drive-in premises around its building) adjacent to the place where the pane of glass had been removed; that while plaintiff was so standing a patron approached and plaintiff stepped back to allow the patron to proceed and, as a proximate result of defendants' negligence, tripped over the sill to the open window and fell backwards, receiving injury. The remainder of the complaint alleged the nature and amount of plaintiff's claimed injuries and damages.

Defendant Terrey's answer denied negligence, proximate cause and damage, and also pleaded contributory negligence and assumption of risk as affirmative defenses.

Defendant Markley, by his answer denied negligence and as affirmative defenses, pleaded contributory negligence and unavoidable accident.

At the commencement of the trial and before any witnesses were called on behalf of plaintiff, the following proceedings took place before the trial judge in chambers:

"The Court: Now, as I understand it, you want to dismiss—you are Mr. Manasse.

"Mr. Manasse (attorney for plaintiff): Manasse, yes sir.

"The Court: And you want to dismiss as to Swift & Company, a corporation, and Ralph Chilton; is that right?

"Mr. Manasse: That is right.

* * * * * *

"Mr. Shera (attorney for Swift & Company): I would like to have a stipulation at this time that the plaintiff, Ramona Markwell, will give a covenant not to sue and a covenant not to sue further in a form acceptable to Swift & Company and Mr. Chilton, by June 20, 1953.

"Mr. Manasse: That is in consideration of the payment to us.

"Mr. Shera: In the sum of $250 on behalf of Swift & Company, $100 on behalf of Mr. Chilton.

"Mr. Manasse: Right.

"Mr. Shera: Thank you very much, your Honor.

"The Court: I understand the case is dismissed as to Swift & Company, as to Ralph Chilton, and as to the John Does?

"Mr. Manasse: That is right, yes sir."

The court then made an order as follows: "Pursuant to stipulation the Court orders this action dismissed as to defendants Swift & Company, a corporation, Ralph Chilton, Doe I, and Doe II. Due to the fact that both defendants Swift & Company, a corporation, and Ralph Chilton made settlements with the plaintiff, said defendants are not given judgment for their costs."

At the conclusion of plaintiff's case, defendant Markley moved for a nonsuit on the following grounds:

"(1) That there was no evidence of any negligence on the part of any of the defendants.

"(2) That if there was any evidence of negligence, such negligence was not the proximate cause of the damage or injuries suffered by the plaintiff.

"(3) That the contributory negligence of the plaintiff was the proximate cause of plaintiff's injuries.

"(4) That the defendant, P. R. Terrey, was an independent contractor, and the defendant, George Markley, was not responsible for the negligent conduct, if any, of such independent contractor.

"(5) That the dismissal of the defendants, Swift & Company and Ralph Chilton, constituted a retraxit and barred any recovery against the remaining defendants."

The defendant Terrey also moved for a nonsuit on all of the grounds advanced by the defendant Markley, with the exception only of ground number 4.

The motion was granted as to both defendants.

[1] Viewing the evidence in a light most favorable to plaintiff, as we are required to do on appeal from a judgment of nonsuit, we regard the following as a fair narrative thereof:

The plaintiff was, on the date of her accident, employed as a car hop at a drive-in restaurant known as the Wich-Stand, located on the corner of Florence Avenue and Figueroa Street, in the City of Los Angeles. The defendant, George Markley, who does business under the fictitious name and style of American Ice Cream Company, is an independent ice cream distributor who buys all of his ice cream from Swift & Company. It appears to have been the practice, when Markley obtained a new customer who agreed to purchase Swift & Company's ice cream for him to arrange to place Swift & Company's ice ceam equipment in the customer's place of business. Markley had apparently just gotten the Wich-Stand as a new customer, and in accordance with the accepted procedure, had made arrangements to substitute Swift & Company's ice cream equipment for the ice cream equipment then in use. When it came to replacing the old equipment with the new, it was discovered that the doors into the drive-in restaurant were not large enough to permit the removal of the existing equipment and the replacement thereof with the new. Ralph Chilton was sent out by Swift & Company to survey the situation, and after he inspected the premises he recommended that one of the large panes of glass which enclosed the interior of the drive-in restaurant be removed so as to permit the removal of the old equipment and the substitution of new cabinets. The defendant Markley telephoned Terrey Glass Company and made arrangements to have defendant Terrey come out on the morning of March 25th to remove the one pane of glass until the substitution of equipment could be accomplished, and then he was to replace the glass. Mr. Terrey came out as scheduled about 10:00 a. m., on the morning of March 25th and proceeded to remove one of the panes of glass. In the process of removing the glass, the pane was broken. Mr. Terrey cleaned up the debris and drove back to his place of business to get a new pane of glass. He returned about 1:00 in the afternoon and finished the job of replacing the glass. The window in question was without any glass from approximately 10:30 in the morning until about 1:00 in the afternoon. During that interval no barricades or warning signs of any sort were placed at or near the open window to warn persons that the window was open and contained no glass.

The plaintiff, Ramona Markwell, had come on duty at the drive-in restaurant at about 9:00 on the morning of the accident. She testified that she observed the glass being removed between 9:15 and 9:30 a. m., that morning, and that the substitution of ice cream equipment had been completed at about 10:00 a. m. The accident which resulted in her injuries occurred at about 12:30 p. m. Just prior to the accident she had finished waiting on a customer and was standing on the sidewalk which circled the restaurant premises, just immediately in front of the open window. She was well aware of the fact that there was no glass in the window in question. She testified that as she was standing on the sidewalk, two men came around the side of the drive-in, and as they walked past her she stepped back and tripped over the steel sill of the open window, which sill was about 18 inches high. She fell back into the interior of the drive-in, and suffered the injuries for which she now claims damages. She stated that as she stepped back, she momentarily forgot that the window was out.

[2] This action sounds in tort, and a tort, in contemplation of law, consists in a violation of a duty imposed by general law or otherwise upon persons occupying the relation to each other which is involved in a given transaction, Hallidie v. Enginger, 175 Cal. 505, 166 P. 1. As we view the complaint herein, appellant seeks to recover because respondents neglected to do something which they ought to have done, whereby the former suffered injury. This we gather from the averments of the complaint alleging that respondents, "did negligently, carelessly and recklessly fail to barricade or guard the opening left by the removal of the pane of glass * * *".

[3, 4] From appellant's contention it is apparent that she claims respondents owed her the duty to barricade or arrange for barricading the window upon removing the pane of glass, to warn her, or to place or arrange for placing warning signs at the site of a dangerous condition. But the decisions are unanimous in holding that notice or warning is not necessary where the danger is obvious, or the person injured has actual notice thereof. To have warned appellant herein by barriers or otherwise that the pane of glass had been removed would be but to have informed her of dangers and conditions, of the existence of which she was admittedly aware. Where one has knowledge of the existence of a dangerous condition, the question of warning becomes immaterial and can have no causal connection with the injury sustained. When a danger is so apparent that an invitee on the premises can reasonably be expected to notice it and protect against it, or where as here, the appellant invitee was admittedly aware of the existing condition, the latter constitutes adequate warning, Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 561, 296 P. 76; Walker v. Greenberger, 63 Cal. App.2d 457, 461, 462, 147 P.2d 105. While these cases refer to the liability of an owner or possessor of land, it follows that no liability would attach to respondents herein if, under the facts, there would be no liability were they the possessors of the premises. If it was negligence for respondent Terrey to permit the space in question to remain unbarricaded after removal of the pane of glass therefrom, there appears to be no escape from the conclusion that it was negligence for appellant, with full knowledge of the existence of such condition, to place herself in a position wherein injury might be sustained by her as a result thereof. Her knowledge of the existence of the dangerous condition was at least equal to that of respondent Terrey, who removed the pane of glass.

[5, 6] However, appellant contends that the facts herein merely present a case of negligence based upon momentary forgetfulness of a known danger and that gen-

erally the question is one for the jury's determination. But to excuse one's failure to avoid a known peril because of momentary forgetfulness, such forgetfulness must be induced by some sudden and adequate disturbing cause. A lapse of memory in the presence of known danger, in order to relieve a plaintiff from contributory negligence, must be occasioned by a reasonable cause and not from mere inattention. In other words, it must be induced by some sudden and adequate disturbing cause, and where, as here, there was a transitory or short-lived period of oblivion to a known danger, not induced by some sudden and inadvertent disturbing cause, such oblivion and forgetfulness is negligence as a matter of law, Henry J. Kaiser Co. v. Industrial Accident Commission, 81 Cal.App.2d 818, 827, 828, 185 P.2d 353; 38 Amer.Juris., sec. 187, p. 863. Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact. But, where as in the instant case, it must be said from a review of the evidence, giving full credit only to that portion thereof which tends to support the allegations contained in the appellant's complaint, indulging in every legitimate inference which may be drawn from that evidence, the determination inevitably follows that there is no evidence of sufficient substantiality to support a verdict in favor of appellant, if such verdict were rendered, under well-established rules and the settled law of this state we must affirm the judgment of nonsuit rendered. The foregoing conclusion at which we have arrived ordinarily would render it unnecessary to discuss repondents' contention that the dismissal of defendants Swift & Company, a corporation, and Ralph Chilton constituted a retraxit and barred any recovery against the remaining defendants, who are appellant's herein. However, since we are convinced that respondents contention in this regard furnishes an added reason why the judgment of nonsuit must be affirmed, we are disposed to give consideration to the issue of retraxit raised in the trial court and on appeal.

[7] While it is true, as contended by appellant, that a mere covenant not to sue one or more joint tort feasors does not operate to relieve other joint tort feasors, Kincheloe v. Retail Credit Co., 4 Cal.2d 21, 46 P.2d 971; Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99, such however is not the situation here presented. From a review of the proceedings that took place in chambers before the trial judge it is at once manifest that in consideration of the payment of $250 by defendant Swift & Company and $100 by defendant Ralph Chilton, the action, on motion of appellant herein, was dismissed as to said last named defendants. The question to be determined is whether such a voluntary dismissal of two of the alleged tort feasors upon paymen of a valuable consideration, under the circumstances here shown, is sufficient to constitute a retraxit and bar recovery agains the remaining defendants.

[8] The generally accepted rule was thus stated in Key v. Caldwell, 39 Cal.App.2d 698, 701, 104 P.2d 87, 88: "It is settled that before a voluntary dismissal as to one defendant will operate as a release of a codefendant it must appear that the defendants are joint tort-feasors and that plaintiff has received some satisfaction for suci dismissal. (Citing cases.)"

In Hildebrand v. Delta Lumber & Box Co., 67 Cal.App.2d 88, 90, 91, 153 P.2d 377 378, the court adopted the foregoing rule in the following language:

"The first issue raised by defendants is that the dismissal filed as to the defendant Oliver amounted to a retraxit and operated as a release of the other defendants.

"The common law rule of retraxit is predicated upon the theory that a complainant who has been compensated for his injury by one of the joint tort-feasors is not entitled to a second recovery from the others. (Case cited.) "The mere discontinuance as to one of the several joint tort-feasors without a showing that satisfaction was given for such discontinuance does not operate to release the others. (Citing cases.)" See also Hawber v. Raley, 92 Cal.App. 701, 707, 708, 268 P. 943.

The rule therefore, would appear to be that where, as in the case at bar, the record discloses that a voluntary dismissal was entered as to two defendants in consideration of appellant having received some satisfaction in compensation for her injuries, all the requisite elements necessary to establish a retraxit, namely a voluntary dismissal and the receipt of some satisfaction, were present.

Appellant relies upon the earlier case of Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99, 101, in support of her claim that the dismissal of defendants Swift & Company and Chilton did not constitute a retraxit. The facts in the case just cited are somewhat similar to the factual situation in the instant case in that plaintiff entered into an agreement with two of the defendants entitled "Covenant Not to Sue and Covenant Not to Sue Further". Based upon this agreement plaintiff in the Lewis case filed a dismissal with the Clerk as to the defendants named in the agreement. The holding of the Supreme Court was that the dismissal did not amount to a retraxit. However the court draws a distinction between a dismissal voluntarily made by application to the Clerk and a dismissal entered in open court, stating, "There is a well-recognized distinction between a dismissal voluntarily made by the clerk's entry, which is presumed to be without prejudice to the bringing of another action, and a dismissal entered in open court pursuant to stipulation, which is ordinarily effective as a *retraxit*. In the absence of such stipulation or motion addressed to the court, there is no *retraxit*. (Citing cases.)"

In the case at bar, there was not a mere covenant not to sue, in fact, no such document had been executed. There was, however, a dismissal ordered by the court of two alleged joint tort feasors pursuant to stipulation and for consideration.

Decisive of the question is the language of the court in Lamb v. Herndon, 97 Cal. App. 193, 202, 275 P. 503, 507, as follows:

"A *retraxit* occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action. Under our law this *authority* is deemed to have been conferred upon the attorney. (Westbay v. Gray, 116 Cal. 660, 48 P. 800; Merritt v. Campbell, 47 Cal. [542] 543.)

"In the case under consideration, had the application for dismissals * * * been made in open court upon the agreement of the litigants as hereinbefore set forth and thereupon the court had entered judgments of dismissal, they would have been judgments on *retraxit* and would have barred further litigation of the matter involved. (Citing cases.)" See also Flynn v. Manson, 19 Cal.App. 400, 126 P. 181; Merritt v. Campbell, 47 Cal. 542, 543; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704.

[9] We are persuaded that under the foregoing authorities the judgment entered herein pursuant to stipulation for consideration operated as a retraxit and relieved the other joint tort feasors of liability to appellant.

Finally, appellant urges that if it be held that her action in dismissing as to two of the joint tort feasors amounted to a retraxit, that respondents, in order to avail themselves thereof must plead the same affirmatively in their answer or by way of supplemental answer. None of the cases cited by appellant in support of her contention involved retraxit, release or covenant not to sue.

[10-12] In the case now engaging our attention, the action upon which respondents base their defense of retraxit arose after the commencement of the trial. It seems to us that it would have been a useless and unnecessary act for respondents at that stage of the proceedings to have requested leave to amend to set up such an affirmative defense. That appellant was not prejudiced or surprised in any way is evidenced by the fact that she at no time raised any objection to the position taken by the respondents in the trial court. It would seem to come rather late when urged for the first time on appeal. Furthermore, it is not always essential to plead affirmatively such a matter. Where the evidence and proceedings before the trial court show a retraxit, the defense may be availed of, even though not affirmatively set up by a de-

fendant, Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 562, 296 P. 76; Chetwood v. Calif. Nat. Bank, supra, 113 Cal. at page 428, 45 P. 704.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

126 Cal.App.2d 481

GORDON v. GORDON.

Civ. 19894.

District Court of Appeal, Second District, Division 3, California.

July 8, 1954.

Hearing Denied Sept. 2, 1954.

In action by husband to set aside deed to his wife on ground that it was procured by duress and without consideration, except that wife caused criminal charges instigated by her to be dismissed, the Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Parker Wood, J., held, inter alia, that evidence supported findings in favor of plaintiff.

Affirmed.

1. Deeds 🔑211(5)

Husband and Wife 🔑232(3)

In action by husband to set aside deed to his wife on ground that it was procured by duress and without consideration, except that wife caused criminal charges instigated by her to be dismissed, evidence supported findings in favor of husband.

2. Attorney and Client 🔑75(1)

Where attorney, who prepared deed from husband to wife, was originally attorney of record for wife and a material witness in husband's action to set aside deed on ground of duress, and court's order requiring substitution of attorney on ground that attorney could not act both as attorney and as witness was complied with without objection, there was no error.

3. Appeal and Error 🔑933(1)

Statements in affidavits filed for consideration upon appellant's motion for new trial would be viewed in light most favorable to respondent.

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A. Brigham Rose, Los Angeles, for appellant.

Avery M. Blount and Hunt & McCann, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to set aside a deed upon the ground that it was procured by duress. Defendant appeals from judgment in favor of plaintiff.

Plaintiff and defendant were married in 1945, and at that time plaintiff owned certain real property as his separate property. On March 10, 1947, defendant caused a complaint to be filed by the district attorney charging that plaintiff assaulted defendant on March 8, with a deadly weapon, and that he violated section 273d of the Penal Code (inflicting injury upon wife). On March 10, defendant was arrested upon said charges and placed in jail. On March 12, he was released on bond. His preliminary hearing was set for March 17.

Plaintiff testified that after he was released on bond he returned to his home (the property involved here, where plaintiff and defendant lived); defendant then said to him: "Well, I got you where I want you and you will go down to Rau [an attorney]."; he went to the office of Mr. Rau (on March 13) because defendant told him to go there; the attorney told him that he (plaintiff) was in a mess and that he could get a number of years in San Quentin; plaintiff then asked, "[H]ow do I get out of it?"; the attorney, who then had a joint tenancy deed in front of him (a deed from plaintiff to plaintiff and defendant as joint tenants), said, "Just sign that."; the attorney also said that the charges would be dropped if he signed the deed; he signed the deed believing that the charges would be dropped, and he would not have signed it if he had not so believed; on March 14 he and defendant went to Mr. Rau's office and talked with him regarding a dismissal of the case; the attorney said he would go to the district attorney's office and do the best he could; then the three of them went to the district attorney's office; a man in that office asked defendant if a weapon was used; she and the plaintiff said that no weapon was used; nothing was said at that time about having executed a deed; they went to court on March 17 and Mr. Rau told the court that defendant's tongue was cut by her teeth, and defendant told the court that no weapon was used.

On March 17, at the preliminary examination, defendant testified that plaintiff did not use any weapon and she did not want to prosecute him. Mr. Rau told the court that he believed that no deadly weapon was used, that the mouth injury was due to a lower dental plate that did not fit well, that there was some question about this having occurred, and that he moved that the case be dismissed.

The case was dismissed. On several occasions thereafter, according to plaintiff's testimony, defendant told him that she could open the case at any time and have him put away. In October, 1947, by reason of proceedings commenced by defendant, plaintiff was committed to the state hospital at Camarillo, and thereafter he was transferred to the state hospital at Mendocino. In August, 1950, he was restored to capacity. In December, 1947, while plaintiff was in the state hospital, defendant was appointed guardian of his estate. He obtained a divorce from her after he was released from the hospital. About February, 1951, he filed a petition for an accounting by her as guardian. About that time she commenced another proceeding wherein she sought to have him returned to the hospital.

Defendant testified that on March 9, 1947, about 1:30 a. m., plaintiff hit her head with a pistol and cut her tongue with a dagger; she went to the district attorney's office and signed a complaint charging plaintiff with assault with a deadly weapon; the day after he was released on bond, he and she went to the office of Mr. Rau, and defendant told Mr. Rau that they were living together again, and "he didn't want anything to happen, that he was sorry he did it," that defendant did not want to prosecute him; plaintiff also said, "By the way, I have talked to you about this deed, about some time executing a deed to my wife, I wonder if I executed it now would it help any?"; Mr. Rau said that if the judge knows that you are living together again it might have a bearing, but he could not promise anything; Mr. Rau also asked if that was the deed defendant had been talking about for some time; prior to the time they went to that office (about February, 1946, when plaintiff was preparing to go to a hospital), plaintiff had telephoned Mr. Rau and told him that defendant had advanced money for him, helped to save his home, restored his health, and that he wanted to make a joint tenancy deed; Mr. Rau made the deed while they were in his office. She also testified that at the preliminary examination she testified that no weapon was used in causing the injuries, and it was her desire that the case be dismissed. She also testified that before they were married she gave him $1,500 in cash for use in buying the house, and after the marriage and before the beating she gave him about $2,500 in cash; before they went to Mr. Rau's office the plaintiff wanted her to say that he never struck her and that she fell and hurt herself; plaintiff said that if she did not so testify he would kill himself; he also said that he would kill her; Mr. Rau represented her in the guardianship accounting and in a case to annul a marriage with Mr. Paulis.

Plaintiff testified further that on March 8, 1947, the defendant came home intoxicated, and he told her that she had to stop drinking or he would get a divorce; then she went into a tantrum and fell against a hinge on the bathroom door; he did not strike or touch her prior to the time she fell; after she fell he left immediately and stayed away from home that night; he returned the next day and saw that she had a bruise on the right side; he told her that her liquor bill was getting too high, and then she cried; he was arrested the next day. Plaintiff also testified that he did not threaten to kill defendant, nor did he threaten to commit suicide; she never gave him anything for the deed; she never gave him $1,500 or any amount prior to marriage or at all.

Mr. Rau, called as a witness by defendant, testified that shortly before plaintiff and defendant came to his office (when the deed was made) defendant telephoned him, and at that time apparently plaintiff was with her—she would talk and then he would talk; the substance of the conversation was that she had advanced money to help him when he was ill and he felt obligated to give her a half interest in the house and he wanted to make the deed; prior to that conversation he had had conversations, either with her or him, regarding the deed; he prepared the deed while they were in his office; he first heard of the criminal matter while they were there; they both said that they were reconciled and they wanted the case dismissed; plaintiff wanted to know if the making of the deed would prejudice the case and whether it was the proper time to make the deed; he replied that defendant did not have control of the case, that all he could do would be to make a motion to dismiss, and if the parties were reconciled the deed would tend to corroborate a reconciliation and to strengthen the motion for dismissal; plaintiff asked him what his fee would be for attempting to get the dismissal; he replied $300; plaintiff said he did not have the money but he could get it from a friend. He also testified that after the conversation in his office, the three of them went to the district attorney's office; he told a deputy there that they wanted the case dismissed because the parties had reached a reconciliation; he showed the deputy the deed and said that the reconciliation was apparently bona fide; the deputy said that the arrest report indicates the husband had cut the wife's tongue with a dagger; the wife replied that the cut was due to slipping of her false teeth; he (Mr. Rau) appeared in court as attorney for the husband (plaintiff in the present case) and made the motion for a dismissal.

The court found that on March 8, 1947, the plaintiff inflicted injuries upon defendant; it is not true that plaintiff used a pistol, or dagger, or other deadly weapon; on March 10, defendant caused plaintiff to be charged with assault with a deadly weapon, and also with violation of section 273d of the Penal Code; plaintiff was arrested on said charges and released on bail; on March 12, defendant represented to plaintiff and threatened him that unless he would execute a joint tenancy deed to himself and defendant, covering said real property, she would see to it that he was prosecuted on said charges, but if he would execute the deed she would cause the charges to be dismissed; plaintiff was in fear of defendant and the circumstances in which he found himself; there was no consideration for said deed, except that defendant did cause the charges to be dismissed; said deed was procured by menace, duress, and against plaintiff's will and without consideration, and the deed is of no legal effect.

[1] Appellant contends that the court erred in setting aside the deed. She argues that there was no evidence that any undue advantage was taken by her. The contention is without merit. There was ample evidence to support the findings.

[2, 3] Appellant also contends that the court erred in requiring her to employ an attorney other than her attorney of record. In support of her motion for a new trial, appellant filed an affidavit of Mr. Rau which stated that he was originally the attorney of record for defendant in the present case; the trial judge, in chambers, discussed the issues of the case with counsel for the parties, and during that discussion counsel for plaintiff indicated his intention of calling affiant as a witness regarding matters occurring in his office; affiant said he would testify if it became necessary in explanation of said matters; the judge stated that affiant would not be permitted to act as attorney for defendant and also be a witness, and he must make a choice of alternatives; after further discussion the judge stated that affiant would not be permitted to try the case and that arrangements must be made for substitution of another attorney, and the case

would be continued to the following day for trial in his department or returned to the department of the presiding judge for reassignment; affiant informed the judge that defendant had previously made a contact with an attorney relative to representing her and it might be possible to procure a substitution of that attorney; the judge stated that such substitution was satisfactory; the substitution was accomplished on that day or the following morning and the trial was had with affiant appearing only as a witness.

Mr. Blount, attorney for plaintiff, also filed an affidavit for consideration upon the motion for a new trial. He stated therein, among other things, that in the discussion in chambers Mr. Rau said that he represented Mr. Gordon in the criminal case, that he represented Mrs. Gordon in civil matters, that he represented both of them in settling their disputes and he prepared the joint tenancy deed described in the complaint; the judge then stated that he would not permit Mr. Rau to appear as counsel for defendant in defending against the execution of a deed which he had prepared while representing Mr. Gordon, and he would return the case to the master calendar for further proceedings; Mr. Blount and Mr. Rau stated to the judge that they preferred that the cause remain with the judge and be tried by him; Mr. Rau said that he had considered the fact that he had appeared for Mr. Gordon and he had discussed the case with another attorney, that Mrs. Gordon had also discussed the matter with another attorney, and that Mr. Rau would arrange to have counsel substituted and the case would go to trial the next morning; the judge suggested that Mr. Rau confer with his client; Mr. Rau, after conferring with Mrs. Gordon, announced to the judge that Mrs. Gordon did not desire the case continued, and she would have other counsel represent her in a trial on the next day; thereupon the case was continued to the next day, and Mrs. Gordon appeared in said courtroom the next day with attorney James H. O'Connor, who represented to the court that he had been substituted to represent Mrs. Gordon and he announced that defendant Mrs. Gordon was ready for trial; the trial proceeded on said day; during said trial defendant did not make any complaint to the judge that she desired a continuance of the trial or that she was dissatisfied with the manner of the trial until after the decision was rendered.

The statements in the affidavits are to be viewed in the light most favorable to the respondent. After the judge announced that Mr. Rau would not be permitted to represent defendant at the trial, it appears that Mr. Rau and defendant complied with the order without objection, and that the substituted counsel and defendant proceeded with and completed the trial without any objection to the order. This contention is not sustainable.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., concurs.

CALLAHAN v. GRAY. *

Civ. 20134.

District Court of Appeal, Second District, Division 2, California.

July 7, 1954.

Hearing Granted Sept. 2, 1954.

Action for injuries to pedestrian who was struck by automobile of defendant while crossing street, allegedly in a marked crosswalk. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment from which the plaintiff-pedestrian appealed. The District Court of Appeal, Moore, P. J., held that evidence warranted implied finding that pedestrian was guilty of contributory negligence.

Judgment affirmed.

1. Automobiles 🔑244(56)

In action for injuries to pedestrian who was allegedly in marked crosswalk on city street when struck by automobile being driven by defendant at a slow rate of speed, evidence warranted implied finding that pedestrian was guilty of contributory negligence by either proceeding in front of automobile when reasonably prudent person would have known that it was dangerous to proceed, or by walking to and against the vehicle upon disregarding its approach.

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* Subsequent opinion 279 P.2d 963.

2. Trial ⚿139(1), 140(1)

The credibility of a witness and the weight to be given his testimony is peculiarly the exclusive function of the jury.

3. Evidence ⚿594

Although a witness is presumed to speak the truth, the jury may reject his testimony even though uncontradicted.

4. Appeal and Error ⚿999(1), 1008(1)

Findings of a trial judge or jury on fact issue will not be disturbed on appeal even though the reviewing court may conclude that a different result should have been reached and though other inferences might reasonably have been drawn from the evidence.

◆

Edward Clayton Jones and William M. Anderson, Los Angeles, for appellant.

Spray, Gould & Bowers and Philip L. Bradish, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an appeal from a judgment denying relief for alleged injuries resulting from the impact of an automobile with a pedestrian allegedly in a marked crosswalk on a city street. The questions for determination are whether or not as a matter of law respondent is guilty of negligence and whether appellant is free from contributory negligence.

At approximately 9:00 p. m. appellant was walking easterly in a crosswalk on Fair Oaks Avenue in South Pasadena. The night was clear. Respondent was driving northerly along the same avenue about 10 to 15 miles an hour. Having stopped behind another car before reaching the crosswalk, he started again when the way appeared to be open, doing five miles per hour, hesitated, and then struck appellant. There is some confusion as to whether appellant was struck with the left front or the left side of the car. She was not seriously injured. She arose, proceeded on her way to Gus' Barbeque across the street. She did not then visit the hospital for X-rays, but did so several hours later.

Respondent claims contributory negligence on the part of appellant, contending that she did not look where she was going, but carelessly walked into the side of his car.

[1] Appellant rests her entire case on Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834. She contends that the facts in her case are practically identical with those outlined in the cited decision. Such contention is error. In that case, the plaintiff, Mrs. Gray, was definitely in the crosswalk when struck and could not, merely by virtue of position, be guilty of contributory negligence as a matter of law unless the manner of the defendant's driving as he approached the crosswalk gave her reasonable cause to fear him. Mrs. Gray first passed in front of the turning truck and was then struck. In the case at bar, the proof warrants a finding on her own testimony that Miss Callahan, without noticing her course, walked into the side of respondent's automobile. In Gray v. Brinkerhoff, the collision occurred in daylight at an intersection where the traffic was controlled by lights. In the case at bar, the accident occurred in the middle of a block, at night time and respondent testified that he did not know that Miss Callahan was in the crosswalk. The Supreme Court held that the question of contributory negligence is a matter of law and not one for the jury where the pedestrian was in the crosswalk. In the instant case, there is a question as to whether or not appellant was in the crosswalk. She contends that she firmly stated that she was in the crosswalk and that respondent said he did not know where he was. On this basis, she contends that the jury should not resolve the doubt in respondent's favor, when he is not certain, as against her firm statement that she was in the crosswalk. Perhaps it was her excess positiveness that impelled the jury to disbelieve her; perhaps

her manner of testifying; perchance she protested too much. She may have left the impression that the was in a hurry to visit Gus' Barbeque and hasten to her bowling contest, resulting in her collision. She testified that she proceeded to cross the street, looked south, saw Gray's automobile and "kept watching the oncoming car with a definite eye, walking, looking first in the zone and then to the right * * * *watching Mr. Gray's at all times.* * * * I looked at the curb in front of Gus's and continued to walk on through." Later she testified that she did not know whether this car was Gray's; "I did not follow that car * * * I was watching where I was walking * * * I looked to the north and down to the south * * * a number of times * * * when I stepped off the curb and looked to the south I don't know where I was." From the maps and the illustrative diagram on the board, the jury could reasonably infer that when appellant approached the point of impact, respondent's car was so near that a reasonably prudent person in appellant's position in the street would conclude it to be dangerous to proceed. There is such confusion and inherent contradiction in appellant's testimony as to justify its rejection by a jury. She said the car stopped instantly upon its door coming in contact with her body. The jury could reasonably have inferred that she walked to and against the vehicle and disregarded its approach. Her testimony reveals some confusion in her mind as to whether she was knocked down by the car. At any rate, she wore no royal badge of honor, no insignia that her speech was the divine afflatus. Being free to adopt such evidence as appeared to be veracious, sincere and most nearly accurate, the jury chose to be guided by the testimony of respondent.

[2-4] The credibility of a witness and the weight to be given to his testimony is peculiarly the exclusive function of the jury. People v. Miller, 51 Cal.App. 189, 190, 196 P. 283; People v. Lecurto, 97 Cal.App. 185, 191, 275 P. 462. A trial judge or jury is not required to believe a witness merely because there is no positive contradiction of his testimony. Travis Glass Co. v. Ibbetson, 186 Cal. 724, 727, 200 P. 595. While a witness is presumed to speak the truth, the jury may reject the testimony of a witness even though uncontradicted. Travis Glass Co. v. Ibbetson, supra; Jewell v. Bell, 120 Cal.App. 682, 685, 8 P.2d 223; Baker v. Fireman's Fund Ins. Co., 79 Cal. 34, 41, 21 P. 357. The same rule applies to inconsistencies in the testimony of a single witness. Therefore, findings will not be disturbed even though the appellate court may conclude that a different result should have been reached. Silva v. Goldman, 117 Cal.App. 423, 426, 4 P.2d 191; Jewell v. Bell, supra, 120 Cal.App. 686, 8 P.2d 223. Even though other inferences might reasonably have been drawn from the evidence, the reviewing court is without power to substitute its conclusions for those of the trial court. Fischer v. Keen, 43 Cal.App.2d 244, 250, 110 P.2d 693.

Because the implied finding that appellant was contributorily negligent is supported by substantial evidence, the judgment cannot be disturbed.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

126 Cal.App.2d 403

ARQUES v. CITY OF SAUSALITO et al.

PEOPLE v. CITY OF SAUSALITO et al.

ARQUES
v.
G. W. THOMAS DRAYAGE & RIGGING CO., Inc., et al.

Civ. 15885, 15886.

District Court of Appeal, First District,
Division 2, California.

July 6, 1954.

Action by lot owner to quiet title to area occupied by wharf which lot owner used as means of access to his lot, and to enjoin city from interfering with his occupancy and use thereof. Lot owner brought a second action for damages to his property which city had removed from the wharf, and for loss of its use. The state intervened in the first action. The Superior Court, Marin County, N. Charles Brusatori, J., entered judgment adverse to the lot owner, and he appealed. The District Court of Appeal, Dooling, J., held, inter alia, that where the state laid out the street on which the wharf was located as a public street, fee simple title to the street remained in state and wharf constructed thereon became state's property, and lot owner could acquire no rights therein by adverse possession against the state, and that the city had a right to remove from the wharf the lot owner's property, which constituted an obstruction to a public street.

Judgments affirmed.

1. Adverse Possession ⚷8(1, 2)
Municipal Corporations ⚷658
Wharves ⚷5

Where state laid out public street upon which a wharf was subsequently constructed, fee simple title to the land comprising the street remained in the state and the wharf constructed thereon became the state's property, and hence lot owner, who used the wharf and street as a means of access to his lot, could not acquire any rights in the wharf or street by adverse possession against state. St.1867–68, pp. 717, 718, § 4; p. 716, § 1 et seq., as amended by St.1869–70, p. 541.

2. Dedication ⚷31

Where state, through its Tide Land Commissioners, laid out public street on a duly authorized and recorded map, its dedication as a public street was complete and required no acceptance. St.1867–68, pp. 717, 718, § 4; p. 716, § 1 et seq., as amended by St.1869–70, p. 541.

3. Navigable Waters ⚷36(6)

Prohibition contained in Constitution of 1879 against the further subdivision of tidelands could not affect dedication, completed in 1872, of portion of such lands as a public street. St.1867–68, pp. 717, 718, § 4; p. 716, § 1 et seq., as amended by St.1869–70, p. 541; Const. art. 15, § 3.

4. Municipal Corporations ⚷54

Municipality, upon its incorporation, became but a department of the state organized for the more convenient administration of certain powers belonging to the state.

5. Municipal Corporations ⚷661(1)

Municipal corporations, in their management and control over streets within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state.

6. Highways ⚷153

The primary purpose of a highway is the passing and repassing of the public, which is entitled to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose.

7. Municipal Corporations ⚷693

Property may be temporarily left in a public street as an incident of loading and unloading, but street is not to be made a permanent storage place for personal property.

8. Wharves ⚷10

Where wharf located on public street was limited in area, the placing, keeping or storing of articles or materials of any kind, nature or description thereon was properly enjoined.

9. Municipal Corporations ⚷696

City had right to remove property which constituted an obstruction to a public street.

Wallace S. Myers, San Anselmo, for appellant.

John B. Ehlen, San Francisco, for respondents G. W. Thomas Drayage & Rigging Co., Inc., and City of Sausalito.

Edmund G. Brown, Atty. Gen., Miriam E. Wolff, Dep. Atty. Gen., for respondent State.

DOOLING, Justice.

Appellant is the owner of Lot 200 as laid out by the Tide Land Commission of the State of California in 1872, as shown on a map prepared by said Commission and recorded in Marin County in Book 2 of Maps, p. 32. The southerly line of said Lot 200 is the northerly line of Johnson Street as laid out by said Tide Land Commission. Lot 200 and Johnson Street as so laid out are a part of the submerged tidelands located in Richardson Bay and are within the city limits of respondent, City of Sausalito. The tidelands covered by said map were laid out in lots and streets by said Tide Land Commission and the lots sold by the State of California pursuant to the authorization of Statutes of 1867–68, p. 716, as amended by Statutes of 1869–70, p. 541. Section 4 of Stats.1867–68, pp. 717–718, authorized the Tide Land Commissioners to prepare maps of said lands "reserving so much thereof for streets * * * as in their judgment may be required. * *."

For many years there has been a wharf or pier located on a part of Johnson Street which gives access to Lot 200. Appellant's father and predecessor in title in 1923 attached to the wharf a water line which supplies a fire hydrant located on said wharf. The respondent city has paid the water bill and serviced this hydrant for at least 28 years.

The fire chief of Sausalito reported to the City Council that by reason of the storage on the wharf of certain beams and a steam hammer by appellant access to the fire hydrant was obstructed; and the City Council, after appellant had refused their demand that he remove them, removed these objects from the wharf.

Appellant commenced one action to quiet title to the area occupied by the wharf and to enjoin the city from interfering with his occupancy and use thereof, and a second action for damages to the steam hammer and its loss of use. The State of California intervened in the first action asserting its title to Johnson Street and alleging that the city had an easement therein for a public street. The trial court held that the State has title to Johnson Street in fee simple, that the city has an easement thereover for street purposes; that appellant has no title or interest therein except an easement for access to Lot 200 and enjoined appellant from storing any property on or obstructing access to the wharf. In the second action appellant was denied any damages.

[1] Since the State of California, through its Tide Land Commissioners duly authorized by statute, laid out Johnson Street as a public street it is difficult to see how appellant can claim any right or title thereto or to the wharf constructed thereon. Not only does the fee simple in this land remain in the State but the wharf constructed thereon has become the State's property. Yokohama Specie Bank v. Higashi, 56 Cal.App.2d 709, 712, 133 P.2d 487, quoting City of Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 23, 292 P. 1076, 80 A.L.R. 379. No rights therein could be acquired by appellant or his predecessors by adverse possession against the State. People v. Chambers, 37 Cal.2d 552, 556–557, 233 P.2d 557; Patton v. City of Los Angeles, 169 Cal. 521, 527 et seq., 147 P. 141. The appellant's full rights to use this public street for ingress to and egress from Lot 200 are recognized and protected by the decree and those rights are the only ones which were acquired by him and his predecessors from the State.

[2] Sausalito was incorporated as a municipal corporation in 1893; on July 12, 1894 its City Council adopted Ordinance No. 29 which recited that "the Town of Sausalito does not accept the said streets, except as to their surveys, names and widths"; and in 1899 the City Council adopted Ordinance No. 97 accepting all streets theretofore offered for dedication by their owners. From these facts appellant argues that the city did not accept the State's offer of dedication within a reasonable time. 9 Cal.Jur. p. 56. Appellant mistakes the rule applicable to the situation here presented. When the State, through its Tide Land Commissioners, laid out Johnson Street on a duly authorized and recorded map its dedication as a public street was complete and required no acceptance. The effect of such a public dedication of the State's own land by the Tide Land Commissioners was considered by the U. S. Court of Appeals for the Ninth Circuit in State of California v. United States, 169 F.2d 914. At page 921 of 169 F.2d that court said: "Several well-reasoned deci-

sions of the Supreme Court of California * * * have definitely established that when a formal dedication of a street is made by the State or by a municipality, no acceptance is necessary." The California cases cited therein fully support this statement.

[3–5] Appellant cites 18 Cal.Jur. p. 1029 for the rule that "A municipal corporation * * * as such, has no proprietary interest or riparian rights in ordinary tidelands situate within its corporate limits. And where no title to such lands appears to have passed from the state, the municipal corporation cannot enjoin acts of a railroad company in driving piles for the construction of a wharf upon such lands. * * *" The passage cites City of San Pedro v. Southern Pac. Railroad Co., 101 Cal. 333, 35 P. 993. In the particular case the railroad company was acting under permission of the Surveyor General granted pursuant to statutory authority and the portion of the tidelands involved had not been dedicated by the State as a public street. The case is not in point. In the case before us the land in question has been dedicated by the State as a public street at all times since 1872. The prohibition in Art. XV, sec. 3 of the Constitution of 1879 prohibiting the further subdivision and sale of tidelands could not affect this completed dedication. Upon its incorporation in 1893 Sausalito became "but a department of the state organized for the more convenient administration of certain powers belonging to the state, * * * and such corporations, in their management and control over streets * * * within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state." People ex rel. Bryant v. Holladay, 93 Cal. 241, 248, 29 P. 54, 56; Laura Vincent Co. v. City of Selma, 43 Cal.App.2d 473, 476, 111 P.2d 17; 7 McQuillen, Municipal Corporations, 3d Ed., p. 578. It may also be noticed that in this very action, in which the State is a party by intervention, the rights of the city have been adjudicated and the State has not only not attacked this judgment but has filed a brief in its support.

[6–8] Finally the appellant argues, without citation of supporting authority, that even though this wharf is a part of a public street citizens have the right to park automobiles and place property on public streets for various purposes. "'The primary purpose of a highway is the passing and repassing of the public, which is entitled * * * to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose.'" In re Bodkin, 86 Cal.App.2d 208, 210, 194 P.2d 588, 590. While property may be temporarily left in a public street as an incident of loading and unloading, Fisher v. Los Angeles Pac. Co., 21 Cal.App. 677, 132 P. 767, it is not to be made a permanent storage place for personal property. Western States Gas & Electric Co. v. Bayside L. Co., 182 Cal. 140, 144–145, 187 P. 735. The wharf here in question is limited in area and the court was well justified in enjoining the "placing, keeping or storing * * articles or materials of any kind, nature or description" thereon.

[9] What we have said disposes of the appeal in the action for damages. After appellant refused to remove his steam hammer from the wharf the city had it removed and placed alongside a public street in the vicinity. The city had a right to remove this property which was an obstruction to a public street. Appellant let it lie where it was placed for approximately two years. He had the right to move and store it in any place where he might lawfully do so and he apparently chose not to exercise this right. If it suffered damage from its exposure by the side of a public thoroughfare appellant was at all times in a position to prevent it.

Judgments affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

126 Cal.App.2d 408

PEOPLE v. CANDELARIO.

Cr. 2998.

District Court of Appeal, First District,
Division 2, California.
July 6, 1954.

Defendant was convicted of possessing marijuana. The Superior Court, Monterey County, Anthony Brazil, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to sustain conviction.

Judgment of conviction and order denying new trial affirmed.

1. Poisons ⚷9

Evidence was sufficient to sustain conviction of possession of marijuana. Health and Safety Code § 11,500.

2. Criminal Law ⚷507(1)

Purchaser of a narcotic was not accomplice of seller, and the successive possession of each were separate and distinct offenses. Health and Safety Code § 11,500.

3. Witnesses ⚷337(5)

In prosecution for possession of marijuana, district attorney was entitled to show, by way of impeachment of his testimony as a witness, that defendant had suffered previous felony conviction. Health and Safety Code § 11,500.

4. Criminal Law ⚷1141(2)

Burden cannot be imposed upon the reviewing court to search out unspecified errors.

◆

Ruben Candelario, in pro. per.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of violating section 11500 Health and Safety Code (possession of marijuana). He appeals from the judgment of conviction and the order denying his motion for new trial.

On September 23, 1953 one McClendon met appellant and one Perez at about 11:30 p. m. in a tavern in Salinas. Appellant invited McClendon to "go out and have some fun." The three got into McClendon's car, Perez sitting in the front seat by McClendon, who was driving, and appellant in the back seat. Perez directed McClendon where to drive and the car was finally stopped on a dirt road. Appellant then asked McClendon to buy six marijuana cigarettes for $5, and McClendon gave appellant $5 and received from him six cigarettes. (The above facts are from the testimony of McClendon.) While the car was still parked two officers in a police car drove up. They found three or four marijuana cigarettes on the ground at the left side of McClendon's car, one on the floor of the car under the steering wheel and one on McClendon's person.

[1, 2] It is clear that this evidence is sufficient to support appellant's conviction. The claim that McClendon was an accomplice is answered by People v. Mimms, 110 Cal.App.2d 310, 314, 242 P.2d 331, holding that the purchaser of a narcotic is not an accomplice of the seller and the successive possessions of each are separate and distinct offenses. See People v. Lein, 204 Cal. 84, 266 P. 536.

[3] The district attorney was entitled to show that appellant had suffered previous felony convictions by way of impeachment of his testimony as a witness. People v. Williams, 27 Cal.2d 220, 163 P.2d 692.

[4] Appellant claims, without specification, that the trial court misdirected the jury. The burden cannot be imposed on the court to search out unspecified errors. People v. Corlett, 67 Cal.App.2d 33, 50, 54, 153 P.2d 595, 964. However, a reading of the instructions discloses no error. The instructions were of the kind given every day and there is no merit in appellant's claim that they "went to such length and used such long and unusual words as to confound and befuddle the minds of the jury."

The claims of newly discovered evidence and misconduct of the jury are not supported by anything found in the record.

Judgment and order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

PEOPLE v. CANDIOTTO.*

Cr. 2968.

District Court of Appeal, First District, Division 1, California.

June 24, 1954.

Rehearing Granted July 9, 1954.

From judgment of Superior Court, City and County of San Francisco, Twain Michelsen, J., of conviction for possession of narcotics, defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that the trial court's refusal to instruct that knowledge of the narcotic character of the thing possessed was an essential ingredient of the offense charged, was error, but was not prejudicial in view of defendant's testimony that he knew marijuana when he saw it, and further held that the trial court's failure to instruct that circumstantial evidence must be irreconcilable with theory of innocence, to furnish a sound basis for conviction, was also error but was not prejudicial.

Affirmed.

1. Poisons 🔑4

Knowledge of narcotic character of article possessed is a necessary ingredient of the offense of possession of narcotics. Health and Safety Code, § 11500.

2. Criminal Law 🔑1173(2)

Poisons 🔑9

In prosecution for possession of narcotics, court's refusal to instruct that knowledge of narcotic character of thing possessed was essential ingredient of the offense charged, was error, but was not prejudicial in view of defendant's testimony that he knew marijuana when he saw it. Health and Safety Code, § 11500.

3. Criminal Law 🔑824(1, 4)

It is court's duty in criminal case to give, on its own motion, instructions on general principles of law pertinent to such cases, but court's failure to instruct on specific points developed by evidence, or on any particular matter deemed essential, is not error in absence of request for such an instruction.

4. Criminal Law 🔑784(1), 1173(2)

In prosecution for possession of narcotics, officer's testimony that they found marijuana in defendant's room and automobile and that defendant told them the marijuana was his, was only circumstantial evidence of defendant's knowledge of possession and of its narcotic character, and court's failure to give jury direct statement that circumstantial evidence must be irreconcilable with theory of innocence, to furnish sound basis for conviction, was error but was not prejudicial where jury would not have found evidence reconcilable with theory of innocence. Health and Safety Code, § 11500; Code Civ.Proc. § 1832.

5. Criminal Law 🔑814(17)

Where evidence is primarily direct, and circumstantial evidence is merely incidental or corroborative, jury need not be instructed that evidence must be irreconcilable with theory of innocence.

6. Criminal Law 🔑1172(2)

That court, trying defendant charged with possession of narcotics, told jury three times (allegedly unnecessarily) that instruction, to effect that testimony which purports to relate an oral admission by defendant should be viewed with caution, did not apply to admissions made on witness stand, was not prejudicial.

7. Criminal Law 🔑814(16), 824(5)

Court's asserted failure to instruct, that confession would have to be voluntary and that jury would have to find whether it was truthful, was not error in absence of evidence which might indicate confession

* Subsequent opinion 275 P.2d 500.

or admission was involuntary, and in absence of objection to testimony relating to the admission or confession and in absence of request for instruction.

8. Criminal Law 🔑519(3)

Mere fact that confession is made to police officer while defendant is under arrest does not necessarily render it involuntary.

9. Criminal Law 🔑406(3), 519(1)

That defendant's statement, that narcotics found in his room were his, was allegedly given to protect girl friend who might have placed them there, did not indicate statement, whether confession or admission, was involuntary.

10. Criminal Law 🔑656(2)

In prosecution for possession of narcotics, court's interruption in cases of nonresponsive answers, immaterial or argumentative questions and poorly taken objections, and court's asking of questions of witness to clarify his testimony or to bring out some feature of his testimony in greater detail, was within proper scope of functions of court and was not judicial misconduct.

11. Criminal Law 🔑489, 1170½(5)

Where defendant's counsel, on cross-examination in prosecution for possession of narcotics, asked chemist if marijuana seeds had been smoked, court's disallowance of question on its own motion was unnecessary curtailment of cross-examination, but was not prejudicial in view of court's subsequently permitting inquiry as to whether defendant had ever smoked marijuana.

12. Criminal Law 🔑1035(3)

Defendant who fails to object at time of occurrence that incidents in criminal case constitute judicial misconduct cannot successfully urge that objection as ground for reversal.

Leslie C. Gillen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of violating Section 11500 of the Health and Safety Code, possession of marijuana, defendant has appealed from the judgment and from an order denying a new trial.

He does not claim that the evidence was insufficient to support the verdict. He does claim prejudicial error in the asserted failure of the trial court to instruct the jury adequately on certain questions and prejudicial error because of asserted misconduct of the trial judge. A brief summary of the principal facts in evidence will aid the discussion.

While watching an automobile (which it developed belonged to defendant) parked outside a certain hotel in San Francisco, three narcotic agents saw defendant leave the hotel and approach the car.

The agents identified themselves, told defendant they would like to search his room (which was in the hotel mentioned) and he willingly allowed them to do so. He was told he was suspected of possessing narcotics. Search was made. No narcotics were found on defendant's person. Agent Mulgannon found a paper bag containing 52 grains of marijuana seeds on the hat shelf in the clothes closet and immediately announced his find as marijuana and exhibited it to the others in the room. He found a second bag (containing 157 grains) in the wastepaper basket and similarly announced the find. He found a partially smoked marijuana cigarette under the shelf paper of a bureau drawer which he also announced in defendant's presence. Defendant said that the marijuana was his, that none of it belonged to his wife, that he would like to smoke the remaining portion of the marijuana cigarette, and that he had obtained the marijuana from one Bob in Los Angeles, which story he changed to make its source one Connie in the Twin Peaks area of San Francisco.

Agent Bautista left the hotel room to seach defendant's car. He looked on the floor and on the seat making what he described as a superficial search. At that time he did not have in his possession the marijuana which had been found in defendant's room and he found no narcotics in the automobile. Later, he put the marijuana which had been found in defendant's room in his pocket and drove defendant's car to a garage. The next day Agent Trainor found a few scattered marijuana seeds on the driver's seat and on the floorboard, two grains in all.

At the trial defendant testified that the marijuana had been found in his room as the agents said and that he then and there claimed it to take the blame against the contingency that it belonged to his girl friend, who also occupied the room. He testified that the marijuana was not his or hers and that he had no knowledge of its existence or presence in the room until the agents found it. He denied ever having seen any such substance in his car. He testified he had loaned his car to someone that day; also that several friends of his had been in his hotel room earlier and at one time he had left them alone in the room while he went downstairs for a package of cigarettes. He also testified that he knows what marijuana is and recognizes it when he sees it.

[1,2] (1) *Defendant assigns as prejudicial error the refusal of the trial court to give a requested instruction which would have informed the jury that knowledge of the narcotic character of the thing possessed was an essential ingredient of the offense charged.*

That it was error to refuse such an instruction is too well established to require extended discussion. In People v. Gory, 28 Cal.2d 450, 170 P.2d 433, it was deemed erroneous to reject an instruction that "'In order for defendant to have in his possession the objects charged in the information, you must be convinced by the evidence and beyond a reasonable doubt that he *knowingly* had such objects in his possession. The meaning of the word "possession" includes the exercise of dominion and control over the thing possessed.'" 28 Cal.2d at page 453, 170 P.2d at page 435. The use in this instruction, of the words "'the objects charged in the information'" and the words "such objects" operated as a reference to the words "'flowering tops and leaves of Indian Hemp (cannabis sativa)'" used in the information. Under such a charge, to support a conviction, there must be sufficient evidence and an implied finding that the accused *knew* that objects or substances in his possession were narcotics.

In People v. Cole, 113 Cal.App.2d 253, 248 P.2d 141,[1] the charges were "possession" and "transportation" of marijuana. The giving of the following instructions was held erroneous: "'While there must be a unity of act and intent in every public offense, it is not necessary that the evidence show that the defendant knew that the object or objects which he possessed *were narcotics* or were prohibited by law, so long as * * * he had knowledge of the existence and location of such object or objects and intended to maintain physical control thereof.'" 113 Cal.App.2d at page 258, 248 P.2d at page 144. Of this the reviewing court said: "The italicized words were erroneous as we understand the law. Under this instruction if the defendant possessed marijuana, honestly believing it to be an innocuous substance as alfalfa or tobacco he would still be guilty. While a specific intent to violate the law is not an ingredient of the crime of possession of a narcotic, 'a knowledge that *the facts exist* which bring the act * * * within the provisions of this code' is necessary. People v. Gory, 28 Cal.2d 450, 456, 170 P.2d 433, 437. One of the facts of which a defendant must have knowledge is that the article is a narcotic, because that is one of the facts, indeed the essential fact, 'which bring(s) the act within the provisions of this code.' To instruct as the court did in this case that it is not necessary 'that the defendant knew that the object or objects which he possessed were narcotics' is to authorize the conviction of a defendant who possessed marijuana in the honest belief that it was not marijuana. If that is the law then if I am given marijuana cigarettes, in a package of one of the standard brands of cigarettes made of tobacco, and retain it in my possession in the honest and innocent belief that it is a package of that brand of cigarettes I am nonetheless guilty of a felony, or if I cut a weed from the roadside which is in fact marijuana and use it as a part of a floral decoration in my home not knowing its narcotic character I am equally guilty. It is axiomatic that all laws must be reasonably construed and such a construction would so clearly pass the bounds of reason as to be unthinkable." 113 Cal.App.2d at page 258, 248 P.2d at page 144.

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[1] A petition for a hearing by the Supreme Court was denied.

Decisions subsequent to People v. Gory, supra, recognize this requirement. In the following cases, when determining whether the evidence was sufficient to support a verdict of conviction of possession of narcotics, the reviewing court made these observations: "While mere presence at the scene of the crime, standing alone, is not sufficient to sustain a finding of guilt, and while actual knowledge of the presence of narcotic substance is essential in such a case as this, the surrounding facts and circumstances may be sufficient to establish the essential facts of knowledge, and physical or constructive possession." People v. Gentry, 118 Cal.App.2d 501, 503, 257 P.2d 1012, 1013; the evidence was held "insufficient to prove the defendant sold the heroin to the operator or that he had possession or knowledge of the presence of heroin in the closet." People v. Barnett, 118 Cal.App.2d 336, 339, 257 P.2d 1041, 1043;[1] "The prosecution must establish that the defendant had knowledge of the presence of the article and that it was marijuana." People v. Batwin, 120 Cal.App.2d 825, 827, 262 P.2d 88, 90; "In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic." People v. Walker, 121 Cal.App.2d 173, 174, 262 P.2d 640, 641; "basically the question is, where a defendant is found in sole occupancy of premises with the key to a locked room on his person, he admits being in the room the day before and narcotics are found therein, may the jury fairly draw the inference that he knowingly possessed the narcotics?" People v. Neal, 122 Cal.App.2d 749, 265 P.2d 525, 526; "the opinion in that case [People v. Cole, supra, 113 Cal.App.2d 253, 248 P.2d 141] is one which the authorities should understand and respect." People v. Rice, 123 Cal.App.2d 124, 266 P.2d 200, 201. In People v. Lotrean, 120 Cal.App.2d 583, 584, 251 P.2d 543, 544, the court made a like interpretation of People v. Gory, supra, 28 Cal.2d 450, 170 P.2d 433, saying: "In that case our Supreme Court states the rule that knowledge in relation to a defendant's awareness of the presence of narcotics is a basic element of the offense of possession. And in that case a conviction for possession of marijuana was reversed because the trial court withdrew from the jury an instruction that to sustain a conviction the accused should have been aware of his possession of the proscribed narcotic."[2]

Thus it clearly appears that knowledge of the narcotic character of the article possessed is a necessary ingredient of the offense.[3] The jury should have been so instructed.

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[1] A petition for a hearing by the Supreme Court was denied.

[2] In the Lotrean case the court interpreted as the substantial equivalent of the instruction approved in the Gory case, and instruction identical to No. 9 in our case (CALJIC No. 703). We do not interpret that instruction as informing the jury that defendant must have knowledge that the objects possessed were narcotics. Nor does either party to this action so view that instruction. Nor do the authors and publishers of that instruction so view it; clearly indicated by their comments in the note to Instruction No. 703 in the 1953 Pocket Parts Supplement to CALJIC.

[3] Three cases have been cited in support of the opposite view but analysis does not persuade us that they necessarily support that view.

In People v. Rumley, 100 Cal.App.2d 6, 222 P.2d 913, the court did say that "knowledge that it was marijuana" is not "an element of the offense," 100 Cal.App.2d at page 9, 222 P.2d at page 915, but on the same page the court observed that the evidence proved that the defendant "knew of the narcotic qualities of the cigarettes", later expressly declared an essential ingredient of the offense by the same court in People v. Walker, supra, 121 Cal.App.2d 173, 174, 262 P.2d 640.

In People v. Bigelow, 104 Cal.App.2d 380, 231 P.2d 881, an instruction identical

But we do not deem such error prejudicial in this case.

The jury was instructed in terms of CALJIC 703 and that "there can be no criminal possession of an article without knowledge of its existence and presence." Under such instructions we imply from the verdict of guilty a finding by the jury that defendant knew of the existence and presence of the article or substance contained in the two paper bags and in the partly smoked cigarette. Defendant's testimony that he knows what marijuana is and recognizes it when he sees it furnishes clear and unequivocal proof that he knew the narcotic character of the article or substance which the jury found he knew was in his possession. Under these circumstances we are convinced the verdict would have been the same had the jury been fully and adequately instructed on the subject of knowledge.

[3–5] (2) *Defendant also claims prejudicial error in the asserted failure of the court to instruct the jury adequately on the subject of circumstantial evidence.*

Proof of the requisite knowledge of the physical presence of the substance (marijuana) and also of the requisite knowledge of the narcotic nature of that substance depended upon circumstantial evidence. The testimony of the arresting officers was direct evidence as to the presence of marijuana in defendant's hotel room and of 12 seeds of marijuana on the seat and floor of his automobile, but it was merely indirect or circumstantial evidence of his knowledge thereof. The testimony of the officers was direct evidence that at the time of the discovery of the marijuana defendant admitted it was his but such admission was merely indirect or circumstantial evidence that he knew of its presence and of its narcotic character. Code Civ.Proc. § 1832; People v. Koenig, 29 Cal.2d 87, 91, 173 P.2d 1. Upon the witness stand he denied ownership and knowledge of the presence of the marijuana declaring that his out-of-court statement was untrue and made to protect a friend who might have owned and put it there, and that third persons had access to his room and his car.

The principles enunciated in People v. Bender, 27 Cal.2d 164, 163 P.2d 8, 15, apply. "The evidence which tends to show that defendant killed his wife is entirely circumstantial. Defendant contends that, therefore, the trial court of its own motion should have given an instruction embodying the principle (as stated in 8 Cal.Jur. 371, § 405) 'that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.' It cannot be too strongly emphasized that such quoted statement enunciates a most important rule governing the use of circumstantial evidence. In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received. The general rule relating to the duty of the court in giving instructions in criminal cases is stated in People v. Warren (1940), 16 Cal.2d 103, 116, 117, 104 P.2d 1024, 1031: '"It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty

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to Instruction No. 9 in our case was given but the appellant did not question its propriety or adequacy. In summarizing the evidence the reviewing court observed it was sufficient to establish that Bigelow possessed the narcotic, that he had knowledge of its presence "and that he knew the substance in his possession was a narcotic." 104 Cal.App.2d at page 385, 231 P.2d at 884; the same court which decided People v. Batwin, supra, 120 Cal.App.2d 825, 262 P.2d 88.

In People v. Brickman, 119 Cal.App.2d 253, at page 263, 259 P.2d 917, at page 924, the appellant complained that the trial court failed to instruct that the jury must be convinced beyond reasonable doubt that the defendant "had knowledge of the presence of the marijuana", but that question was not available for consideration and decision by the reviewing court because the appellant had failed to have the instructions incorporated in the record upon appeal. That was the same reviewing court which later decided People v. Lotrean, supra, 120 Cal.App.2d 583, 261 P.2d 543.

to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction." 8 Cal.Jur. 309, and cases cited. All of these general principles should be considered in determining whether the trial court has performed its duty in any particular case.' To the same effect is People v. Scofield (1928), 203 Cal. 703, 709, 710, 265 P. 914. In a criminal case where circumstantial evidence is substantially relied upon for proof of guilt it is obvious that 'instructions on the general principles of law pertinent to such cases' necessarily include adequate instructions on the rules governing the application of such evidence.

"In respect to the particular rule now invoked by the defendant the District Court of Appeal in People v. Hatchett (1944) 63 Cal.App.2d 144, 155, 146 P.2d 469, 475, after a review of cases which concern the question, stated that 'Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction.' In accord is People v. Rayol (1944), 65 Cal.App.2d 462, 464, 150 P.2d 812." Pages 174–176 of 27 Cal. 2d, page 15 of 163 P.2d. See also People v. Koenig, supra, 29 Cal.2d 87, 91–93, 173 P.2d 1; People v. Zerillo, 36 Cal.2d 222, 233, 223 P.2d 223; People v. Hatchett, 63 Cal.App.2d 144, 152–156, 146 P.2d 469; People v. Tholke, 75 Cal.App.2d 857, 859–861, 171 P.2d 904; People v. Webster, 79 Cal.App.2d 321, 327–329, 179 P.2d 633. The failure to give the instruction was found prejudicial and cause for reversal in the Zerillo, Hatchett, Rayol and Tholke cases; erroneous but not prejudicial in the Bender, Koenig and Webster cases.

In the instant case the instructions given included CALJIC Nos. 24, 25 and 26, but nothing comparable to CALJIC 27 or 28. They were, therefore, inadequate and erroneous in the same respect and for the same reason that the instructions given in the Bender and other cases cited were inadequate and erroneous.

Plaintiff contends that defendant's out-of-court admission was direct, not circumstantial, evidence, but has offered no analysis tending to show that the statutory illustration of indirect evidence, Code of Civ.Proc. § 1832, is inapplicable here.

Plaintiff further contends that when the evidence is primarily direct and the circumstantial evidence is merely incidental or corroborative, the jury need not be instructed that the evidence must be irreconcilable with the theory of innocence. That is true within the meaning of such statements as made in People v. Jerman, 29 Cal.2d 189, 173 P.2d 805, and People v. Harmon, 89 Cal.App.2d 55, 200 P.2d 32. In the Jerman case, the defendant's own testimony gave evidence of every element of the charge. Hence, every element of the charge was covered by direct evidence, none thereof depended upon circumstantial evidence. Obviously, in such a case, the circumstantial evidence was "incidental" or "corroborative"; the evidence relied upon was "primarily" direct; and by definition the rule under discussion did not apply. Similarly, in the Harmon case, the reviewing court, having found that the accused "admitted the possession of narcotics", at page 61 of 89 Cal.App.2d, at page 36 of 200 P.2d, presumably an admission made on the witness stand, concluded that this and other direct evidence relegated the circumstantial evidence to a secondary position; no element of the charge depended primarily or solely upon circumstantial evidence. If proof of a significant element of the charge depends upon circumstantial evidence, the instruction should be given. Thus, in People v. Hatchett, supra, 63 Cal.App.2d 144, 146 P.2d

469, the defendant, under prosecution for murder, admitted the shooting but claimed it was done in self-defense. The state's evidence bearing upon that issue was almost wholly circumstantial. Failure to give the instruction was cause for reversal of the judgment. In People v. Rayol, 65 Cal. App.2d 462, 150 P.2d 812, there was direct evidence (testimony of witnesses) of the physical acts committed but the question whether or not the defendant was a knowing participant rested entirely upon circumstantial evidence. Judgment was reversed for failure to give the instruction. Similarly, in the instant case, proof of defendant's knowledge wholly depended upon circumstantial evidence.

In the instant case, the failure to include in the instructions given a direct statement of the precise principle under discussion was error.

It does not necessarily follow that such error was prejudicial. The instructions given include the instructions on circumstantial evidence which were given in the Bender and Koenig cases. In the instant case, considering all the evidence the jury had before it, we do not believe that even if fully and adequately instructed on the subject, it would have found the evidence reconcilable with any other rational conclusion than that he knew of the existence and presence of the marijuana in his room and knew of its narcotic character.

We conclude, therefore, that the erroneous incompleteness of the instructions on circumstantial evidence did not prejudice the defendant.

[6-9] (3) *Defendant assigns as prejudicial error the giving of certain instructions on admissions and the failure to give instructions on confessions.*

The court, observing that evidence had been received tending to show that defendant had made an out-of-court statement tending to prove his guilt, defined an "admission," as distinguished from a confession, and admonished the jury to view with caution the testimony of any witness which purports to relate an oral admission of the defendant.

Defendant does not question the correctness of this instruction, as concerns admissions, but does complain that the court unnecessarily three times told the jury that this instruction did not apply to admission made on the witness stand. That may have been unnecessary emphasis but, considered in its context, we do not find it prejudicial.

Defendant further questions this instruction because the court did not also instruct the jury on the subject of confessions by fully defining a confession and informing the jury that a confession must be voluntary; that even if voluntary, the jury must determine whether or not it is truthful; that testimony which purports to relate an oral confession must be viewed with caution; and that before a confession can be considered, there must be independent proof of the corpus delicti,—all as more fully expressed in the third and fourth paragraphs of CALJIC No. 29 and in Nos. 29-A, 29-B, 29-C and 29-D.

It is not certain that the admission in question amounted to a confession. However that may be, we find no basis for reversal in the failure to instruct.

The officer's testimony which narrated the admission went in without objection. During the examination and cross-examination of the officer on this subject no suggestion was made or question raised as to the voluntary character of the admission. Defendant freely testified to the like effect; he said he "immediately claimed it [the marijuana]," to protect his girl friend. This by defendant's own testimony indicates a voluntary act, nothing of an involuntary character. The mere fact that a confession is made to a police officer while under arrest does not necessarily render it involuntary. People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12. His motivation did not render his declaration of ownership involuntary. As said of the defendant in People v. Hubbell, 54 Cal. App.2d 49, 75, 128 P.2d 579, 593, "[h]is desire to save the children from being brought into court did not tend any more strongly to show an involuntary nature of the confession than did the wish of the defendant in People v. Smalling, 1892, 94

Cal. 112, 113, 29 P. 421, to take responsibility for the crime upon himself in order to free his sister, who was also under arrest, which motive was held not to invalidate his confession as material and competent evidence. It must be apparent that a confession dictated by the hopes and motives of the accused and inspired solely by his own mental processes and emotions is voluntary in a legal sense." Normally, the question whether a confession was freely and voluntarily made is presented preliminarily to the trial court before its introduction in evidence. See cases collected in 8 Cal.Jur. 115, Crim.Law, § 205. Defendant did not then raise any question, did not interpose any objection to the officer's testimony on this subject, and later defendant gave testimonial confirmation of his out-of-court statements as narrated by the officers.

Finally, there was evidence of the corpus delicti (the testimony of the officers of their finding of the marijuana in defendant's room) independent of defendant's out-of-court admission, evidence which is without conflict and is undisputed.

Under these circumstances, it was incumbent upon defendant to request instructions upon these subjects. In the absence of such a request it was not error for the court to fail to give them.

[10] (4) *Defendant makes numerous assignments of asserted judicial misconduct.* He claims that the judge created an atmosphere of hostility toward defendant and his counsel and prevented defendant from having a fair trial. He likened this case to People v. Burns, 109 Cal.App.2d 524, 542–552, 241 P.2d 308, 242 P.2d 9. Instead, we find it quite comparable to the situation which obtained in People v. Deacon, 117 Cal.App.2d 206, 255 P.2d 98.

The incidents complained of consist principally of interruption by the court in cases of nonresponsive answers, immaterial questions, argumentative questions and poorly taken objections. In some instances the court asked questions of a witness to clarify his testimony or to bring out some feature of his testimony in greater detail. Such conduct is properly within the scope of the functions of the trial court, and we can not say from the record that the court below acted in a manner unfair to the defendant.

[11] In one instance the court did unnecessarily curtail defendant's cross-examination of a witness. The chemist had given his analysis of the substances found in defendant's room and in his car. Defendant's counsel asked him if the seeds found in the car had been smoked. The court upon its own motion disallowed the question on the ground that the question of addiction is no part of the charge in this case. In support of the question counsel merely urged that it was cross-examination. Later, when defendant was on the witness stand, his counsel asked him if he ever smoked marijuana cigarettes. The court volunteered: "That is not material. That isn't the question before the jury, the use of marijuana." Defense counsel thereupon started to give a specific reason why the question was proper, saying: "If I may be heard, the officer testified—". The court responded: "Wait a minute, please. I will ask for an offer of proof, without the presence of the jury." That was done. The judge promptly changed his ruling and allowed the question. Had counsel assisted the court as efficiently in the first instance as in the second, it is conceivable that the first question would have been allowed. Certainly, the disallowance of the first question was not misconduct, nor do we find it prejudicial.

[12] Under these circumstances, defendant having failed to object, at the time of their occurrence, that the incidents in question constituted judicial misconduct, he can not now successfully urge that objection as a ground for reversal. People v. Avery, 35 Cal.2d 487, 493, 218 P.2d 527.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

126 Cal.App.2d 303

DESHOTEL
v.
ATCHISON, T. & S. F. RY. CO. et al.

Civ. 15892.

District Court of Appeal, First District,
Division 2, California.

June 29, 1954.

Action for injuries sustained when taxicab, in which plaintiff was a passenger, and train collided at crossing, brought against railroad and its employee, and against taxicab company and its driver, on theory of concurrent negligence. The Superior Court, Alameda County, O. D. Hamlin, Jr., J., after a verdict against the taxicab company and in favor of the railroad, granted plaintiff's motion for new trial, and the railroad and its employee appealed. The District Court of Appeal, Kaufman, J., held that the order granting new trial was sustainable upon ground of insufficiency of evidence to support verdict in favor of railroad.

Order affirmed.

1. Appeal and Error ⚷977(3)
New Trial ⚷6

Granting of a motion for new trial is largely within discretion of trial judge, and will be reversed only if an abuse of discretion clearly appears.

2. Appeal and Error ⚷1015(1)

An order granting new trial on ground of insufficiency of evidence will not be reversed unless it appears as a matter of law that there was no substantial evidence which would support a contrary verdict.

3. Appeal and Error ⚷1015(1, 3)

On motion for new trial on ground of insufficiency of evidence it is for trial court to judge credibility of witnesses and determine probative force of testimony and weight of evidence.

4. Appeal and Error ⚷933(1)

On appeal from order granting or denying new trial, all presumptions are in favor of the order and it will be affirmed if sustainable on any ground.

5. Railroads ⚷350(11)

In action against railroad and railroad employee for injuries sustained when taxicab, in which plaintiff was a passenger, and train collided at crossing, whether train's speed of 20 miles per hour was a reasonable speed under the circumstances was question of fact.

6. Railroads ⚷316(1), 337(1)

In action against railroad and railroad employee for injuries sustained when taxicab, in which plaintiff was a passenger, and train collided at crossing, whether railroad was negligent was not to be judged by speed of train alone, but if warning devices were insufficient to alert driver to fact that he was approaching crossing, negligence in respect to the warning devices could be considered one of the proximate causes of the accident. Public Utilities Code, §§ 7604, 7678.

7. Carriers ⚷305(1)
Railroads ⚷337(1)

In action for injuries sustained when taxicab, in which plaintiff was passenger, and train collided at crossing, brought against a railroad and its employee, and against the taxicab company and its driver on theory of concurrent negligence, if negligence on part of railroad, no matter how small the amount, proximately contributed to the accident, a verdict against the railroad, as well as against the taxicab company, would be justified.

8. Negligence ⚷61(1)

Where concurrent negligence is charged by complaint, as well as negligence of each defendant separately, if one defendant would establish that the negligence of the other is sole proximate cause of collision, it must appear that his own negligence was so disconnected in time and nature as to demonstrate that the damage was not in any way the natural or probable consequence of such negligence.

9. New Trial ⚷70

In action for injuries sustained when taxicab, in which plaintiff was passenger, and train collided at crossing, brought against railroad and its employee, and against taxicab company and its driver, on theory of concurrent negligence, order granting plaintiff a new trial against the railroad and its employee was sustainable on ground of insufficiency of evidence to support verdict in railroad's favor, and court did not abuse its discretion in entering such order.

10. Appeal and Error ⟹1064(1)

Carriers ⟹321(21)

In action for injuries sustained when taxicab, in which plaintiff was a passenger, and train collided at crossing, brought against railroad and its employee, and against taxicab company and its driver, on theory of concurrent negligence, instruction that speed of vehicle in excess of 15 miles per hour when traversing grade crossing, if vision is not unobstructed, is prima facie unlawful, unless driver establishes that such speed did not constitute violation of basic speed law, under the circumstances, improperly shifted burden of proof on issue of speed from plaintiff to defendant, and the giving of such instruction was prejudicial error. Vehicle Code, § 511.

11. Appeal and Error ⟹901

On appeal from order granting new trial, burden is on appellant to establish affirmatively that the order is erroneous.

Robert W. Walker, William F. Brooks, Los Angeles, Hardin, Fletcher, Cook & Hayes, Oakland, Cyril Viadro, San Francisco, of counsel, for appellants.

James A. Myers, Oakland, D. W. Brobst, Oakland, for respondent.

KAUFMAN, Justice.

This is an appeal by defendants, The Atchison, Topeka and Santa Fe Railway Company and William M. Floyd, an employee of said company, from an order granting plaintiff a new trial in an action for personal injuries.

On January 11, 1952, shortly after 9:30 a. m. plaintiff and respondent, Dewey Deshotel, was seriously injured as a result of a collision between the Yellow Cab in which he was a passenger and a Santa Fe train at the intersection of Parker and Acton Streets in the City of Berkeley. Respondent sued the Yellow Cab Company, its driver Hughes, and the Santa Fe Railway alleging negligence on the part of each corporate defendant in separate counts, and concurrent negligence of both in a third count. The jury returned a verdict for $300,000 against the Yellow Cab Company, and a verdict in favor of the defendant Santa Fe.

Motions for new trial were filed by both plaintiff and Yellow Cab Company. The court granted a new trial "upon all the issues" as to both motions. As to plaintiff's motion against defendant Santa Fe, the court granted the motion upon the ground of the insufficiency of the evidence to justify the verdict and errors of law occurring at the trial. The Yellow Cab Company's motion was granted upon all issues "upon the ground of excessive damages appearing to be given under the influence of passion and prejudice and errors in law occurring at the trial."

Appellants contend that the trial court abused its discretion in granting respondent a new trial on the ground of the insufficiency of the evidence to justify the verdict. While it is admitted that the trial court's discretion on such a motion is very broad, it is argued that this is a case where it was arbitrarily exercised, since here, as a matter of law, the negligence of the Santa Fe, if there was any, could not have been a proximate cause of the accident. See Harvey v. Machtig, 73 Cal.App. 667, 677, 239 P. 78; Moss v. Stubbs, 111 Cal.App. 359, 363, 295 P. 572, 296 P. 86; Henderson v. Braden, 35 Cal.App.2d 88, 91, 94 P.2d 625; De La Falaise v. Gaumont-British Picture Corp., 39 Cal.App.2d 461, 467, 103 P.2d 447.

[1–4] At the outset, it may be said that the granting of a motion for new trial is largely within the discretion of the trial judge, and will be reversed only if an abuse of discretion clearly appears. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338. An order granting a new trial on the ground of the insufficiency of the evidence, one of the grounds on which the order appealed from herein was granted, will not be reversed unless it appears as a matter of law that there was no substantial evidence which would support a contrary verdict. Ballard v. Pacific Greyhound

Lines, 28 Cal.2d 357, 170 P.2d 465; Ridenour v. Scarcella, 107 Cal.App.2d 554, 237 P.2d 322; Mann v. Shipley, 80 Cal.App.2d 453, 181 P.2d 641. It is for the trial court on such motion to judge the credibility of the witnesses and determine the probative force of the testimony and weight of the evidence. On appeal all presumptions are in favor of the order and it will be affirmed if sustainable on any ground. Rembold v. Goodwin, 93 Cal.App.2d 605, 209 P.2d 402; Taylor v. Rodriquez, 10 Cal.App.2d 608, 52 P.2d 494; Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 159, 108 P.2d 989.

Appellant takes the position that the failure of the cab driver to stop, look and listen at the intersection, as he was required to do by sec. 576(a) of the Vehicle Code, was the sole proximate cause of the accident, and therefore if there was any negligence on the part of the Santa Fe it could not have contributed to the accident. There was testimony that the cab driver drove in a straight line into the train, that his skid marks were only five feet on the one side and nine feet on the other, showing that he did not apply his brakes until he had nearly collided with the train. The cab driver had suffered a loss of memory of the accident and of the events immediately preceding it, hence he was unable to testify as to how the accident occurred. His passenger, Dewey Deshotel, plaintiff herein, had also suffered a similar loss of memory. The driver did testify that he did not recall ever having been over this crossing before, that the only crossings of the Santa Fe that he had been over were those protected by wigwag signals. There was testimony that all street crossings from the yard limits of the Santa Fe to that here involved with the exception of Derby Street, were protected by electric wigwag signals where the street was a through street, that is one continuing on past the track on the other side. If the street did not so continue on the other side of the track, then there was no wigwag. The diagram and photograph introduced into evidence show that the railroad track at the intersection is flush with the pavement and that the railroad cross-arm warning device is placed between ornamental trees. The cross-arm visible in the photograph on the left side nearest the track is to some extent obscured by the trees. The diagram shows that the cross-arm on the right side is similarly situated between the same type of trees.

[5, 6] Appellant has placed great emphasis on the fact that the speed of the train was not a proximate cause of the accident, because traveling at the speed of 20 miles per hour prescribed for this area by the company rules, the train could not have been stopped in time to avoid hitting the cab. Even if the testimony that the train was traveling at approximately twenty-miles per hour is taken as true, and that of another witness who estimated the train's speed at 35 miles per hour is discounted, still it is a question of fact whether 20 miles per hour was a reasonable speed under these circumstances. Whether or not the Santa Fe Railway was negligent is not to be judged by the speed of the train alone. If the warning devices are insufficient to alert drivers to the fact that they are approaching a crossing, such negligence may be considered one of the proximate causes of an accident. The photograph shows that the area where the accident occurred, is a residential district. All the testimony is to the effect that it was a rather dark day, that it was or had been raining. There was some testimony that visibility was bad, other testimony that it was fair. Several witnesses testified to the fact that another car was traveling a short distance ahead of the Yellow Cab, estimated variously from a car length to 25 feet, that it proceeded directly across in front of the train and narrowly escaped being hit.

In view of the condition of the crossing, the area in which it was situated, and weather conditions, a speed of 20 miles per hour, which would not permit the train to be stopped within a distance of less than 450 to 500 feet might be considered negligent.

It would seem to have been quite material whether or not warning signals were sounded at a crossing such as this. Appellant admits that the testimony of the witnesses differs on the question of whether the bell was ringing and the whistle blowing.

Public Utilities Code, sec. 7678, declares that it is a misdemeanor for a person in charge of a locomotive engine to omit to cause a bell to ring or steam whistle, air siren or air whistle to sound at least 80 rods from crossing and up to it. Public Utilities Code, sec. 7604 provides that a bell of at least 20 pounds weight shall be placed on each locomotive engine, "and shall be rung at a distance of at least 80 rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed the street, road, or highway; or a steam whistle, air siren, or an air whistle shall be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the street, road, or highway". A penalty is provided for violation of this section, and it is further provided that the corporation is liable for all damages sustained by any person "and caused by its locomotives, train, or cars, when the provisions of this section are not complied with." Testimony either negative or positive that there was no bell ringing or whistle sounding as the train passed over a public crossing has been held sufficient to sustain a finding of negligence. Jones v. Southern Pacific Co., 74 Cal.App. 10, 239 P. 429; Switzler v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 138, 285 P. 918; Lahey v. Southern Pacific Co., 16 Cal.App.2d 652, 61 P.2d 461; Hoffman v. Southern Pacific Co., 215 Cal. 454, 457, 11 P.2d 387. It is unnecessary to review all the testimony of the witnesses on this point in view of appellant's admission that it differs. His argument discounting the testimony of certain witnesses because they were not particularly listening for the signals or because they were so used to them, that they paid no attention, is merely an argument as to the weight of the evidence. It is noteworthy that one witness who was driving not far from the scene of the accident did not recall hearing any signals but did hear the noise to the train's brakes being applied.

[7, 8] Appellants' contention that the evidence shows how little the train crew could have done and how much the cab driver could have done to avoid the accident might be good if an argument on comparative negligence were pertinent. No matter how small the amount of negligence on the part of the railway, if it proximately contributed to the accident it would justify a verdict against the railway as well as the Yellow Cab Company. As noted above, the negligence need not be solely that of the train crew. It may be that of the company in not sufficiently protecting the crossing under the existing conditions, and in not directing the train crew to proceed at slower speeds over such crossings. Concurrent negligence was charged by the complaint herein, as well as the negligence of each defendant separately. Where such is the case, if one defendant would establish that the negligence of the other is the sole proximate cause of the collision, it must appear that his own negligence was so disconnected in time and nature as to demonstrate that the damage was not in any way the natural or probable consequence of such negligence. See Smith v. Schwartz, 14 Cal.App.2d 160, 57 P.2d 1386; Stevenson v. Fleming, 47 Cal.App.2d 225, 117 P.2d 717; Day v. General Petroleum Corporation, 32 Cal.App.2d 220, 89 P.2d 718; 7 Cal.Jur.2d 264.

[9] It may therefore be said that if a verdict had been rendered against the Santa Fe as well as against the Yellow Cab Company, there would have been sufficient evidence in the record to support such verdict. On a review of an order granting a new trial all presumptions are in favor of the order, and it will be affirmed if sustainable upon any ground. The present order is sustainable upon the ground of the insufficiency of the evidence, one of the grounds stated by the trial judge in the order, and it cannot be said that evidence to support a verdict against appellant railway is insufficient as a matter of law. No abuse of discretion has been shown. Rembold v. Goodwin, 93 Cal.App.2d 605, 209 P.2d 402; Mann v. Shipley, 80 Cal.App.2d 453, 181 P.2d 641.

[10] What has been said above requires an affirmance of the order, and discussion of appellant's second contention is unnecessary for a disposition of the case. Nevertheless, it may be said that it is well settled that it is error to give the instruction com-

plained of by respondent herein in a civil case. The instruction was not given at respondent's request. The jury was instructed that:

> "It is prima facie unlawful, under Section 511 of the Vehicle Code of California, for the driver of a vehicle to exceed the speed of 15 miles an hour when traversing a grade crossing of a railroad track, if during the last 100 feet of the approach to such crossing the driver does not have a clear and unobstructed view of such crossing and of any traffic upon such railway for a distance of 400 feet in both directions along such railway, unless the driver of such vehicle establishes by competent evidence that any said speed in excess of 15 miles an hour did not constitute a violation of the basic speed law, as declared in Section 510 of the Vehicle Code, at the time, place, and under the conditions then existing."

The giving of this portion of Section 511 of the Vehicle Code has been held to be erroneous in numerous cases because it is applicable only to criminal actions, and it improperly shifts the burden of proof in a civil action on the issue of speed from the plaintiff to the defendant. And when it is given with Section 513 of the Vehicle Code which states the rule for civil actions, it creates a conflict. Westberg v. Wilde, 14 Cal.2d 360, 94 P.2d 590; Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995. In the present case, Section 513, stating the correct rule was not even given. Appellant contends that the instruction could not have been prejudicial, however, and attempts to distinguish the Westberg and Akers cases on the ground that in those cases both the incorrect instruction on burden of proof similar to that given here, and the correct instruction on Section 513 of the Vehicle Code were given. Hence, it was necessary to reverse because of the conflict, the court being unable to tell whether the correct or incorrect instruction had been followed. But it would seem all the more likely that a jury would fall into error if they had only the incorrect instruction as in the present case. There was not even a chance, as in the above two cases, that they might have been guided by the correct rule. Anderson v. Mothershead, supra, was a case similar to this, where the court did not instruct on the correct rule of Section 513. The court there plainly stated that the giving of the instruction was prejudicially erroneous. Anderson v. Mothershead, supra. Appellant contends that it is speculative whether the court there would have reversed on that ground alone, since other errors were committed, as well. However, the case is a direct holding that it is prejudicial error to give an instruction on Section 511, Vehicle Code, similar to that given herein. See, also, Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 848, 179 P.2d 47; Anderson v. Newkirch, 101 Cal.App.2d 171, 178, 225 P.2d 247; Cavalli v. Luckett, 40 Cal.App.2d 250, 256, 104 P.2d 708.

[11] Appellant cites Shuey v. Asbury, 5 Cal.2d 712, 55 P.2d 1160, wherein on appeal from the judgment it was held that an erroneous instruction to the effect that defendant was guilty of negligence as a matter of law if her speed exceeded twenty miles per hour was not prejudicial, since under the facts of the case, it was apparent that no other verdict could have been rendered. Also cited is Wood v. Moore, 64 Cal.App.2d 144, 149, 148 P.2d 91, and wherein it was held that the instructions were not prejudicial to the complaining party since there was no issue as to her speed and the evidence of her negligent operation of her car was overwhelming. Again in Noble v. Miles, 129 Cal.App. 724, 727–728, 19 P.2d 265, such erroneous instructions were held not prejudicial where the element of speed was not considered a controlling element in the case. All of these cases were appeals from judgments. None were cases in which the court was considering an appeal from an order granting a new trial wherein all presumptions are in favor of the order. Here the burden is on appellant to establish affirmatively that the order is erroneous. Taylor v. Rodriquez, 10 Cal.App.2d 608, 52 P.2d 494.

Appellant argues that the instruction could have no effect on the verdict obtained by the Santa Fe since the speed of the cab was material, if at all, only as to the defendant cab company. Santa Fe's negligence in no way depended on who had the burden of proving that the cab driver was negligent. Appellant's argument that the erroneous instruction worked to the advantage of the respondent is not sound for if the instruction tended to shift all blame for the accident to one defendant, it prejudiced the respondent in his right to secure judgment against both parties if the negligence of both contributed to the accident. The present case is somewhat similar on its facts to Bayley v. Souza, 42 Cal.App.2d 166, 108 P.2d 725, wherein one defendant had been exonerated, and the court there noted that the ends of justice would best be served by granting a new trial as to all defendants on all the issues. The trial judge herein evidently viewed the matter in that light. No abuse of discretion appears to have been committed.

Order granting respondent a new trial is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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BERENDSEN v. McIVER.

No. 15992.

District Court of Appeal, First District, Division 1, California.

June 30, 1954.

Hearing Denied Aug. 26, 1954.

Action was brought to reform a deed and to quiet title, on ground that, because of mistake of scrivener, deed was drawn up as a joint tenancy deed rather than as a tenancy in common deed as contended by the parties. The Superior Court of the State of California, in and for the County of Contra Costa, Norman Gregg, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to sustain finding that there had been a mistake on the part of the scrivener.

Judgment affirmed.

1. Reformation of Instruments 🔑45(6)

In action to reform a deed, on ground that by mistake of the scrivener a joint tenancy form deed was used rather than a tenancy in common form deed as allegedly intended by the parties, evidence sustained finding that joint tenancy form deed was used because of mistake of scrivener, so as to justify reformation of deed.

2. Reformation of Instruments 🔑36(2)

Complaint set forth facts sufficient to constitute a cause of action for reformation of deed in the form of a joint tenancy deed due to scrivener's mistake in drawing deed in form of a joint tenancy deed rather than in form of a tenancy in common deed.

3. Limitation of Actions 🔑180(7)

The bar of the statute of limitations to an action should be set up by demurrer, or in an answer, and not by motion to dismiss. Code Civ.Proc. §§ 581–583.

4. Limitation of Actions 🔑179(2)

Ordinarily, where application of statute of limitations may be an issue, it is not enough in an action based on mistake merely to allege failure to discover the mistake earlier, but reasons for such failure and circumstances of the discovery must be given.

5. Limitation of Actions 🔑180(7)

Where defendant did not demur, but moved for a dismissal and judgment on the pleadings seeking reformation of deed and from time to time objected to introduction of evidence on ground that complaint did not state a cause of action and was barred by statute of limitations, there was not a sufficient pleading of the statute of limitations. Code Civ.Proc. §§ 353, 338, subd. 4.

6. Limitation of Actions 🔑182(2)

Party relying on statute of limitations must affirmatively set it up in his pleading, either by demurrer or answer, or it will be deemed to have been waived. Code Civ.Proc. §§ 353, 338, subd. 4.

7. Limitation of Actions 🔑96(2)

Where complaint seeking reformation of deed, on ground of mistake, was filed over 6 years after execution and recording of deed and more than 3 years after death of plaintiff's testator, who was one of the grantees, but it was filed within 4 months of the discovery of the mistake by the plaintiff, action was not barred by 3 year limitations. Code Civ.Proc. §§ 353, 338, subd. 4; Civ.Code, §§ 19, 1213.

8. Deeds ⚷87

Statute providing that recording of deed is constructive notice to "subsequent purchasers and mortgagees" does not apply to the grantee of the recorded deed. Civ. Code, § 1213.

See publication Words and Phrases, for other judicial constructions and definitions of "Subsequent Purchasers And Mortgagees".

9. Vendor and Purchaser ⚷231(1)

Statute providing that recordation of deed is constructive notice to "subsequent purchasers and mortgagees" is not applicable to executor of grantee of recorded deed. Civ.Code, § 1213.

10. Evidence ⚷89

In action to reform a deed, so as to change it from joint tenancy deed to tenancy in common deed, on ground that it had been drawn up as a joint tenancy deed because of mistake of scrivener, evidence that after death of plaintiff's testator, who was one of the grantees, the defendant's intestate, who was the other grantee, endeavored to buy testator's half interest, which both plaintiff and intestate believe that testator's estate owned, was sufficient to overcome statutory presumption that official duty had been performed by plaintiff as executor to examine record of the deed. Code Civ.Proc. § 1963, subd. 15.

11. Evidence ⚷433(1), 434(1)

Oral evidence is admissible to show that a writing, through fraud or mistake, does not express the intention of the parties.

12. Reformation of Instruments ⚷44

In action to reform deed, on ground of mistake of scrivener who drew the deed, oral testimony was properly admitted to show the mistake of the scrivener.

13. Witnesses ⚷133

In action by executor of first deceased grantee against administratrix of estate of second deceased grantee to reform deed, on ground of mistake of scrivener who drew deed, dead man's statute did not render executor incompetent to testify, since the action was not an action on a "claim or demand" against estate of second grantee within meaning of the statute. Code Civ. Proc. § 1880, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Claim or Demand".

Harrison W. Call, Sacramento, for appellant.

Tinning & DeLap, Dana Murdock, J. Vance Porlier, Richmond, for respondent.

BRAY, Justice.

In an action to reform a deed and to quiet title, defendant appeals from a judgment in favor of plaintiff.

Questions Presented:

1. Sufficiency of the evidence.
2. Sufficiency of complaint.
3. Is the action barred by section 338, subdivision 4, and section 353, Code of Civil Procedure?
4. Admission of oral testimony.
5. Was administrator incompetent to testify?

Facts.

In 1945, Andrew P. Berendsen, who died June 13, 1948, and Hugh Alexander McIver, who died November 27, 1950, were business partners. In a deed delivered sometime in July, 1945, and recorded August 7, 1945, they were named as joint tenant grantees. The complaint alleged that the property was purchased by them as tenants in common, but that by mistake of the scrivener a "joint tenancy" form deed was used. The complaint seeks to have the deed reformed to one of tenancy in common. The instructions given by Berendsen and McIver to the title company which drew the deed, authorized the company to deliver all documents when title "to said property [is] vested of record in Hugh A. McIver, a married man, and Andrew P. Berendsen, a single man." There is no evidence of any instructions to the title company that the deed should be in joint tenancy. Both grantees were dead at the time of the trial. After Berendsen's death an undivided one-half interest in the property was listed in the inventory in his estate. McIver stated to the attorney for the estate that he would sell to the estate his one-half interest in the property for $4,500, or would sign a deed if the estate could sell the whole parcel for $1,000 per acre. Later McIver made a written offer to pay the estate $5,000 for "a clear title to the land in said partnership of McIver & Berendsen." He deposited with the estate's attorney $500 on account of the offer. The half interest was appraised in the estate at $6,000. The offer was rejected as not being 90 per cent of the appraised value. McIver requested the executor of the Berendsen estate to sign with him a check drawn on the partnership account to pay taxes on the property. The executor did. In the McIver estate, appellant administratrix listed in the inventory an undivided one-half interest only in the property. Under the heading "Property Held in Joint Tenancy" were three other parcels, not including the property in question.

The real estate broker who handled the purchase transaction testified that McIver instructed him to the effect that he wanted the deed in joint tenancy of himself and partner. The broker received no instructions from Berendsen. McIver's daughter loaned McIver $2,300 for his share of the purchase price. She testified that her father told her the deed was in joint tenancy.

1. Sufficiency of the Evidence.

[1] It is obvious from the foregoing recital that the parties treated the property as held in tenancy in common and not in joint tenancy, and that there was sufficient evidence together with the reasonable inferences therefrom to support the court's finding that the deed being in joint tenancy was due to the mistake of the scrivener.

The testimony of the real estate broker and McIver's daughter merely created a conflict in the evidence, which conflict the trial court resolved in favor of plaintiff. It should be noted in this behalf that McIver's own acts in treating the Berendsen estate as owning a half interest in the property are in themselves a refutation of the testimony of the broker and the daughter.

"In 45 Am.Jur. pp. 618–619 this is said: 'A mutual mistake of their agents is not necessarily a mistake of the parties. Undoubtedly, it would be * * * where the mistake was made by a scrivener who acted as common agent of both parties in drafting the instrument; * * *.'" Mills v. Schulba, 95 Cal.App.2d 559, 562, 213 P.2d 408, 410.

The facts in this case are concisely summed up in the following statement of the trial judge, Honorable Norman A. Gregg, at the end of the trial: "Gentlemen, very frankly, I don't have any trouble with the facts of this thing. On the one side is the fact that this deed very obviously is in the form of a joint tenancy deed, but it's inescapable to me that everybody considered to the contrary. It was listed in both estates. There was testimony that after Mr. Berendsen's death Mr. McIver went and asked the executor to draw a check to pay the taxes on it. Mrs. McIver in the inventory of her estate and in the divorce action stated they had a half interest in it."

2. Sufficiency of Complaint.

[2, 3] The complaint is poorly drawn, but not fatally defective. No demurrer to it was filed. Defendant moved to dismiss and for judgment on the pleadings on the ground that the action was without merit and not brought in good faith, the alleged cause of action fictitious and a sham, that plaintiff was guilty of laches and the cause of action barred by the statute of limitations. The court denied the motion. Sections 581 to 583, Code of Civil Procedure, dealing with dismissals, do not provide for dismissal because of laches or the bar of the statute of limitations. "The bar of the statute of limitations to an action * * * should be set up by demurrer, or in an answer, and not by motion to dismiss." Everts v. Blaschko, 17 Cal.App.2d 188, 190, 61 P.2d 776, 777.

[4] The complaint alleges that the parties purchased the property as tenants in

common and that the scrivener, in drawing the deed, by mistake, used a form deed entitled "Joint Tenancy Deed"; that said deed conveyed title as joint tenants instead of tenants in common; that the mistake was not discovered during the lifetime of either Berendsen or McIver but was discovered "by the parties hereto" on June 29, 1951, and that after demand by plaintiff, defendant refused to rectify the error and claims to be the owner to the exclusion of plaintiff's right and title. While the complaint would not be sufficient against special demurrer had one been interposed, it sets forth facts sufficient to constitute a cause of action for reformation of the deed due to the scrivener's mistake in drawing it. "Appellants' attack on the amended complaint comes at a late date, for they did not demur. 'In the absence of a demurrer, great liberality has been indulged in order to sustain faulty complaints in actions to reform contracts', Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157, 1158, and our only inquiry is whether the pleading is sufficient as against a general demurrer." Mills v. Schulba, supra, 95 Cal.App.2d 559, 561, 213 P.2d 408, 410. The rule is the same as to motions for judgment on the pleadings. See Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1. "Our courts have repeatedly held that the mistake of a draftsman is a good ground for the reformation of an instrument which does not truly express the intention of the parties. 22 Cal.Jur., p. 719 and cases cited; See, also, Merkle v. Merkle, 85 Cal.App. 87, 107–108, 258 P. 969." Mills v. Schulba, supra, 95 Cal.App.2d at page 561, 213 P.2d at page 410. Ordinarily where the application of the statute of limitations might be an issue, it is not enough in an action based on mistake merely to allege failure to discover the mistake earlier, but the reasons for such failure and the circumstances of the discovery must be given. See Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 486, 45 P. 809; People ex rel. Post v. San Joaquin, etc., Ass'n., 151 Cal. 797, 91 P. 740; Shapiro v. Equitable Life Assur. Soc., 76 Cal.App.2d 75, 88, 172 P.2d 725. But it has likewise been held that the failure to so allege can be raised only by a special demurrer or a general demurrer which specifies the applicable statute of limitations. Thus in Graham v. Los Angeles First Nat. Trust & Savings Bank, 3 Cal.2d 37, 43 P.2d 543, a general demurrer to the third amended complaint was sustained without leave to amend. Upon appeal from the judgment rendered thereon the court stated that the complaint, as here, merely gave the date of the discovery of the fraud charged, but did not set forth the circumstances of the discovery. The court said, 3 Cal.2d at pages 43–44, 43 P.2d at page 546: "* * * respondent relies upon the rule set out in Consolidated R[eservoir & Power] Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268 and Lady Washington C[onsolidated] Co. v. Wood, 113 Cal. 482, 486, 45 P. 809. In both these cases demurrers specifically setting up the statute of limitations had been interposed. It may be conceded that these cases are definite authority for the rule that if the defense of the statute of limitations is properly presented, the complaint is vulnerable unless it shows facts and circumstances surrounding the discovery of the fraud from which the court may decide that the facts and circumstances furnish justification for a suspension of the statute until the discovery of the facts constituting fraud. In the instant case, however, the defense of the statute of limitations was not interposed. The demurrer was a general demurrer which did not specify the statute of limitations. Although the defense may be raised by a general demurrer, such demurrer must specify that the ground relied on is the bar of the statute of limitations."

Other cases holding that the failure to allege the reason for the delay in discovering the alleged fraud or mistake and the circumstances of the discovery, can be attached only by special or general demurrers specifying the *applicable* statute of limitations, are Gillis v. Pan American Western Petroleum Co., 3 Cal.2d 249, 44 P.2d 311; Turner v. Milstein, 103 Cal.App.2d 651, 230 P.2d 25; Bank of America, etc., Ass'n v. Ames, 18 Cal.App.2d 311, 63 P.2d 1208. A rather unique decision on the subject appears in Richardson v. Michel, 45 Cal.

App.2d 188, 113 P.2d 916. There the court stated that in a fraud action it is necessary to allege the times and circumstances under which the fraud was discovered, that in that particular fraud action there were no such allegations, that appellants in their answer had alleged that the cause of action was barred by specified proper sections of the statute of limitations, that the appellants had objected to evidence on this ground and had argued to the trial court the applicability of the statute. It appeared that the trial court had found that the cause of action was not barred. The reviewing court stated that neither side had offered any evidence on this subject and there was no support in the evidence for that finding. It then, in spite of the lack of allegations in the complaint, remanded the case for retrial on the sole issue as to the statute of limitations.

[5, 6] In our case, as we have stated, the defendant did not demur. He did move for a dismissal and judgment on the pleadings and from time to time objected to the introduction of evidence on the ground that the complaint did not state a cause of action and was barred by the statute. This was not a sufficient pleading of the statute of limitations. Everts v. Blaschko, supra, 17 Cal.App.2d 188, 190, 61 P.2d 776. "* * * the party relying on it [the statute of limitations] must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived." Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 744, 47 P.2d 273, 275. "The complaint need not show that the action is not barred (citations), except in the case of an action for fraud, and even then a sufficient cause of action is stated unless the statute is pleaded. (Citations.)" Bank of America, etc., Ass'n v. Ames, supra, 18 Cal.App.2d at page 315, 63 P.2d at page 1210.

3. Statutes of Limitation.

[7] Defendant contends that the cause of action is barred by section 338, subdivision 4, Code of Civil Procedure, which requires actions for relief on the ground of fraud or mistake to be brought within three years of the discovery of the mistake. He also relies on section 353, Code of Civil Procedure, which extends the time for the bringing of an action where the holder of a cause of action dies before the expiration of the time limited for the commencement thereof. Such extension is limited to six months from the date of death. While here the complaint was filed over six years after the execution and recording of the deed and more than three years after the death of Berendsen, it was filed within four months of the discovery of the mistake by plaintiff executor. A reasonable inference from the evidence in this case is that neither of the principals to the deed discovered the error in their respective lifetimes, nor did either of the personal representatives of their respective estates until shortly before the suit was filed. It is apparent that both the principals and the representatives believed that the property was owned by Berendsen and McIver as tenants in common. They treated it as such. While there is no definite evidence of why the principals did not discover the error in their lifetimes, the fact that McIver, to whom the deed was delivered, by whom it was recorded, and who kept it in his safe deposit box, did not discover it, raises a reasonable inference that whatever prevented him from discovering it likewise prevented his partner from discovering it. It is obvious that buying the property as partners they both considered it partnership property and hence neither one of them would be particularly concerned about checking up on the form of the deed.

[8] Defendant contends that pursuant to section 1213 Civil Code, plaintiff had constructive notice of the contents of the deed because it was recorded. Section 1213 does not apply to a grantee of the particular deed recorded. The section provides for constructive notice to "subsequent purchasers and mortgagees" only. As said in 22 Cal.Jur., p. 724, § 12, "The mere recording of an instrument is not notice of a mistake therein: for otherwise, as has been observed, no contract could be reformed after the lapse of three years from that date." See, also Lillis v. Silver Creek, etc., Water Co., 21 Cal.App. 234, 131 P. 344; Brown v. Oxtoby, 45 Cal.App.2d 702, 114

P.2d 622. Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; Brooks v. Nelson, 95 Cal. App. 144, 272 P. 610, and Goodell v. Blumer, 41 Wis. 436, 444, are not in point. They merely hold that in a court pleading a party may not deny on information and belief the fact that a certain document is recorded; that it is the duty of such party to check the records before answering to see if it is recorded.

Defendant would also apply section 19, Civil Code, which provides for constructive notice to a person "who has actual notice of circumstances sufficient to put a prudent man upon inquiry". Defendant points to no evidence in the case of actual notice of such circumstances.

[9] Defendant contends that the executor of the Berendsen estate had constructive notice of the contents of the deed because of its being recorded. The executor is not a "subsequent purchaser or mortgagee" under the section. Nor was the attorney who represented the executor of the Berendsen estate at the same time he was the attorney for McIver personally and who initially was the attorney for the executor of the latter's estate, included in that category. This attorney testified that he discovered that the deed had been drawn in joint tenancy probably two or three months after he had filed the petition for probate in the McIver estate. This petition was filed in late November or early December of 1950, and thus the time of the discovery by the attorney would be some time in the early part of 1951. Assuming, as claimed by defendant, that his knowledge would be implied to the executor of the Berendsen estate as he was then the attorney for both estates, and that the statute of limitations would then start to run, the action would not be barred as it was filed in October, 1951.

[10] The evidence shows that from September 7, 1949, through May 12, 1950, there were negotiations between the executor of the Berendsen estate and McIver in which McIver was endeavoring to buy the half interest of the Berendsen estate which both believed that estate owned. This fact alone would lull the executor into believing that the estate had such interest. If, as claimed by defendant, the rebuttable presumption stated in section 1963, subdivision 15, Code of Civil Procedure, that official duty has been performed, applies, such evidence was sufficient to overcome it as well as any claim of laches on the part of plaintiff in not examining the record sooner.

4. Oral Testimony.

[11, 12] In support of his contention that oral testimony cannot be admitted to show the mistake, defendant cites no cases so holding. He refers to cases like Hebert v. Miller, 94 Cal.App.2d 211, 210 P.2d 251, and Security-First Nat. Bank v. Leatart, 75 Cal.App.2d 211, 215, 170 P.2d 687, which did not deal with mistakes but with the attempt of a grantee to limit or qualify the estate granted. It has uniformly been held that oral evidence is admissible to show that a writing, through fraud or mistake, does not express the intention of the parties. See 22 Cal.Jur., p. 741, § 23; Mills v. Schulba, supra, 95 Cal.App.2d 559, 213 P.2d 408.

5. Competency of Administrator.

[13] Defendant contends that under section 1880, subdivision 3, Code of Civil Procedure, plaintiff was incompetent to testify. That section prohibits parties to an action against an executor upon *a claim or demand* against the estate of a deceased person from testifying as to any matter or fact occurring before the death of such deceased person. This was not an action on a *claim or demand* against the McIver estate. It was the type of action referred to in the following statement from Alvarez v. Ritter, 67 Cal.App.2d 574, 579–580, 155 P.2d 83, 86: "Moreover, the disqualification of witnesses under Section 1880, supra, applies only to parties or assignors of parties in an action or proceeding *upon a claim against the estate of a deceased person.* It has been uniformly held in California that neither a party nor an assignor of a party to an action to establish a resulting trust, to quiet title to property or to require an accounting of a partnership, is disqualified to testify to facts occurring before the death of the decedent, since such actions are not based upon claims or de-

mands against the estate. Myers v. Reinstein, 67 Cal. 89, 7 P. 192, 194; 11A Cal. Jur. 890, sec. 632; 12 So.Cal.Law Rev. p. 10. In the text of 11A Cal.Jur. at page 890, it is said in that regard:

"'Claims to property adverse to the estate are not within the statute, because, if the property belongs to the claimant, the recovery in the action does not tend to diminish the estate to which the judgment might decide it did not belong.'" See also Calmon v. Sarraille, 142 Cal. 638, 642, 76 P. 486.

The judgment is affirmed.

PETERS, P. J., and BRAY and FRED B. WOOD, JJ., concur.

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SHELL et al. v. SCHMIDT.

Civ. 15541.

District Court of Appeal, First District, Division 1, California.

June 29, 1954.

Rehearing Denied July 26, 1954.

Hearing Denied Aug. 26, 1954.

Actions by twelve sets of husbands and wives against contractor for contractor's alleged fraud in constructing houses, which were purchased by plaintiffs, contrary to plans filed with Federal Housing Authority and for alleged breach of contract, to which plaintiffs were allegedly third party beneficiaries, and by which contractor promised to follow such plans in return for grant of priority permits to contractor by authority. The Superior Court, San Mateo County, Murray Draper, J., entered judgment upon verdicts for plaintiffs, and contractor appealed. The District Court of Appeal, Peters, P. J., held that where nine of the twelve separate verdicts were not sustainable and the thirteenth verdict, which was sustainable, was in lump sum, jury's splitting of liability between counts alleging fraud and count alleging breach of contract in determining amount of damages was reversible error.

Judgments reversed with instructions to retry issue of damages only.

1. Army and Navy 🔑51

Enumeration of remedies in Veterans' Emergency Housing Act of 1946 merely created new enumerated remedies and was not intended to and did not deprive veterans, who purchased homes constructed under such statute, of any action for fraud or breach of contract which they might have had under general common law principles. Veterans' Emergency Housing Act of 1946, § 1 et seq.; U. S. Code Cong. Service 1946, p. 199.

2. Army and Navy 🔑51

Statute of limitations contained in Veterans' Emergency Housing Act of 1946 applied to remedies created by such statute and not to non-statutory remedies. Veterans' Emergency Housing Act of 1946, § 1 et seq.; U. S. Code Cong. Service 1946, p. 199.

3. Fraud 🔑58(1)

In actions by twelve sets of husbands and wives against contractor for contractor's alleged fraud in constructing houses, which were purchased by plaintiffs, contrary to plans filed with Federal Housing Authority, evidence was not sufficient to sustain implied findings that, as to nine sets of plaintiffs, contractor had been guilty of fraud. Veterans' Emergency Housing Act of 1946, § 1 et seq.; U. S. Code Cong. Service 1946, p. 199.

4. Sales 🔑38(5)

Generally, there is a duty on part of seller to disclose concealed defects known to him.

5. Fraud 🔑58(1)

In actions by twelve sets of husbands and wives against contractor for contractor's alleged fraud in constructing houses, which were purchased by plaintiffs, contrary to plans filed with Federal Housing Authority, evidence was sufficient to sustain findings of fraud which were made as to three sets of plaintiffs. Veterans' Emergency Housing Act of 1946, § 1 et seq.; U. S. Code Cong. Service 1946, p. 199.

6. Action 🔑50(3)
Fraud 🔑21

Where contractor had allegedly been guilty of fraud in constructing houses, which were purchased by plaintiffs, contrary to plans filed with Federal Housing Authority, it was proper to join the twelve fraud counts alleged by each of twelve sets of plaintiffs in one complaint, but each set of plaintiffs had to recover, if at all on fraud issue, because of reliance upon misrepresentations made to such set of plaintiffs and could not recover upon misrepresentations which were made to other plaintiffs but which were not publicly made. Civ.Code, § 1711.

7. Contracts 🔑187(1)

Where contractor promised, in constructing homes, to follow plans which were filed with Federal Housing Authority in return for authority's grant of priority permits to contractor, veterans, who purchased homes so built, were third party beneficiaries of contract between contractor and authority. Veterans' Emergency Housing Act of 1946, § 1 et seq.; U. S. Code Cong. Service 1946, p. 199; Second War Powers Act of 1942 as amended 50 U.S.C.A. Appendix, §§ 631–645b.

8. Army and Navy 🔑51

Where contractor promised, inter alia, to follow plans filed with Federal Housing Authority in construction of homes in return for grant of priority permits to contractor by Authority, contract existed between contractor and Authority. Veterans' Emergency Housing Act of 1946, § 1 et seq.; U. S. Code Cong. Service 1946, p. 199; Second War Powers Act of 1942 as amended 50 U.S.C.A. Appendix, §§ 631-645b.

9. Contracts 🔑187(1)

Third party beneficiary of contract may maintain an action directly on such contract since promise, in such situation, is treated as having been made directly to the third party. Civ.Code, § 1559.

10. Contracts 🔑187(1)

It is not any objection to an action by third party that the contracting party could also have sued upon the contract for the same breach.

11. Contracts 🔑187(1)

An incidental beneficiary cannot successfully maintain an action on a contract, but beneficiary of such contract must be more than incidentally benefited by contract before he can successfully maintain an action on the contract as third party beneficiary.

12. Contracts 🔑187(1)

Question whether third party beneficiary is an incidental beneficiary or one for whose express benefit the contract was entered into and, therefore, one who can maintain action on contract is one of construction.

13. Contracts 🔑187(1)

To be able to maintain action on contract, third party beneficiary need not be specifically named as beneficiary. Civ. Code, § 1559.

14. Contracts 🔑187(1)

Where contract is for benefit of a class, any member of intended class may enforce it, even though government is one of the contracting parties. Civ.Code, § 1559.

15. Contracts 🔑322(3)

In action by twelve sets of husbands and wives against contractor for alleged breach of contract, to which plaintiffs were allegedly third party beneficiaries, and by which contractor promised to follow such plans, which he had filed with Federal Housing Authority, in return for grant of priority permits to contractor by authority, evidence was sufficient to establish breach of third party beneficiary contract to damage of plaintiffs. Veterans' Emergency Housing Act of 1946, § 1 et seq., U.S. Code Cong. Service 1946, p. 199; Second War Powers Act of 1942 as amended 50 U.S.C.A. Appendix, §§ 631–645b; Civ. Code, § 1559.

16. Judgment 🔑615

If given state of facts entitles one to recover damages upon theory of tort and upon theory of contract, recovery cannot be twice had.

17. Appeal and Error ⚷1070(1)
Trial ⚷335

Where, in actions by twelve sets of husbands and wives against contractor for alleged fraud and for breach of contract, nine of the twelve separate verdicts were not sustainable and the thirteenth verdict, which was sustainable, was in lump sum, jury's splitting of liability between counts alleging fraud and count alleging breach of contract for purpose of determining amount of damages was reversible error. Second War Powers Act of 1942 as amended 50 U.S.C.A. Appendix, §§ 631–645b; Veterans' Emergency Housing Act of 1946, § 1 et seq.; U.S. Code Cong. Service 1946, p. 199.

◆

James W. Harvey, Walter K. Olds, Dorothy E. Handy, San Francisco, for appellants.

Ropers & Majeski, Redwood City, for respondents.

PETERS, Presiding Justice.

Twelve sets of plaintiffs, each set consisting of a husband and wife, brought these actions against Max Schmidt and others for fraud, and for breach of contract. The other named defendants were granted a nonsuit, the propriety of which is not involved on this appeal. The husband plaintiffs, all veterans, and their wives, had purchased homes from Schmidt, constructed by him in San Mateo County. The first 12 counts of the complaint, which are identical except for the names of the plaintiffs, all charge Schmidt with fraud as to each sale transaction. The 13th count, in which all plaintiffs join, charges the breach of a contract between Schmidt and the United States, it being averred that plaintiffs, as veterans, were third party beneficiaries of that contract. The fraud counts and the contract count are based on the same facts, and allege but one cause of action. The fraud alleged, so far as pertinent here, is that Schmidt in applying for priority permits from the Federal Housing Authority represented to and promised[1] that agency that he would build the houses in conformity with certain designated plans and specifications; that Schmidt failed to comply with the submitted plans and specifications in certain specified respects; that this caused damage to each set of plaintiffs, in certain particulars, in the total amount of $4,800. The breach of contract count alleges that Schmidt contracted and agreed with the F.H.A. to build the houses in conformity with the plans and specifications submitted by him in applying for the priority permits; that plaintiffs, as veterans, are third party beneficiaries of that contract; that Schmidt violated the contract by not building in conformity with the plans and specifications in exactly the same respects alleged in the fraud counts; that plaintiffs were damaged in precisely the same respects and amounts as set forth in those counts. This count, in which all 12 sets of plaintiffs join, alleges a total damage of $57,600, or $4,800 to each set of plaintiffs. Thus, each set of plaintiffs pleaded but one basic cause of action for $4,800 damages, but alleged alternative theories of recovery—fraud and breach of contract. The jury brought in verdicts for $1,250 for each set of plaintiffs on the 12 fraud counts, and awarded all of the plaintiffs $12,000 collectively on the contract count. Thus, in legal effect, each set of plaintiffs was awarded a total of $2,250. From the judgments on these verdicts Schmidt appeals.

The facts are not substantially in dispute. On April 30, 1946, Schmidt applied to the F.H.A. under Priority Regulation 33 for priorities on building materials to construct 48 dwellings for veterans. Regulation 33 had been originally issued by the Civilian Production Administration pursuant to authority granted by the Second War Powers Act of 1942, as amended, 50 U.S.C.A.Appendix, §§ 631–645b. Later the Veterans' Emergency Housing Act of 1946, 50 U.S.C.A.Appendix, § 1821 et seq.[2]

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[1] The fraud counts also allege that such representation was made to plaintiffs, but except as to three sets of plaintiffs, there was a complete failure to prove this allegation. This will be discussed later in this opinion.

[2] U. S. Cong. Service 1946, p. 199.

empowered the Housing Expediter to delegate to the Civilian Production Administration certain powers conferred upon him by certain sections of the Veterans' Emergency Housing Act of 1946. This power was exercised, and regulation 33 was continued in effect under authority of both statutes, and was admittedly in effect at all times here pertinent.

This regulation prescribes in detail the method by which a contractor desirous of building homes for veterans and who needs material priorities, shall make application to the Civilian Production Administration (The F.H.A.). Among other things, the regulation, as amended, expressly provides that a builder constructing houses under it must perform the work pursuant to the description, that is, pursuant to the plans and specifications required to be submitted by the builder to the F.H.A., before he can secure the desired priorities. Another section of the regulation provides that all houses completed after the effective date of the regulation are subject to a maximum sales price established by the F.H.A.

When Schmidt applied for his permit he was required to and did submit plans and specifications of the proposed houses he desired to build. These specifications, among other things, represented that each house was to have exterior wall sheathing of wood, two 30,000 B.T.U. gas floor furnaces, and interior wall surfacing of gypsum lath and plaster. Pursuant to this application priorities were granted, and a maximum sales price of $9,700 per unit (later on Schmidt's petition increased to $12,000) was fixed by the F.H.A.

Between May 15, 1947, and November 13, 1947, the respondents purchased from appellant, or from his agents, for $12,000 each, 12 of the 48 houses then in various stages of construction. All of the 12 houses purchased by respondents were built by appellant without compliance with and in violation of the plans and specifications submitted by him to the F.H.A. None of the 12 had an exterior sheathing of wood. The exterior walls, in fact, were made of construction paper covered with chicken wire and over this cement stucco was applied. Wood exterior wall sheathing protects a stucco house from wind and moisture, a protection not afforded by the paper type of construction used by appellant. Only one floor furnace, apparently of 30,000 B.T.U. capacity, was installed in each house, instead of the two called for by the specifications. Also in violation of the specifications, which called for interior walls of gypsum lath and plaster, sheet rock was used.

The complaint was filed February 11, 1949. In the first 12 causes of action, based on fraud, it is averred that on November 9, 1948, the plaintiffs first discovered the falsity of the representations made by appellant.

The evidence of the respondents as to the claimed misrepresentations can be summarized as follows: None of the respondents saw the plans and specifications prior to the time they purchased their homes, nor did they know what they contained. The Shells (first count) testified that they understood that the home was inspected and approved by the Veterans Administration. The Johnstons (second count) testified that they relied entirely on the government and its inspection service to see that they got a good buy, and that the selling agent represented to them that the house they ultimately purchased was to be similar to the one across the street. That house had exterior wall wood sheathing which could then be seen. This led them to believe that their house was to be similarly constructed. Substantially similar testimony was given by the Douglases (fourth count). The Brichtas (third count) testified that they never saw the plans or specifications. Teeter (fifth count) testified that although he did not see the plans and specifications he knew that they existed, and he was told that the houses were government inspected. There is no evidence of the claimed representations made to the Hexbergs (sixth count) in the record. The Thunens (seventh count) were told by the selling agent that these homes were G.I. supervised by a G.I. appraiser. The Kottas (eighth count) testified that they relied upon the representation that the homes were government inspected. The Mitchells (ninth count) testified that although they were not told that their house was government inspected, they "figured" it was. They were told that the house was being built under G.I. specifications, and it was specifically represented to them that their house was to have wood sheathing. This is the only plaintiff who directly so testified. The Rodriguezes (tenth count) and the Coccarys (twelfth count) testified that they asked to see the plans and specifications, but did not receive them. Rodriguez testified that he was told not to worry about the plans and specifications because all of the houses were being built according to specifications, and that the houses would be inspected and passed on by the government before he would be allowed to buy. Coccary was told that the plans and specifications were not available at the moment. The Schneiders (eleventh count) testified that they relied upon their house being a veteran's building for their protection.

All of the respondents who testified admitted that they had seen and inspected the houses before they purchased, and that they knew that their house contained but one gas furnace. None was aware of, asked any questions about, or paid any particular attention to the material used on the interior walls. All testified that their homes were not only underheated, but that, because of the inadequate exterior walls, they became damp and cold, and that mold and mildew grew on the back room walls. The evidence is ample and substantial to the effect that largely because of the inadequate exterior walls, and partly because of the inadequate heating equipment, the plaintiffs were made quite uncomfortable, and did not receive a house of the quality and type called for by the plans and specifications.

Testimony was given by an investigator from the office of the Housing Expediter that after the houses were purchased he visited the tract and discovered the variances from the specifications. He testified that, because of these violations, prosecution of appellant by the government was contemplated, but that the case was placed on the inactive list when it was learned that the homeowners would bring suit against him.

Appellant does not challenge the implied findings to the effect that he failed to construct the houses in accordance with the plans and specifications filed with the F.H.A., his basic contentions being that his exclusive liabilities for such violations and the exclusive remedies of the purchasers for such violations are controlled by the pertinent provisions of the Veterans' Emergency Housing Act of 1946, and that such statute does not confer on purchasers any right to maintain a cause of action for fraud or for breach of contract when such causes of action are predicated on failure to comply with the plans and specifications submitted to the F.H.A. Respondents, while conceding that the federal statute does not authorize fraud or breach of contract actions for such violations, maintain that the federal statute merely created additional statutory remedies and in no way affected the existing common law remedies for fraud or breach of contract. Respondents' theory is that they are suing on common law causes of action not grounded on the Veterans' Emergency Housing Act, and that the federal statute is only relevant as setting up a standard against which to measure the acts of the appellant in failing to perform according to the plans and specifications required by that statute.

We agree with respondents that the federal statue should not be interpreted as containing the exclusive remedies of purchasers so as to deprive them of their common law remedies. To do so would be to deprive veterans of most important rights, and after one year from the date of purchase (the statute of limitations provided in the statute for the statutory remedies of purchasers) to confer immunity on contractors in their relations with purchasers. This would be in subversion of the very purpose and intent of the statute.

Section 5 of the Veterans' Emergency Housing Act of 1946 provides that it shall be unlawful to sell a house in excess of the maximum sales price fixed by the F.H.A., and also that it shall be unlawful for the contractor to violate the terms of any regulation or order issued under the provisions of the statute. It is thus made unlawful to violate any of the conditions imposed by regulation 33. Section 7(a) of the Act confers upon the government power to prosecute violators, and to obtain monetary compensation for purchasers from contractors on account of deficiencies in construction resulting from the contractor failing to comply with the specifications filed by him. By section 7(d) the individual purchaser is granted the statutory right to sue the contractor for violation of the maximum selling price fixed by the F.H.A., and such action must be brought within one year from the date of the violation.

Based on these provisions it is appellant's argument that the purchaser has but one action—the right to seek recourse for an overcharge—which action must be brought within one year, and that the purchaser has no legal right to sue the contractor for fraud or breach of contract where such fraud or breach is predicated upon failure to comply with the specifications submitted.

There seems to be no case directly holding that, under the Veterans' Emergency Housing Act of 1946, the purchaser has remedies not therein conferred, but there are cases deciding a similar point under similar statutes. Heinicke v. Parr, 6 Cir., 168 F.2d 194, and Keele v. Holt, 5 Cir., 171 F.2d 480, held that, although under the Second War Powers Act of 1942 neither that statute nor regulation 33 provided for actions for restitution or for an overcharge, such actions would lie under general equitable or common law principles. In other words, such remedies existed in addition to those granted by statute. In United States v. Austin, D.C., 100 F.Supp. 33, it was recognized that the government could seek restitution even though the Second War Powers Act of 1942 did not provide for this remedy. In Adams v. Albany, D.C., 80 F.Supp. 876, it was indicated, by way of dicta, that common law remedies existed under the Veterans' Emergency Housing Act of 1946.

The theory of the cases holding that purchasers were not deprived of their common law remedies by the Second War Powers Act of 1942, and that both the purchasers and the government had remedies not therein enumerated, was that the statute was passed for the benefit of veterans, and should be interpreted so as to help and to assist rather than to penalize them. Such reasoning is equally applicable to the Veterans' Emergency Housing Act of 1946. Not only does the very name of the statute disclose its purpose of aiding veterans, but such purpose has frequently been noted by the courts. In Adams v. Albany, D.C., 80 F.Supp. 876, 879, the court expressed this purpose in the following language: "We start with the fact that the statute under discussion was passed for the benefit of veterans of World War II. It was an act of munificence on the part of a grateful Government towards those who served in World War II, which expressed itself in the form of assistance in the purchase of housing accommodations." See comment U. S. Code Congressional Service, 79th Cong., 2nd Sess. 1946, p. 1177.

[1] This fundamental purpose would, in many cases be defeated if the statute were interpreted so as to deprive the veterans of their normal remedies to the benefit of defaulting contractors—the very class it was the purpose of the statute to protect the veterans against. It must be held, therefore, that the enumeration of remedies in the statute merely created new enumerated remedies and was not intended to and did not deprive the veterans of any action for fraud or breach of contract that they might have under general common law principles.

[2] But, says appellant, if veterans do have an action for damages caused by the failure of the contractor to follow the plans and specifications, whether in fraud or contract, such action must be brought within one year of the date of the violation as provided in the federal statute, on the theory that, when a statute creates a right, the expiration of the period set forth in the statute for the bringing of the action extinguishes such right. But that is not this case. The one-year statute applies only to the statutory right created by the statute—the right to bring an action for an overcharge. But the Veterans' Emergency Housing Act of 1946 did not "create" the causes of action for fraud and breach of contract. Respondents here are relying on common law causes of action that do not find their origin in that statute. The stat-

ute merely establishes the standard by which appellant's conduct is to be measured. It did not create the right to sue. Therefore, the statute of limitations applicable to the remedy created by the statute, has no application to the non-statutory remedies. The actions were brought well within the periods applicable to the common law remedies here involved.

[3] Appellant next contends that there was no evidence of fraud, and that the implied findings on that issue are unsupported by any substantial evidence. With that contention, as to 9 sets of respondents, we must agree. The Hexbergs did not testify at the trial. There was no evidence at all of any fraudulent or other representations made to them. The other respondents admitted that they did not see the plans and specifications prior to the times of their respective purchases, and admitted that they did not know what they contained. They can hardly claim that they were induced to purchase in reliance upon any representations contained in the plans and specifications. Moreover, all respondents who testified, admitted that they had inspected the houses prior to purchase, and knew that they contained but one floor furnace. Such inspection also would have disclosed that the interior walls were not gypsum lath and plaster, but were constructed of sheet rock. Such evidence will not support a finding of reliance or inducement upon which to predicate a fraud action. By their own testimony these respondents have negatived any inducement to purchase based on the provisions of the plans and specifications.

[4] Respondents argue, in support of the fraud verdicts, that appellant was under a duty of disclosure, and that his nondisclosure constitutes fraud. There is, in general, a duty to disclose concealed defects known to the seller. Herzog v. Capital Co., 27 Cal.2d 349, 164 p.2d 8. Obviously, although the interior wall finish and the number of furnaces were matters that a reasonable inspection would disclose, the sheathing under the exterior wall finish would not be disclosed by a reasonable inspection. But the type of sheathing used was not, in the absence of misrepresentation, a defect of the type referred to in the nondisclosure rule. Houses can be and are built with the type of construction here used. If the purchasers are not misled, such construction would not constitute a concealed defect. To find that the exterior wall construction is a defect, reliance must be had on the plans and specifications, and none of the respondents knew what they contained.

[5] This reasoning does not apply to three sets of respondents. Mrs. Mitchell (ninth count) testified that it was represented to her by the selling agent that the entire house, with the exception of the garage, was covered with wood sheathing. This was a direct misrepresentation of fact and sustains the finding of fraud as to this set of respondents. Mr. Johnston (second count) when he asked the selling agent if the rest of the house subsequently purchased by him was covered with paper like the garage, was told: "No, it is like the rest of those houses being built across the street." Visual inspection disclosed that the houses referred to had wood sheathing on the exterior walls. Somewhat similar testimony was given by Mrs. Douglas (fourth count). Thus, positive misrepresentations sufficient to sustain the findings of fraud were made to these parties.

[6] Respondents argue that the evidence is sufficient to indicate an intent to defraud a class, namely, veterans, and that in such a situation false representations made to any member of the class, can be relied upon by all other members of the class. In this connection section 1711 of the Civil Code is relied upon. It provides: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." That section would have been applicable had the representations made to Mitchell, Johnston and Douglas been published by Schmidt to veterans generally. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358. But here there was no such public broadcast of the misrepresentations. The misrepresentations were made to particular in-

dividuals. In the instant case, although it was proper to join the 12 fraud counts in one complaint, each couple must recover, if at all on the fraud issue, because of reliance upon misrepresentations made to that couple, and cannot recover upon misrepresentations made to others, and not publicly made. Goodspeed v. Great Western Power Co., 19 Cal.App.2d 435, 65 P.2d 1342.

[7] But these arguments do not apply to the cause of action for breach of a contract made for the benefit of a third party. This is the 13th count of the complaint. That count is based on two premises. First, that the application for a permit and its granting subject to conditions resulted in a contract between appellant and the United States to the effect that appellant contracted and agreed to build the houses in conformity with the plans and specifications in exchange for a permit to secure priority for building materials then otherwise unobtainable. The second premise is that respondents, as veterans, who purchased the homes so built, were third party beneficiaries of this contract. Both premises are sound.

[8] That the relationship between the government and appellant can properly be described as contractual is clear. Under the statute the contractor, in order to secure priorities for building materials, had to file a request therefor. This request could be granted only upon the contractual promising, among other things, that if priorities were granted, he would build in accordance with the plans and specifications. All of the elements of a lawful contract are present. All of the federal cases to which we have been referred that have found it necessary to discuss the nature of the application and its granting under the federal statutes here involved, have referred to it as creating a "contract" between the government and the contractor. United States v. Sauers, D.C., 99 F.Supp. 753, 755; United States v. Austin, D.C., 100 F.Supp. 33, 41.

Once it is established that the relationship between the contractor and the government is contractual, it follows that veterans purchasing homes, that is, the class intended to be protected by that contract, are third party beneficiaries of that contract. As already pointed out, the statute and the regulations passed thereunder resulting in the contract were passed to aid and assist veterans and for their benefit. Purchasing veterans constitute the class intended to be benefited, and the contract must therefore be for their benefit.

[9-13] Under section 1559 of the Civil Code, embodying general common law principles, a third party beneficiary may maintain an action directly on such a contract. (See cases collected 12 Cal.Jur.2d 493, § 261.) The promise in such a situation is treated as having been made directly to the third party. J. F. Hall-Martin Co. v. Hughes, 18 Cal.App. 513, 123 P. 617. It is no objection to an action by the third party that the contracting party (here the government) could also sue upon the contract for the same breach. Malone v. Crescent City M. & T. Co., 77 Cal. 38, 18 P. 858. Of course, the beneficiary must be more than incidentally benefited by the contract. An incidental beneficiary cannot successfully maintain an action. (Cases collected 12 Cal.Jur.2d 500, § 268.) Whether the beneficiary is or is not an incidental one, or a beneficiary for whose express benefit the contract was entered into, is a question of construction. Woodhead Lumber Co. v. E. G. Niemann Investments, 99 Cal.App. 456, 278 P. 913. It is not required that the third party beneficiary be specifically named as a beneficiary. All that section 1559 requires is that the contract be "made expressly for the benefit of a third person," and "expressly" simply means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly." Le Ballister v. Redwood Theatres, Inc., 1 Cal.App.2d 447, 448, 36 P.2d 827.

[14, 15] Where the contract is for the benefit of a class any member or members of the intended class may enforce it. Garratt v. Baker, 5 Cal.2d 745, 56 P.2d 225. The fact that the government is one of the contracting parties does not change the rule. Agreements between a state or municipality with individuals have frequently been held to be third party beneficiary contracts for

the benefit of some member or groups of members of the public. See cases collected in annotation 81 A.L.R. 1271, at page 1299. Thus, there would seem to be no reasonable doubt but that the jury's findings that there was a third party beneficiary contract breached by appellant to the damage of respondents are amply supported by the record.

From this analysis it follows that 9 of the judgments for $1,250 each based on fraud cannot be sustained, but 3 of such judgments are supported by substantial evidence. The judgment in favor of all respondents for $12,000 based on breach of contract is also supported by substantial evidence. If separate causes of action were involved, such a state of facts would warrant an affirmance of the $12,000 judgment, and 3 of the $1,250 judgments, and a reversal of the other nine $1,250 judgments. But separate causes of action are not involved. Respondents have alleged the existence of but one primary right, and but one violation of that right. Such a complaint states but one cause of action, even though two or more theories of recovery are alleged. Work v. County Nat. Bank & Trust Co., 4 Cal.2d 532, 51 P.2d 90.

[16, 17] That but one cause of action was basically alleged is apparent. Each set of plaintiffs was seeking recovery of such amount as would place their home in the condition it would have been had compliance been had with the plans and specifications. To do this, it was alleged, would require $4,800. This sum was sought either on the theory of breach of contract or fraud, or both. But no matter how many theories of recovery were stated or proved, respondents were entitled to but one recovery which could not exceed $4,800. Double recovery could not be secured lawfully for the same identical violations of the plans and specifications. Once they have been reimbursed for their damages, regardless upon what theory such reimbursement is made, they have no lawful right to any more damages. This rule is stated as follows in 2 Freeman on Judgments (5th ed.), § 583, page 1235: "If a given state of facts entitles one to recover damages upon the theory of tort, and the same state of facts entitles him to recover upon the theory of contract, it would seem plain that recovery could not be twice had simply because the facts would support recovery upon either theory." But the jury, pursuant to several and misleading instructions of the trial court, attempted to and did split the liability. This was error of a most serious nature.

The jury was given 26 forms of verdict, 13 in favor of respondents, 12 on the fraud counts and one on the contract count, and 13 similar forms for appellant. The jury was properly instructed on the measure of damages for fraud and the measure of damages for breach of contract, such measures, under the facts, being substantially identical. Then the court correctly told the jury that each set of plaintiffs could recover a maximum of $3,950[3], "even though you should find that as to each cause of action, the cause of action for fraud and the cause of action for breach of contract, any one pair of plaintiffs has a right to recover." Then, after the jury had started its deliberations, it requested further instructions on the question of damages. The jury was then told that within the maximum limits it could allow damages on either the fraud counts or the contract count or both—in other words, that it could split the liability. The court, at this time, first repeated substantially the whole of the correct instruction partially quoted above. The foreman of the jury then indicated that further information was desired, particularly as to whether but one verdict could be brought in, or whether verdicts were required on the 13 forms submitted to it. The court thereupon described the 13 counts of the complaint, told the jury that it was limited to a maximum of $3,950 for any one set of plaintiffs, and then stated: "Now, within that limit you may do as you wish in respect to the two forms of verdict, the thirteenth cause of action considered on one side and the twelve together as another group. If it be your view that there is both breach of contract and fraud, as they were described to you in the instructions, then in my opinion you should return verdicts on all thirteen of the causes of action." After informing the jury what it should do if it found fraud and no breach of contract, and vice versa, the court repeated: "If you feel that there should be a recovery on both types of action, the one for fraud and the one for breach of contract, then you should return twelve verdicts on the first twelve causes of action for the plaintiffs and one verdict for the plaintiffs on the thirteenth cause of action, dividing the total of your damages in such way as you wish—and I think counsel would agree that it wouldn't be particularly material how that was done. It could be a dollar on either. It wouldn't have to be mathematically precise so long as the total verdicts" received by any set of plaintiffs did not exceed $3,950. After conferring with counsel the court repeated that if both fraud and breach of contract were found, 13 verdicts for plaintiffs should be returned, and then stated: "but if you have fixed upon an amount as being what any one couple should recover, then that figure, whatever it is, ought to be divided between your two verdicts * * *. That would constitute * * * a finding that there is a fraud and there is a breach of contract. If you settle on a figure as being what one particular couple ought to get, then put a part of that into the verdict for them individually, and a part of it will be their one-twelfth of the lump sum verdict. But, the two together, the one-twelfth plus the individual verdict should be the amount that you think is properly recoverable by them, and the division between the two causes of action would in my opinion be immaterial, whether you have one dollar in one and the balance in the rest or whether you divided 50–50 I don't think would make any substantial difference." When the foreman expressed some doubt on the matter, the court stated that if the jury found for plaintiffs on both theories, it should fix a single figure as the total damages suffered by each set of plaintiffs, "then break it down between two verdicts, the first—and it makes no difference how you allocate it, in my opinion— * * * would go into the individual verdict, one of those on the first twelve causes of action and the balance of that figure * * * include that as one-twelfth of the verdict on the thirteenth cause of action." Whereupon, the jury returned and shortly thereafter returned the 13 verdicts here involved.

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[3] This figure is not in accord with the prayer of the complaint which alleges $4,800 for each set of plaintiffs as their total damage. Respondents, not having appealed, cannot complain of this error, if error it was.

Thus the jury was told, if it found both fraud and breach of contract, to bring in separate verdicts after arriving at the total damage and dividing that figure in any way it saw fit. This was error. It resulted in verdicts and judgments that are highly inconsistent and contradictory. If each set of respondents was damaged in the amount of $1,250 by reason of Schmidt's failure to comply with the plans and specifications, as found by the jury in its verdicts on the first 12 counts, that same set of respondents was damaged in the amount of the same $1,250 because of Schmidt's breach of his contract to build in accordance with the plans and specifications. Yet the jury by its verdict on the 13th count has fixed this damage at an additional $12,000 for all respondents, or $1,000 for each set of respondents. This was done pursuant to erroneous instructions that it was permissible to thus split the total damages. Conceivably, the error would not have been prejudicial if both theories found by the jury were sustainable by the record. But, where, as here, 9 of the separate verdicts are not sustainable, and the sustainable verdict is in a lump sum, it is obvious that this splitting of the damages was prejudicial to appellant as well as to respondents. This error, however, does not require a new trial on the issue of liability. Liability to all respondents for breach of contract, and, in addition, as to three of the respondents for fraud, has been established. Those issues need not be retried. The new trial should be limited to the issue of damages alone.

The judgments are reversed with instructions to the trial court to retry the issue of damages only, and when such damages have been ascertained, to enter judgments in favor of respondents in the amounts so fixed. Inasmuch as the basic question of liability has been determined adversely to appellant, and the issue of damages adversely to respondents, and inasmuch as the reversal is as to damages only, it is ordered that respondents and appellant each bear their own costs on these appeals.

BRAY and FRED B. WOOD, JJ., concur.

126 Cal.App.2d 455

ACOSTA v. SAN DIEGO COUNTY et al.

Civ. 4821.

District Court of Appeal, Fourth District, California.

July 7, 1954.

Action for judgment declaring indigent Indian who lived on reservation in county eligible for direct county relief. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment for plaintiff. County appealed. The District Court of Appeal, Griffin, J., held that Indian who lived on reservation in county was resident of county and entitled to direct county relief.

Judgment affirmed.

1. Indians 🔑32

In absence of treaty ratified by the United States Senate, limiting jurisdiction over Indian reservations, such reservations within state are part of state and subject to its jurisdiction in all matters which do not interfere with control which federal government has exercised over Indian affairs.

2. Indians 🔑29

Reservation Indians, as citizens of the United States, are citizens of state where they live, and are entitled to participate in both national and local elections.

3. Indians 🔑5

Although there are important similarities between the two relationships, the ordinary guardian-ward relationship does not exist between the United States and Indians living upon reservations.

4. Indians 🔑5

Indians living on reservations as citizens and residents of the state in which they are living, are endowed with rights, privileges and immunities equal to those enjoyed by all other citizens and residents of the state. U.S.C.A.Const. Amend. 14, § 1.

5. Indians 🔑5

The fact that Indians, while living on Indian reservations, may be exempt from certain state and county taxes and other laws is not necessarily determinative of question of their residence.

6. Paupers 🔑43(2)

The fact that Indians living on reservation could not transfer their interest in property held in trust for them by the United States, as security for relief payments, if required to do so by county, would not alone justify county in denying relief to such Indians. Welfare and Institutions Code, §§ 200, 2500.

7. Declaratory Judgment 🔑364

In action for judgment declaring that indigent Indians living on reservation in county were entitled to receive relief payments from county, statement by trial judge that Indians in question did not belong to any tribe recognized as such by the United States and that the United States had made no treaties with them, was not erroneous where treaties which had been made with such Indians were never approved by the United States Senate and never became binding.

8. Paupers 🔑43(1)

Provision of Welfare and Institutions Code that, to be entitled to receive direct county relief, one must have lived in county for three years and during such period have received no public or private relief, applies only to those who have newly entered county or state. Welfare and Institutions Code, §§ 200, 2500, 2555.

9. Paupers 🔑43(1)

Where indigent plaintiff had lived on Indian reservation in county since her birth, she was resident of county and was entitled to receive direct county relief. Welfare and Institutions Code, § 2500.

James Don Keller, Dist. Atty., and County Counsel, by Olney R. Thorn, Deputy Dist. Atty., San Diego, for appellants.

Robert A. Estes & Richard P. MacNulty, San Diego, for respondent.

Felix S. Cohen, Arthur Lazarus, Jr., Washington, D. C., of counsel, Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., Rita Singer, Sacramento, of counsel, amici curiæ, for respondent.

GRIFFIN, Justice.

This is an action for declaratory relief. Judgment was entered in favor of plaintiff, and defendant County of San Diego appealed. The sole question here presented is whether or not the Board of Supervisors of San Diego County has a duty, under sections 200 and 2500 of the Welfare and Institutions Code, to provide relief to the plaintiff, a needy Indian, and other Indians in like circumstances living on government reservations in said county, or whether said county is only required to provide emergency relief to such persons under the provisions of section 2501 of the Welfare and Institutions Code.

Section 200, supra, provides generally that "Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors in each county may provide for the care and maintenance of the indigent sick or dependent poor of the county, and for that purpose may levy the necessary property or poll taxes, or both". Section 2500 provides that "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, or by their own means, or by State hospitals or other State or private institutions." Section 2501 provides that "Every county may give such emergency relief to dependent nonresidents as the respective boards of supervisors deem necessary."

The facts are not in dispute. It is conceded that plaintiff is a needy person within the meaning of section 2500, supra, but defendant contends that reservation Indians are not residents of the county for the purpose of obtaining direct county relief under the code sections involved.

Prior to April 13, 1951, the District Attorney of San Diego County, observing the lack of uniformity existing in this state between the counties as to extending direct county indigent relief to reservation Indians, requested the attorney general for his opinion as to the duty of the county to provide such relief. On August 22, 1951, the attorney general expressed his opinion that there was such a duty. 18 Ops.Cal.Atty. Gen. 88. On November 30, 1951, the district attorney advised the Board of Supervisors that he could not agree with the opinion of the attorney general and that it was his belief that such an expenditure of county funds would be illegal and a violation of Article IV, sec. 31 of the Constitution of California. Relying upon the opinion of the attorney general, the Indian Bureau, on July 1, 1952, refused to provide direct relief to Indians residing on reservations in this State, although certain relief is given to reservation Indians residing in some other states. It appears from the record that at all times since July 1, 1952, the plaintiff has been relieved by payments from the County of San Diego under the Emergency Relief section, which provides that the county may give emergency relief to dependent nonresidents. Both prior and subsequent to the first day of July, 1952, a contract existed between the Bureau of Indian Affairs and the County of San Diego under the "Joint Powers Agreements Act", Government Code, Secs. 6500–6512, whereby any medical or hospital services needed by the plaintiff or other Indians in like circumstances are provided for at the San Diego County General Hospital, the cost of which shall be paid to the county by warrant from the United States government. It has always been the policy of the county to treat any Indian living off of a reservation as an ordinary citizen of the county, and such Indians have always been given direct county relief when the need for such relief was established. Furthermore, by a contractual relationship between the state and the United States whereby this state is allowed to participate in the distribution of federal funds under the Old Age Security program, the Aid to Needy Blind program, and the Aid to Needy Children program, Indians living on reservations have been given their full benefits under such programs when their eligibility has been established.

The Pala Indian Reservation, upon which plaintiff, a Mission Indian, has resided since her birth, consists of approximately 1100 acres of land held in trust by the United States for the Pala Indians. Some of these Indians have been allotted some of this acreage in severalty, but none own the fee patent title. Plaintiff is a registered voter in the Pala precinct, which includes the Pala Indian Reservation.

It is therefore argued by appellant: (1) That the jurisdiction of the federal government over Indians while residing on Indian reservations is exclusive; that consequently, such Indians, while they are on the reservations, cannot be controlled nor governed by the laws of the state within which the reservations are located, citing Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820; and 27 Am.Jur., Indians, p. 572, Sec. 47, and cases cited. (2) That reservation Indians are "wards of the Nation" under the guardianship of the United States government, and the Superior Court is without power to declare a termination of this relationship, citing Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299, 305; Tiger v. Western Investment Co., 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738; and United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; that a reservation Indian may become subject to the burdens and obligations of state jurisdiction in two distinct manners: (a) he may abandon his residence upon the government reservation by moving onto nonreservation land within the state and county, or (b) the Congress of the United States, having exclusive jurisdiction over the Indians residing on reservations, may relinquish part or all of this jurisdiction to the states; that in the absenee of such express reliquishment of exclusive jurisdiction by the federal government the California Reservation Indian today still stands in the position of a ward of the United States, not subject to the jurisdiction of the laws or courts of the State of California while he remains on the reservation. (3) It is contended that the Reservation Indians are not subject to the burdens or obligations of the laws of the County of San Diego or of the State of California and therefore are not entitled to the benefits of such laws while remaining on the reservations because they are not subject to taxation by either county or state authorities while residing thereon, citing United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532; and United States v. Pearson, 8 Cir., 231 F. 270; that neither state nor county had jurisdiction over crimes committed on reservation lands by Indians on the day here in question, and had no right to pass any laws governing such Indians thereon in reference to their lands, nor to exercise the power of eminent domain over such property without the express consent of Congress, citing People v. Carmen, 265 P.2d 900 [Rehearing granted by the Supreme Court]; Elk v. Wilkins, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643; that California Indians owe no allegiance to the State of California and receive no protection from such state, citing United States v. Kagama, supra; and Plummer v. Hubbard, 207 App.Div. 29, 201 N.Y.S. 747; that an Indian reservation may compare with a military reservation within the State boundaries with respect to the jurisdiction of the State of California and, according to 1 Ops. Cal.Atty.Gen. 176, 178, the persons stationed upon the premises become isolated, both territorially and as respects their civil relations, and the land is no longer a part of the soil of the state "nor are the occupants inhabitants of the state"; and it is contended that this principle of exclusive jurisdiction of the United States has been recognized repeatedly by the courts of this state, citing United States v. Watkins, 9 Cir., 22 F.2d 437; Pacific Coast Dairy, Inc. v. Department of Agriculture, 19 Cal.2d 818, 123 P.2d

442; Consolidated Milk Producers For San Francisco v. Parker, 19 Cal.2d 815, 123 P.2d 440.

In connection with the above contentions defendant concedes that Congress, by the adoption on August 15, 1953, of Public Laws 277, 280–281, 83rd Congress Chaps. 502, 505 and 506, First Session, 18 U.S.C.A. §§ 1157, 1161, 1162, 28 U.S.C.A. § 1360 and note, in conformance to a House Concurrent Resolution No. 108, 67 Stat. B132, has consented to a limited state jurisdiction, both civil and criminal, over Reservation Indians in California and intends to adopt legislation concerning the future right of taxation of their property by the state, and that "for all practical purposes the basic duty of law enforcement and criminal jurisdiction has been transferred from the federal government to the State of California" thereby, but contends that by the terms of this enactment, the United States Government still remains in the position of guardian to its Indian wards residing upon reservation land, citing Memorandum Opinion of Commissioner of Indian Affairs dated August 24, 1953, commenting on the provisions of Public Laws 277 and 280, supra. It is defendant's argument that the removal of this restriction clearly indicates that the criminal and civil jurisdiction over Indians residing on the reservations was exclusively in the United States Government prior to said date, otherwise the action taken by Congress conferring that right would have been needless legislation. (4) It is argued that the county is without jurisdiction to enforce the burdens of the relief statutes because under sections 2601–2605 of the Welfare and Institutions Code it may require, as a condition to the grant of aid to an indigent, as security for the money so expended, that the applicant transfer to it such property or interests in property as the applicant has, and may provide in the agreement for the control and sale of the indigent's property as a condition for receiving aid. It is therefore contended that any such agreement obtained from an Indian indigent residing on a reservation would be a nullity and unenforceable, and accordingly the board of supervisors could, for this reason, conclude that the applicant had not complied with the conditions required, and it might reasonably refuse aid, citing Elk v. Wilkins, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643. (5) Exception is taken to the remark of the trial judge, in his written opinion, that the Mission Indians do not belong to any tribe recognized as such by the United States as a distinct political unit, and that the United States has never made any treaty with them nor treated them as a political group, contending that no evidence was produced on this subject, and if the trial judge made his conclusion from the history and development of the Indians of this county and their relations with the United States Government, it was erroneous since there was a treaty entered into between the United States and the Cahuillas and Luisenos Indians of this state on January 5, 1952, and a similar one with the Diegueno Indians at Santa Isabella in this county on January 7, 1952. It is further contended that the courts have recognized that the Indians of San Diego County and Riverside County were "tribal Indians" in Apapas v. United States, 233 U.S. 587, 590, 34 S.Ct. 704, 58 L.Ed. 1104; United States v. Kagama, supra; and Hicks v. Coleman, 25 Cal. 122. (6) It is next argued that the fact that plaintiff exercised her right of franchise in the elections of this state does not necessarily meet the residential requirements for obtaining direct county relief; that the right to relief is a privilege rather than a right and that the adoption of section 2500, supra, by the legislature may have placed a mandatory duty upon the county to provide relief under certain circumstances, but that it established a separate and distinct measurement for the determination of residence for such purpose, as prescribed in section 2555 of the Welfare and Institutions Code, which reads:

> "A resident of the State of California is a person who comes within all the following descriptions:
>
> "(a) Who has lived continuously in the State for a period of three years with the intent to make it his home.
>
> "(b) Who, during the three-year period aforementioned, has not received any public or private relief or

> support from friends, charitable organizations, or relatives other than legally responsible relatives; * * *"

that since plaintiff has been receiving public support and relief during the last three years period, the Board of Supervisors was justified in denying her relief under section 2555(b), supra, since there is no contention or showing that it acted arbitrarily or fraudulently in finding she did not meet the residential requirements, citing Bila v. Young, 20 Cal.2d 865, 129 P.2d 364; Worcester v. Board of Supervisors, 55 Cal.App.2d 883, 132 P.2d 276; and Patten v. County of San Diego, 106 Cal.App.2d 467, 235 P.2d 217. (7) It is next claimed that the admission to citizenship of all Indians born in the United States on Indian reservations and becoming naturalized under the Citizen's Act for Indians, Act of June 2, 1924, 43 Stat. 253, 8 U.S.C.A. § 3,[1] is not determinative of the question of residence and does not deprive the United States Government of its power or duty toward the Indians, citing United States v. Gray, 10 Cir., 201 F. 291; 27 Am.Jur., Indians, p. 572, sec. 47, and cases cited.

It is the position of the County of San Diego that it stands willing and able to perform its obligation to the plaintiff and those Indians in like circumstances at such a time as the Federal Government emancipates the California Reservation Indians; that silence or nonaction on the part of Congress does not sanction the belief that it is the intent of the Government of the United States to divest itself of exclusive jurisdiction over Indians residing on Government Indian reservations in the State of California; that by providing emergency relief under section 2501, supra, the County of San Diego has exercised its limited authority to the fullest extent the law permits, and to exceed these bounds would be to subject it to a possible violation of Article IV, Section 31 of the Constitution of California.

The Attorney General, appearing as amicus curiae in support of his previous opinion and the Association on American Indian Affairs, Inc., in assisting in safeguarding the rights of American Indians, insists that there is no legal or factual justification for the exclusion of Indians living upon reservations from the operation of section 2500, supra, and that any such exclusion would be a violation of the Constitution and Civil Rights statutes of the United States.

In considering the questions raised, *ad seriatum,* 1, 2, 3, and 7, the conclusion is inescapable that the jurisdiction of the United States over the Indians residing on Indian reservations in California is not exclusive; that they are not "wards of the Government" in the sense that they are incompetent to acquire a residence in this state; and that the American Indians living upon such federal Indian reservations are residents of the state and county in which the reservation is located for certain purposes, even though they are, to a considerable extent, still subject to the jurisdiction of the United States government.

[1] The decisions hold that the United States does not have exclusive jurisdiction over Indian reservations in all respects. On the contrary, the state's jurisdiction extends to all matters which do not interfere with the control which the federal government has exercised over Indian affairs. The principle that Indian reservations are geographically, politically and governmentally within the boundaries of the state wherein they are located, unless Congress, upon admission of the state into the union, or otherwise, has by express words excepted such areas from that jurisdiction, was laid down by the Supreme Court of the United States in United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869. See also Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419; Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740; and People of the State of New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261. None of the 18 treaties entered into by the United States with Indians in California, including the ones referred to by the defendant county, were ever ratified by the Senate. In the absence

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[1] Now 8 U.S.C.A. § 1401.

of such limiting treaty provisions, tribal lands within the state are part of the state and subject to its jurisdiction in many respects, regardless of whether or not the Indians themselves may be exempt from certain aspects of that jurisdiction. Langford v. Monteith, 102 U.S. 145, 26 L.Ed. 53.

As further evidence of this conclusion, the long history of federal legislation bearing on this issue should be considered. The states have been authorized by federal statute to enter upon Indian lands for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations, or for the purpose of enforcement of compulsory school attendance by Indian pupils. 45 Stat. 1185, 60 Stat. 962, 25 U.S.C.A. § 231. The states may not tax the production of oil, gas and other minerals on unallotted Indian reservations. 43 Stat. 244, 25 U.S.C.A. § 398.

[2] Under the Federal Highway Act, 42 Stat. 212, 23 U.S.C.A. 31 et seq. Indian lands in California were deemed as much a part of the area of the State as other private lands. Indian lands within the state are counted, along with public land, as a basis for additional federal road contributions. Reservation Indians are counted in the federal census as residents of California and are included in the population figures which are used not only for determining representation in Congress, but also as a basis for the allocation of positions in the federal civil service and as a basis for various contributions of the federal government to the education and welfare of the state. Smith-Hughes Act of February 23, 1917, 39 Stat. 929, 20 U.S.C.A. § 11 et seq.; Barden-George Vocation Act of August 1, 1946, 60 Stat. 775, 20 U.S.C.A. § 15i et seq.; National School Lunch Act of June 4, 1946, 60 Stat. 230, 42 U.S.C.A. § 1751 et seq. Such Indians are entitled to participate in both national and local elections. State ex rel. Crawford v. Norris, 37 Neb. 299, 55 N.W. 1086; Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456. As citizens of the United States they are citizens of the state where they live. Deere v. State of New York, 2 Cir., 22 F.2d 851; United States Constitution, Amendment XIV, sec. 1. The territory in any Indian reservation of the United States Government in the state may be formed into an elementary school district. California Education Code, Secs. 2601 and 8026–8030. Such Indians may participate in Social Security benefits generally administered by the state and federal government. Non-Indians living on California Indian reservations are recognized as residents of California. State Inheritance laws have been expanded over allotted Indians, Sec. 5; General Allotment Act of Feb. 8, 1887, 24 Stat. 388–389, 25 U.S.C.A. § 348. States have been further authorized to condemn restricted Indian lands in accordance with state law. Sec. 3, Act of Mar. 3, 1901, 31 Stat. 1058–84, 25 U.S.C.A. § 357. State inheritance taxes may be applied to the restricted personal property of Indians. Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612.

No Indian reservation in San Diego County is self-sufficient, and no resident of any such reservation can help traveling beyond its borders, nor can he escape ordinary state cigarette, gasoline, sales or use taxes. Reservation Indians who purchase or possess unrestricted property outside the reservation enjoy no more advantageous a tax status than their white fellow citizens. It has been held that the state may tax cattle grazing upon Indian lands under a lease from the Indians. Thomas v. Gay, supra.

These are some of the indications that these Indians are *sui juris,* and are not, in a technical sense, "wards of the Government". It is further pointed out that such Indians residing on these reservations may sue in their own names and are not required to sue in the name of a guardian. Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999. They are qualified to serve as jurors and are competent witnesses in judicial proceedings. They are subject to selective service and entitled to the benefits accruing therefrom. Under the Workmen's Compensation Act, Stats. 1917, pp. 831–841, Sec. 11, subd. (d), it has been held that they are not to be considered as "incompetent" within the meaning of that act. Francisco v. Industrial Accident Commission, 192 Cal. 635, 221 P. 373;

Anderson v. Mathews, 174 Cal. 537, 163 P. 902.

The contention that the Mission Indians in California are wards of the federal government because they had a tribal form of government is not supported by the anthropologists, as indicated by Professor A. L. Kroeber, in his monograph on native culture in California, citing Heizer and Whipple on "The California Indians", p. 27, stating:

> "Tribes did not exist in California in the sense in which the word is properly applicable to the greater part of the North American continent. When the term is used it must therefore be understood as synonymous with 'ethnic group' rather than as denoting political unity."

[3] These statutes and decisions rendered thereunder, viewed in the light of their broad goals, hardly show an intent on the part of the federal government to maintain strict "guardianship" over Indians living upon reservations. It is clear that this ordinary guardian-ward relationship does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships.

During the last 25 years a number of significant changes have taken place in the legal position of the American Indians which look to the continued lessening of the control by the United States over their activities. The argument that responsibility for reservation Indians rests exclusively on the federal government has been rejected by the courts. Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456; Swift v. Leach, 45 N.D. 437, 178 N.W. 437. That reservation Indians are entitled to direct relief from either the state or county in which they reside was conceded in State ex rel. Williams v. Kemp, 106 Mont. 444, 78 P.2d 585. The only issue there was which political body should bear the expense.

[4] From the conclusion reached that Indians living on reservations in California are citizens and residents of this state, it must therefore follow that under section 1, Amendment XIV of the Constitution of the United States they are endowed with the rights, privileges and immunities equal to those enjoyed by all other citizens and residents of the state. Oyama v. State of California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249; Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478; Peters v. Pauma School District of San Diego County, 91 Cal.App. 792, 267 P. 576.

[5] The fact that the Indians, while residing on Indian reservations, may be exempt from certain state and county taxes and other laws is not necessarily determinative of the question of their residence. It is conceded by defendant that a reservation Indian may become subject to the burdens and obligations of state jurisdiction if Congress relinquishes "part or all of this jurisdiction to the state". It is apparent that Congress has, in this respect, released a major portion of its assumed jurisdiction over the Indians.

The issue of whether Indians living upon reservations are subject to state laws and taxation is not necessarily pertinent to the issue before us. Many non-Indians in San Diego County live upon tax-exempt property belonging to federal or local government agencies or to religious institutions, but in no such case has this fact been considered a justification for the withholding of any public services. As was cogently pointed out by the Supreme Court of Arizona in Harrison v. Laveen, supra, while benefits have been granted by the federal government to members of various Indian tribes, these benefits are no different in character from those allowed to many other classes of citizens, such as federal employees, holders of tax-exempt securities and veterans. In no case has the enjoyment of such special rights or privileges served as a justification for the exclusion of any such favored group from participation in the ordinary rights of citizenship, including the right to equal treatment under state welfare laws.

The opinion of the Attorney General, 1 Ops.Cal.Atty.Gen. 176, 178, in reference to the residential status of persons stationed on military reservations, in view of the changing circumstances, has been rejected, and the appellate court, in Arapajolu v.

McMenamin, 113 Cal.App.2d 824, 249 P.2d 318, 34 A.L.R.2d 1185, said quoting from the syllabus:

> "If California retains jurisdiction over a federal area sufficient to justify holding that the area remains a part of the state, a resident therein is a resident of the state and entitled to vote by virtue of the constitutionally granted right, and no express reservation of such right is necessary and no attempted express cession of such right to the United States could be effective."
>
> And "Residence in California on lands held by the United States but over which the federal government does not accept exclusive jurisdiction is residence in California for voting purposes." See also 20 Ops.Cal.Atty.Gen. p. 127.

[6] Contention No. 4 that since such Indians could not transfer their interest in their trust property to the county, as security, if required to do so by the county, such inability justified the denial of relief, is not sustainable. The same situation may apply to any resident who may have some nontransferrable interest in trust property. That fact alone would not justify the county in denying relief solely on this ground. If the Indians had sufficient property and could treat with that property as do non-Indians, they would not be eligible for relief for the reason that they would not be considered indigents. If it should develop that such Indians did have an assignable interest and refused to do so, a different question would then be presented.

[7] As to Exception No. 5, it appears from the record and history of the treaties alleged that said treaties with the California Indians such as are referred to by the County, were never approved by the United States Senate and accordingly never became binding on the United States Government. The statement of the trial judge, as indicated, is not erroneous.

[8] As to Exception No. 6, it is true that the Welfare and Institutions Code does set forth in section 2555 the necessary residential requirements of any individual entitling him to receive direct County relief. The only question is whether the evidence establishes that plaintiff complied with subdivision (b) thereof in that she has not, during the three-year period, received any public or private relief or support from friends, charitable organizations or relatives, etc. 4 Ops.Cal.Atty.Gen. 199, and 14 Ops.Cal.Atty.Gen. 89, hold that sec. 2555, supra, applies only to individuals who have newly entered the county or the state. Since plaintiff has resided on an Indian reservation in this county since her birth that section is not applicable.

[9] The decree holding that plaintiff is a resident of the County of San Diego, State of California, and that she is not disqualified from receiving the benefits provided for by section 2500 of the Welfare and Institutions Code by reason of the fact that she resides on an Indian reservation situated within the boundaries of this county must be sustained.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

126 Cal.App.2d 335

ALLEN v. GARDNER et al.

GARDNER v. FERGUSON et al.

Civ. 15941.

District Court of Appeal, First District,
Division 1, California.
June 30, 1954.

Contractor's action against subcontractor for breach of subcontract to furnish concrete. From judgment of Superior Court, Alameda County, Chris B. Fox, J., in favor of contractor, the subcontractor appealed, urging that the amount of damages was not sustained by evidence. The District Court of Appeal, Peters, P. J., held that damages were properly computed, as to all the concrete not furnished by the subcontractor, on the basis of the difference between the contract price of $15.50 per cubic yard and $43.02 per cubic yard, which was the cost to an engineer who was hired by the contractor to furnish some of the concrete and who kept detailed cost records, since the contractor testified his costs as to concrete he himself furnished were the same as those of the engineer, though the contractor himself kept no such records.

Affirmed.

1. Appeal and Error 🔑110, 782

Order denying motion for new trial was nonappealable and appeal therefrom would be dismissed.

2. Damages 🔑6

Fact of damage from breach of contract must be proved with reasonable certainty, and uncertainty as to nature, existence or cause of damage is fatal to right of recovery therefor. Civ.Code, § 3301.

3. Damages 🔑6

Only a reasonable basis of computation of damages for breach of contract is required, and damages so computed will be allowed even if result reached is only approximation.

4. Damages 🔑120(3)

Where a subcontractor breached his contract to furnish specially designed concrete which was not available ready made in existing market, statute providing in effect that in estimating damages in favor of a buyer the value to buyer is price of equivalent thing in market nearest to place of scheduled delivery, was probably not applicable and damage was difference between contract price and $43.02 per cubic yard which contractor had to pay, but even if statute was applicable, evidence that school district was charged and paid $43.02 per cubic yard for extra concrete furnished by contractor was sufficient evidence of market price. Civ.Code, § 3354.

5. Damages 🔑120(3)

Where subcontractor breached his contract to furnish concrete and contractor hired engineer to furnish 927.6 cubic yards of it and contractor furnished balance of 1147.65 cubic yards, and engineer kept detailed records of cost of concrete he furnished and contractor kept no such records but testified his costs were same as those of engineer, difference between contract price per cubic yard and the cost to engineer per cubic yard of concrete he furnished was proper measure of damages as to all concrete not furnished by subcontractor. Civ.Code, § 3300.

6. Contracts 🔑322(4)

In contractor's action for subcontractor's breach of subcontract to furnish concrete, evidence sustained court's finding that contractor furnished 2,075¼ cubic yards needed to complete his contract and also some additional concrete under a supplemental contract.

7. Damages 🔑126, 191

In contractor's action for subcontractor's breach of contract to furnish concrete, evidence sustained finding that contractor's overhead expense was increased by his furnishing concrete not furnished by subcontractor; and determining what proportion of contractor's total business was represented by concrete job and allocating that proportion of total overhead as applicable to concrete job was proper method of estimating cost of overhead caused by breach.

8. Damages 🔑191

In contractor's action for subcontractor's breach of contract to furnish concrete, evidence sustained court's finding that each cubic yard which contractor had to furnish after subcontractor's breach, cost contractor $5 for aggregates, $10.98 for cement, $5.57 for equipment rental, $12.44 for labor and $5.69 for overhead.

9. Damages 🔑189

In contractor's action for subcontractor's breach of contract to furnish concrete, evidence sustained finding of fact of damage and the amount fixed in award.

10. Appeal and Error 🔑1010(1)

Record, which, when read most favorably to respondent, supported all findings challenged on appeal, necessitated affirmance.

◆

Murle C. Shreck, E. R. Vaughn, Sacramento, for appellants.

Royal A. Stewart, Richard W. Horton, Reno, Nev., Worthington, Park & Worthington, Herbert C. Kohlwes, San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Mervin L. Gardner was awarded the principal contract to construct a school. The contract, among other things, required Gardner to furnish a specified quantity of specially designed concrete. This portion of the contract was subcontracted to the Fergusons, who agreed with Gardner to furnish the required concrete at $15.50 per cubic yard. After supplying a small quantity of the concrete, for which they were not fully paid, the Fergusons wrongfully breached their contract, and refused to continue performance. Gardner was required to and did furnish the balance of the concrete required on the job. The trial court found that this concrete cost Gardner $43.02 a cubic yard. Damages were awarded to Gardner based on the difference between $15.50 per cubic yard, the price at which the Fergusons had agreed to furnish the concrete, and $43.02 per cubic yard, the cost to Gardner of the balance of the concrete. The Fergusons were adjudged entitled to an offset for the amount still owing them. So reduced, Gardner's net damage was fixed at $54,237.87, and judgment entered in his favor for that amount. The Fergusons appeal from that judgment and from the order denying their motion for a new trial.[1] Appellants do not challenge the findings that they wrongfully breached the contract causing damage to Gardner, but direct their attack solely against the sufficiency of the evidence to sustain the findings as to the precise amount of damage.

The facts, more in detail, follow: Gardner, the cross-complainant, is a licensed contractor. He had a contract to construct a school for the Tahoe-Truckee Joint Unified School District. This contract required him to furnish 2,450 cubic yards of specially designed concrete. In May of 1950 the cross-defendants, collectively referred to herein as the Fergusons, contracted with Gardner to mix, prepare, furnish and deliver at the job site, all of the concrete called for by the main contract. The subcontract provided for a price of $15.50 per cubic yard, based on an estimate of six sacks of cement per cubic yard, with adjustments upward or downward dependent upon whether more or less cement was in fact required.

The Fergusons started performance under the contract, and supplied 374.75 cubic yards of concrete, but in October of 1950 they wrongfully breached the contract, and refused further performance. Gardner, thereupon, furnished the balance of the concrete. The court has found that he furnished 2,075.25 cubic yards of concrete, of which 1,147.65 cubic yards were poured under his direct supervision, and 927.6 cubic yards were poured by Lee H. Rovzar, a civil engineer, hired by Gardner for this purpose. Gardner kept no detailed records of the cost of the concrete poured by him, but Rovzar kept detailed records, which showed a total cost of $43.02 per cubic yard for the concrete poured by him. Gardner testified that his costs were the same as Rovzar's. The trial court accepted this figure as the cost to Gardner of the 2,075.25 cubic yards furnished by him, either directly or through Rovzar.

Gardner had not fully paid the Fergusons for the 374.75 cubic yards of concrete furnished by them, and refused to do so. Thereupon, the Fergusons, through an assignee, brought this action against Gardner for the balance owed to them. Gardner answered and cross-complained against the Fergusons to recover the damages incurred by the Fergusons' breach of contract.

The causes were tried before the court without a jury. The court held that Gardner was entitled to damages against the Fergusons for the difference between the contract price of $15.50 per cubic yard, and the cost to Gardner of furnishing the concrete, fixed by the trial court at $43.02 per cubic yard, on 2,075.25 cubic yards. Thus, Gardner's total damages were fixed at $57,110.88. The trial court also held that Gardner owed the Fergusons $2,873.01 for part of the concrete furnished by the

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[1] This is a nonappealable order. The appeal therefrom should be dismissed.

Fergusons, which sum was offset against the claims of Gardner. So computed, the net damages to Gardner were fixed at $54,237.87. Judgment was entered against the Fergusons in this amount. It is from this judgment that the Fergusons appeal.

Appellants attack only the findings relating to the amount of damages found, contending that these findings are unsupported. As pointed out above, Rovzar's cost computations were used to compute Gardner's damages. Appellants attack practically every major and some minor items contained in those computations. Their basic contention is that Gardner failed to prove the amount of his damages with the certainty required by law. They also contend that, even if Rovzar's computations be accepted as to the 927.6 cubic yards of concrete poured by him, it was error to use those figures as the cost of the 1,147.65 cubic yards of concrete poured by Gardner. They also attack the finding that Gardner poured 1,147.65 cubic yards of concrete.

Most of these attacks of appellants relate to the method of proof used by Gardner to establish his damages. He produced Rovzar as his witness, who testified that his cost for the concrete poured by him was $43.02 per cubic yard. Rovzar supported this figure with detailed records of his costs. These records, of course, referred only to the 927.6 cubic yards of concrete that he poured. Gardner, who had kept no records of the cost of the 1,147.65 cubic yards poured by him, testified that his costs were the same as those of Rovzar, that there was no difference in his labor costs, the cost of cement or aggregates, the cost of pouring, etc., and those of Rovzar. Gardner also testified that the school architect, during the course of the construction, ordered additional concrete work, and that for this supplementary concrete the school district was charged and paid $43.02 per cubic yard. The Fergusons contend that this was not a proper or sufficient way to prove damages insofar as the concrete directly poured by Gardner is concerned. In the absence of direct evidence of costs incurred by Gardner it is urged that there was a failure of proof on the issue.

[2, 3] Appellants have misconceived the law applicable to this situation. They stand before the court as violators of their contract. Their acts caused damage, serious damage, to Gardner. Those facts were proved definitely and with certainty. The law requires, and properly so, that the fact of damage be proved with reasonable certainty. § 3301, Civ.Code. Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damage, is fatal. But the same certainty as to the amount of the damage is not required. An innocent party damaged by the acts of a contract violator will not be denied recovery simply because precise proof of the amount of damage is not available. The law only requires that some reasonable basis of computation be used, and will allow damages so computed even if the result reached is only an approximation. See annotation commenting on cases from many states, 78 A.L.R. 858.

These rules have frequently been applied in California. In Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 46, 172 P.2d, 867, 874, the California Supreme Court quoted the following with approval from Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652: " 'The most elementary conceptions of justice and public police require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one * * *.' " In Stott v. Johnston, 36 Cal.2d 864, 875, 229 P.2d 348, 355, 28 A.L.R.2d 580, it is stated: "In this regard it appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. * * *

" * * * the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." In Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 174, 88 P.2d 698, 89 P.2d 386, 388, the court declared: "The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult of ascertainment does not bar the recovery." In Noble v. Tweedy, 90 Cal.App.2d 738, 203 P.2d 778, these rules were again applied. There the court stated that once the fact of damage is shown with reasonable certainty "the fact that the amount thereof may be difficult of exact admeasurement, or subject to various possible contingencies, does not bar a recovery." 90 Cal.App.2d at page 745, 203 P.2d at page 782. At page 746 of 90 Cal.App.2d, at page 782 of 203 P.2d, the court declared: "As long as there is available a satisfactory method for obtaining a reasonably proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. (Citing cases.) The method in the present case was practicable and fair, and the amount of damages assessed was as reasonably accurate as the circumstances would permit." In Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal.App.2d 265, 271, 61 P.2d 944, 948, the same rule is stated as follows: "The fact that the exact amount of damage could not be determined does not defeat plaintiff's right to recover. * * * The law does not require absolute certainty in fixing damages, although it does require as much certainty as possible under the proof which is available. Oftentimes it is necessary that the amount be left to the discretion of the court or jury." In Pye v. Eagle Lake Lumber Co., 66 Cal.App. 584, 590, 227 P. 193, 195, the court declared: "This would leave plaintiff in a condition where defendants would admit the breach of their contract and say that, because it was difficult for plaintiff to prove with exactness the amount of his admitted loss, he could recover nothing. This, of course, is not the law. In cases where substantial damage is shown, where the amount is entirely uncertain or extremely difficult of ascertainment, the sum to be awarded is a question for the jury, in the exercise of a sound discretion. The fact that the full extent of the damages must be a matter even if speculation is not ground for refusing all damages. 17 Corpus Juris, 756. 'While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account. * * *' The law requires 'only that the best evidence be adduced of which the nature of the case is capable.' [City of] Kennett v. Katz Const. Co., 273 Mo. 279, 202 S.W. 558." See also Jegen v. Berger, 77 Cal.App.2d 1, 15, 174 P.2d 489; Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 199, 143 P.2d 12; Monroe v. Owens, 76 Cal.App.2d 23, 29, 172 P.2d 110; Arques v. National Superior Co., 67 Cal.App.2d 763, 779, 155 P.2d 643.

[4] Tested by these standards the method used by the trial court was a proper one. It used the proper measure of damages. Section 3300 of the Civil Code provides that, unless otherwise expressly provided by law, the measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Obviously, the damage caused by the breach was the difference between the contract price and what Gardner had to pay, the measure adopted by the trial court. But appellants urge that section 3354 of the Civil Code expressly provides a different measure of damages. That section provides that in estimating damages in favor of a buyer the value to the buyer "is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession * * *." Thus, in cases where this section is applicable, the amount actually paid to secure the article is not the proper measure. Appellants contend that this section here applies, and that respondent must fail because of his failure to offer evidence of the market value of the concrete involved. It is doubtful if this section is applicable to a contract for the supplying of specially designed concrete which could not be purchased ready-made in any existing market, but even if it were applicable there was

evidence of the market value of the product. The school district paid Gardner $43.02 per cubic yard for the extra concrete ordered by it. That is some evidence, sufficient evidence, upon which to conclude that that was the market value of the concrete in the area involved. Certainly, it will not be presumed, in the absence of evidence to the contrary, that the school district paid more than the market price.

[5] So far as using Rovzar's computations as a basis for Gardner's costs is concerned, the evidence was the best available. Of course, it would have been more satisfactory had Gardner kept complete records of his costs. But he did not. Rovzar did. He testified that the concrete poured by him cost $43.02 per cubic yard. He supported this with itemized figures. Ample opportunity to challenge the items set forth in these records was afforded appellants. Gardner testified that his costs were the same. Under the circumstances this was a reasonable and satisfactory method of estimating the damages, under the rules of the cases above set forth.

[6] Appellants point out that Gardner claims to have furnished, and the trial court found that he did furnish, 1,147.65 cubic yards of concrete before hiring Rovzar to complete the contract, and contend that this finding is unsupported. They argue that Gardner must have furnished this concrete during the winter months, and that it is incredible that he could have poured this quantity of concrete during the period in question. The finding of the trial court is that 2,075.25 cubic yards of concrete were mixed and poured after the breach. There is positive evidence that Rovzar poured 927.6 cubic yards of this quantity. Gardner directly testified, when asked if, after the breach, he had completed the contract, that: "We furnished the balance of the concrete in the amount of 2,075 and a quarter yards needed to finish the contract." There was also evidence that a substantial quantity of concrete had been supplied by Gardner to the school district in excess of the 2,450 cubic yards called for by the main contract. Under the evidence, the excess over what Rovzar furnished must have been supplied by Gardner. The appellate court must accept this evidence as supporting the challenged finding. Any conflict in the evidence on this and the other issues was resolved by the trial court. Thus, had no other evidence been offered beyond what is above summarized, the award would be amply supported.

[7, 8] Appellants do make a detailed attack on several of the items testified to by Rovzar as having been included by him in arriving at the figure of $43.02, and contend that over $29,000 of the $54,000 plus judgment is excessive.

Rovzar presented detailed records and work sheets of his total costs for pouring 927.6 cubic yards of concrete. The breakdown of these costs as testified to by him is as follows:

$11,545.28	– for labor, a cubic yard cost of	$12.44
5,160.40	– for equipment, rentals, a cubic yard cost of	5.57
10,187.75	– for cement, a cubic yard cost of	10.98
7,737.78	– for aggregates (sand and gravel) a cubic yard cost of	8.34
$34,631.21	subtotal of actual costs.	
5,277.80	for overhead, computed as 15.24 per cent of the cost of all materials shown in the subtotal, or a per cubic yard cost of	5.69
$39,909.01	total cost for 927.6 cubic yards, a cubic yard cost of....	$43.02

These same unit costs were projected into the item costs for Gardner, resulting in the judgment already described.

Appellants object to the allowance of any amount for overhead, claiming that there was no evidence that respondent's overhead increased by reason of the breach, and that there was no proof that such overhead amounted to 15.24 per cent of the other costs. Particularly is the claim made that there was no evidence to justify the allowance for increased overhead expenses during the period Gardner was pouring the concrete.

Of course, if there was no evidence of increased overhead caused by the breach it would have been error to allow any damages for this item. Oakland California Towel Co. v. Sivils, 52 Cal.App.2d 517, 520, 126 P.2d 651. But there was such evidence. Obviously, the breach of the contract by the Fergusons adversely affected the contract of the prime contractor responsible for the entire project, by increasing his duties and responsibilities, and consuming the time of Gardner and his staff in performing the work the Fergusons had contracted to perform. In particular, Gardner testified that he had a most difficult time after the breach to locate adequate quantities of cement to complete the contract, and in locating a contractor. Much of his time and that of his staff was consumed in these tasks. Rovzar testified that, because of the breach, overhead of the respondent was increased because company time was consumed that otherwise would not have been consumed in finding and ordering materials, keeping records, in expediting the materials, and in paying for these materials. None of these costs would have accrued had appellants not breached the contract. One way to secure a rough estimate of the proportionate cost of the overhead caused by the breach would be to determine what proportion of the total business of Gardner was represented by the concrete job, and to allocate that proportion of the total overhead expenses as applicable to the concrete job. This is precisely what was done. There was evidence that the concrete job constituted 15.24 per cent of the total business Gardner performed during this period. Rovzar testified that the books of the Gardner firm were audited semi-annually, and that such audit showed that 15.24 per cent of the main office expense was "chargeable to that operation," that 15.24 per cent was the "exact ratio between all operations," that is, the "Exact determination of the expense as applied to all operations, whether concrete, carpentry work, steel work or other trade or subcontractors," during the period he was pouring concrete. Obviously, if this was a proper charge during that period, under the rules already discussed it was proper to estimate the overhead expense during the Gardner period at the same ratio. The inclusion of this item by the trial court, and the method used in proving it, were proper.

There is also an attack made on the cost of the aggregates, that is, the sand and gravel. Rovzar fixed his total cost for aggregates at $7,737.78 to make 927.6 cubic yards of concrete. Material requisitions introduced into evidence show that the average cost of aggregates was $5.00 per cubic yard, a reasonable price. But appellants claim, by analyzing the figures, that the trial court must have allowed $5.70 per cubic yard for such aggregates in its award. Respondents explain this apparent overcharge by pointing out that the exhibit introduced erroneously totals the requisitions for the aggregates furnished, showing 1,059.42 cubic yards, but that correct addition would show the proper figure to be 1,586.82 cubic yards. The actual costs were properly added and show the figure $7,737.78. This brings the cost of the aggregates down to a figure well within the figure allowed by the trial court and within the evidence. There is no error in the allowance made by the trial court for this item.

The appellants next attack the item for the cost of cement, fixed by Rovzar at $10.98 per cubic yard, or $1.80 per sack, figuring 6.09 sacks to a cubic yard, the quantity testified to by Rovzar. Material requisitions introduced into evidence for these purchases support this quantity and price. Rovzar testified that this cement was purchased from the Gardner Supply Co., and that the cement was charged for "on a market value plus sales tax, the existing cost at that time based on commercial cement available at that time * * * at Truckee and Reno and various places." Rovzar went on to state that commercial cement was not then available, and that in one instance he had to borrow 300 sacks of cement from the Tahoe Truckee Lumber Company "and replace it in kind with this cement at this price." He also testified, when asked if the prices fixed in the requisitions "represent any markup or profit for Gardner Supply Company," "No, they do not, as far as I know. I am sure they don't." Obviously, the allowance for cement is amply supported.

An equally unsuccessful attack is made on the allowance for equipment rental. Rovzar testified, and supported his testimony by invoices, that he paid out $5,160.40 for equipment rentals for such machinery as concrete mixers, wheelbarrows, trucks, scoopmobile, etc., and that the charges were based on those fixed by a national organization—"I believe in this case it is the American Equipment Distributors." Appellants' main attack, so far as this item is concerned, is that there is no comparable evidence of Gardner's equipment rental costs during the period he was pouring concrete. Gardner did testify that his costs were the same as Rovzar's. For reasons already stated, it was proper to use Rovzar's costs to estimate those of Gardner.

For the same reasons, contrary to the arguments of appellants, it was proper to compute Gardner's labor costs on the basis of the evidence produced by Rovzar as to his costs. Rovzar's evidence properly proved his actual costs for labor.

No other contention of appellants requires comments.

[9, 10] This case is predominantly a fact case. Angus v. Roth, 98 Cal.App.2d 672, 220 P.2d 429. There is substantial evidence in support of the damages awarded, that is, in support of the fact of damage and in support of the amount fixed in the award. Appellants' arguments, once it is determined that it was proper to use Rovzar's figures to calculate the damages during the time Gardner poured the concrete, are basically on fact questions. These were passed on by the trial court after an extensive trial, and oral argument and written briefs had been presented. Read most favorably to respondent, the record supports all of the challenged findings. This necessitates an affirmance.

The appeal from the order denying the motion for a new trial is dismissed; the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

126 Cal.App.2d 220

STEGNER et al.

v.

BAHR & LEDOYEN, Inc., et al.

No. 15830.

District Court of Appeal, First District, Division 1, California.

June 24, 1954.

Rehearing Denied July 19, 1954.

Hearing Denied Aug. 19, 1954.

Action by property owners to enjoin lessors, lessees and operators of a rock quarry from further operation of quarry. From adverse judgment of Superior Court, Santa Clara County, M. G. Del Mutolo, J., the property owners appealed. The District Court of Appeal, Fred B. Wood, J., held that property owners were not entitled to an injunction on ground that operation of the quarry violated an ordinance when it was not shown that they suffered private injury from operation of the quarry.

Judgment affirmed.

1. Trial 🔑375

The trial judge's view of the property with the consent of counsel is evidence in the case and may be used alone or with other evidence to support the findings.

2. Appeal and Error 🔑201(1)

Contention that trial judge, who viewed the premises with the consent of counsel, did not have an adequate opportunity to observe operations under all conditions complained of, and therefore what he saw could not be used along with other evidence to support the findings, should have been urged at time of trial rather than for the first time on appeal.

3. Trial ⚷375

In action by property owners to enjoin lessors, lessees and operators of a rock quarry from further operations wherein trial judge with consent of counsel made one visit to the scene of operations, the trial judge's view of the property was properly used as evidence to support the findings when it was not apparent that one visit was insufficient or that the judge's opportunities to observe were inadequate.

4. Nuisance ⚷33, 75

In action by property owners to enjoin lessors, lessees and operators of a rock quarry from further operations, evidence was sufficient to sustain finding that quarry operations were not and did not threaten to become a nuisance, public or private.

5. Nuisance ⚷19

Where operation of rock quarry caused an increase in truck traffic on highway abutting plaintiffs' property but it was not shown that this traffic obstructed or interfered with plaintiffs' right of ingress or egress nor that the increased traffic unlawfully obstructed the free passage or use in any customary manner of the highway, the increased traffic on the highway did not furnish a basis for enjoining the quarry operation. Civ.Code, § 3479.

6. Injunction ⚷102

Courts of equity are not concerned with criminal matters and they cannot be resorted to for the prevention of criminal acts, except where property rights are involved. Civ.Code, § 3369.

7. Nuisance ⚷65, 72

Violation of a penal ordinance does not of itself create a private nuisance per se, and in the absence of special injury, an injunction will not be granted on the application of a private individual merely to prevent violation of a penal ordinance. Civ. Code, § 3369.

8. Nuisance ⚷72

Property owners were not entitled to an injunction restraining lessors, lessees and operators of a rock quarry from further operation of the quarry on the ground that the operation was in violation of ordinance when they did not show that they suffered private injury from continued operation of the quarry. Civ.Code, § 3369.

◆

Howe & Finch, Palo Alto, for appellants.

Costello, Johnson & Rodgers, Palo Alto, for respondents Bahr & Ledoyen, Inc., Robert Bahr, Alice Bahr, his wife, Maurice Ledoyen, and Betty Ledoyen, his wife.

McDougall & Fairfax, Kenneth R. McDougall and Norman C. Howard, Palo Alto, for respondents Jeannette H. Mullen, Peter Mullen and Ruth Schnell.

FRED B. WOOD, Justice.

Plaintiffs brought this action against the owners and lessors and the lessees and operators of a certain rock quarry, to enjoin further operation of the quarry and to obtain declaratory relief.

It appears that on July 2, 1951, the board of supervisors of the county adopted, as an immediately effective urgency measure, an ordinance which in a certain zone required a permit for the erection of any building or structure designed for any use other than a single family dwelling or for the establishment of any multiple family, auto court, commercial or industrial business or use. None of the defendants took out a permit for the operation of this quarry, claiming theirs was a previously established non-conforming use to which the ordinance did not apply. Plaintiffs claim the ordinance is applicable and that they are specially damaged by the operation of the quarry.

Among other facts, the court found: (1) Neither the ordinance in question nor any other ordinance in evidence provides any remedy or relief other than the imposition of a misdemeanor penalty if its provisions are violated, (2) The quarry is located in a mountainous, hilly, sparsely settled, unincorporated rural area far removed from any incorporated city or town or well-populated district, (3) Other commercial enterprises are carried on in the area, some owned by some of the plaintiffs, (4) The most usually traveled approach to this quarry is over 3½ miles of Page Mill Road, the first two miles of which are straight and bordered by treeless unimproved vacant land; for the last 1½ miles the road is bordered by a large rock quarry which has been there for many years, dilapidated and unsightly structures, a large cow corral full of manure, an unsightly barn and unsightly piles of debris, all plainly visible from the road and owned by others than defendants, some owned and operated by certain of the plaintiffs; about one-quarter mile beyond defendants' quarry is another large rock quarry (which has been there many years) abutting directly upon the road and plainly visible therefrom, (5) Defendants' quarrying operations have produced a quarry pit and a pile of rock but the pile is not constantly increasing in size; the quarry is in a sparsely settled mountainous and hilly area, not visible from residences of plaintiffs except Malmgren and a portion is barely visible from a portion of the residence of Stegner; it is 1000 feet from Malmgren's residence and one-half mile from Stegner's residence; the quarry is not visible from Page Mill Road or from any public highway; neither the quarry pit nor the pile of rock has caused the area to be disfigured or blighted or impaired, nor has it made offensive the outlook from any of plaintiffs' property, (6) The quarrying operations are carried on in a careful and modern manner, (7) The operation of the machinery produces noise but most of plaintiffs' property is so far removed from the quarry that the noise can not be heard; said operation does not produce loud or offensive noise; nor does it produce rumblings or disturbances or vibrations that can be felt on the property of plaintiffs, (8) Dust from defendants' quarry does not come on any of plaintiffs' property in any injurious or harmful amount, if at all, or in any unusual or excessive quantities or in such quantities as to cause any injury or harm at all, (9) In said quarrying operations, bulldozers, trucks and other heavy machinery are used for removing and transporting rock therefrom and dump trucks, using Page Mill Road, call at the quarry for rock; only six of said trucks are owned by defendant Bahr & Ledoyen, the balance by persons not parties to this action; said trucks are not operated in a careless or reckless manner over the highway, nor at high speed, nor continuously; it is not true that by reason of said trucks travel over said highway has been or is dangerous to persons using the highway; nor is the surface of the highway injured or damaged by the operation of said trucks, (10) The quarry and quarrying operations are not and do not threaten to become injurious to health or offensive to the senses or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property; nor do they unlawfully obstruct the free passage or use of any highway in the customary manner; nor are they nor do they threaten to become a public or a private nuisance.[1]

From the findings the court concluded: (a) Under this ordinance defendants had a vested right to continue the establishment of their quarry to the scope contemplated prior to July 2, 1951; (b) a valid non-conforming use was established prior to July 2, 1951, and that use has not been abandoned or changed since then; (c) the ordinance is solely a penal law; no violation thereof may be enjoined; no declaration that defendants have violated or threaten to violate it may be made unless such violation is or would also be a nuisance; (d) the quarrying operations are not and do not threaten to become a nuisance, public or private; (e) the ordinance was not necessary for the immediate preservation of the public peace, health and safety and did not take effect until 30 days after its enactment; (f) defendants have not violated and are not violating the ordinance; (g) plaintiffs are not entitled to injunctive, or any relief, as prayed for in their complaint.

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[1] The court also found that defendants had established a commercial rock quarry prior to July 2, 1951, doing a substantial amount of work, expending money and incurring liabilities in excess of $53,000; the scope of operations is the same as planned and intended prior to July 2, 1951; the planned development commenced prior to July 2, 1951, and was completed in a speedy manner and has continued ever since without change; that on July 2, 1951, no facts existed necessitating immediate preservation of the public peace, health and safety in the area covered by the ordinance.

Plaintiffs, in support of their appeal from the judgment, challenge these findings and conclusions upon several grounds. We will consider first the question whether or not the evidence supports the findings that the defendants' quarrying operations do not constitute a nuisance and do not cause damage to the plaintiffs.

At the beginning of the trial counsel for defendants requested that the trial judge "visit the quarry and this area up there," as a means of eliminating the need for an expensive air pollution test and of determining the amount of dust and noise "because your Honor can hear it, your Honor can see the amount of dust, and your Honor can see just what is going on." The judge indicated willingness to do so and counsel for plaintiffs said, "That's perfectly satisfactory to us." At the conclusion of the trial the judge asked counsel if the following Monday, October 20, 1952, would be good for going out to the scene of operations and the surrounding area, and counsel on both sides agreed. A minute order of October 20, 1952, recites the convening of the court, the presence of the judge, the clerk, the sheriff and counsel for plaintiffs and defendants, and states, "Whereupon the Court views the Property in the Action * * *" The findings of fact recite that "evidence both oral and documentary was introduced and the Court, on motion of the defendants, which motion was not opposed by plaintiffs, and in the presence of counsel for the plaintiffs and counsel for the defendants having personally viewed the quarry involved and the surrounding area and the cause having been submitted, the Court makes the following findings of fact and conclusions of law * * *" There is no record of what the judge observed upon this occasion other than as reflected in the findings of fact and conclusions of law which he later signed and filed.

[1] Under the circumstances there can be no doubt of the applicability of the rule that the trial judge's view of the property "with the consent of counsel is evidence in the case and 'may be used alone or with other evidence to support the findings.' Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal.App.2d 153, 159, 164 P.2d 257, 260; see, also, Wilkins v. City of San Bernardino, 29 Cal.2d 332, 348, 175 P.2d 542; Safeway Stores v. City Council, San Mateo, 86 Cal.App.2d 277, 284, 194 P.2d 720; Wheeler v. Gregg, 90 Cal.App.2d 348, 366, 203 P.2d 37; Sindell v. Smutz, 100 Cal.App.2d 10, 15–16, 222 P.2d 903." McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 889, 264 P.2d 932, 937. See also, Ethel D. Co. v. Industrial Accident Commission, 219 Cal. 699, 704–705, 28 P.2d 919; Neel v. Mannings, Inc., 19 Cal.2d 647, 654, 122 P.2d 576; Stacey v. Hayes, 31 Cal.App.2d 422, 424, 88 P.2d 165; Anderson v. State of California, 61 Cal.App.2d 140, 145, 142 P.2d 88.

[2, 3] Plaintiffs contend that this rule is not here applicable because the judge made only one visit and did not have adequate opportunities to observe operations under all conditions. It is not apparent from the record that one visit was insufficient or that the judge's opportunities to observe or the observations which he actively did make were inadequate in any respect. If plaintiffs had any misgivings in this respect they should have voiced them at the time instead of urging them for the first time upon appeal. They rely upon Fendley v. City of Anaheim, 110 Cal.App. 731, 294 P. 769. It is true that in that case the reviewing court found the evidence did not support the findings of the trial judge despite the fact that he had viewed the premises. The court recognized the general rule, that what the court observed in such a case is evidence, but there the trial judge made and recorded a summary of his observations, to the effect that "he discovered vibrations, the presence of which was made manifest in the same manner as the witnesses had described, and he also observed a rattling of the windows. Under such circumstances, at most the observations of the court while viewing the premises were simply in corroboration of the evidence." 110 Cal.App.2d at page 736, 294 P. at page 771. In other words, there the trial judge made a record of his observations and those observations were inconsistent with the findings of fact which he made. In addition, as expressed in McCarthy v. City of Manhattan Beach, supra, 41 Cal.2d 879, 889, 264 P.2d 932, 938, the evidence in the Fendley case "estab-

lished that most of the discomforts occurred at nighttime. There was no evidence to the contrary and in such circumstances, the trial court's inspection of the premises in the daytime was an insufficient basis to sustain its finding that the operation of the plant caused no discomfort to plaintiffs." We have no such situation in our case. We see no reason why the general rule is not fully applicable here.

Plaintiffs further contend that the usual weight can not be accorded the judge's view of the premises because, they say, it is contrary to all the evidence in the case. There is no such conflict.

[4] Defendant Bahr described the operations at the quarry in some detail. These operations have included blasting since August 1, 1952, not before; done about twice a week. It is deep blasting, which gives off very little sound. The general blasting that most people call blasting is known as surface blasting, used in breaking boulders and blasting tree stumps. Defendants do not do surface blasting. Plaintiff Wallace Stegner testified that during a period of one and one-half years he heard only three blasts; two in July, 1952, and one in October, 1952. He thought the July blasts came from the direction of the quarry and was more certain that the October blast did. Plaintiff Cary B. Jones lives about a mile from the quarry. He heard a blast in July; did not know where it came from; it did not vibrate his house perceptibly. Bahr testified he heard a blast in July but it did not come from this quarry. Stegner observed no vibrations at his place other than upon the occasion of the October blast. Plaintiff Malmgren testified that he observed blasting (one shot) in September, 1952. It was a dull thud, not a very heavy blast. Mrs. Kathryn Kuehn, not a party, heard blasting in July, 1952, and again several weeks before the trial. She did not know where the July blast came from. It made the windows rattle. The more recent blast was not so loud and did not shake the place. She lives one and one-half miles from defendants' quarry. She does not hear the quarry operations. Here is evidence which, coupled with what the judge may have observed, would support a finding that the quarry operations do not cause vibrations which affect the properties of the plaintiffs.

One asserted element of damage is noise incident to the bulldozer, scraper, and rock crushing operations at the quarry. Plaintiff Margaret Stebbins operates a nursery on Page Mill Road about one-quarter mile from the quarry. She hears noise from the operation of a caterpillar, not too loud, except when the wind blows in her direction. She says the traffic on the road is very audible. Mr. Stegner described the noise as fairly constant during working hours; grinding noises and heavy motor noises. His hearing of these noises depends upon the wind direction, whether he is inside or outside his house, whether or not the radio is on, and "many things." Asked by the court if he was not in an area where there are a lot of airplanes flying around, Stegner said "sometimes," generally on Sunday afternoon, principally the little Pipers. Asked by the court if while in the courtroom he had heard jet planes flying around, he said "No, my ears have been tuned to other things." We mention this as an indication that the court, perhaps, was making an appraisal of the witness' sensitivity to various types of sound. Mrs. Johnson, not a party, lives about 300 to 400 yards from the quarry. She can not see the quarry, there being a hill in the way. She hears noises from the quarry when outside her home but not while inside. Mrs. Elizabeth Garbett, not a party, lives about one-quarter mile from the quarry. She can not see it but can hear a bulldozer and scraping. Mrs. Kuehn lives about one and one-half miles from the quarry. She testified she does not hear the quarry operations, other then the blasting which she mentioned. In weighing this testimony, the trial judge had the benefit of his own personal observations upon the ground. We do not. He had real evidence, not incorporated in this record, concerning the nature, intensity, frequency and constancy of the noise emanating from the quarry and from other sources. We see no basis in this record for a reviewing court to substitute its judgment for that of the trial court concerning such facts.

Dust was another element of alleged damage. Mr. Stegner testified that since the quarry operations started it became necessary to wash the windows at his house twice as often and that there was dust on the furniture. The dust is not so heavy as to be appreciable on the outside. Malmgren testified there is dust coming from the quarry, when the wind blows in his direction. Mrs. Malmgren testified she gets some dust when the wind is blowing right. Mr. Jones says it is a little dustier than previously. Mr. Stedman said there is some dust; his bushes and the trees are dirty. There is testimony, also, that the traffic on Page Mill Road causes a great deal of dust. If so, that contribution to the dust in the air would not necessarily be attributable to the quarry operations. It might be due solely to the manner in which the trucks are operated, most of them by persons not parties to this action. This testimony concerning dust conditions and the cause or causes thereof is not such that a reviewing court could undertake to balance it against the unrecorded observations of the trial judge and say as a matter of law that those observations, considered alone or in connection with the testimony, could not support the findings which the judge made upon this subject.

Another element of alleged damage is the asserted unsightly disfiguration of the landscape. Mr. Stegner testified on that subject. He can see a portion of the quarry from his front window. His house is on the upper part of his property. Lower down on his property he can not see the quarry. He considers that the view from his window is spoiled; the quarry site is a steady widening area of bare rock. Mrs. Stegner said that now they generally do not use their front terrace because of the noise and change of view. Our attention has not been called to any other witnesses who testified on this subject for the plaintiffs. Against this evidence must be weighed the impressions received by the judge when he viewed the quarry site in its setting,—a hilly, mountainous, uncultivated, sparsely settled area with two other, long established quarries in the vicinity. We can not overturn his findings and substitute others of our own upon such a record.

Further delineation of the testimony seems unnecessary. Enough has been narrated to demonstrate the fallacy of plaintiffs' argument that the recorded evidence in the case is such as to negate the inference or presumption that what the judge observed, the things he saw and heard when he viewed the properties and the area, furnish sufficient support for his findings. We must bear in mind, also, that in "determining whether a present or proposed use of property is a nuisance, many factors must be considered. 'The law relating to private nuisances is one of degree. A use that would be reasonable under one set of facts might be unreasonable under another.' (Citation.)" Hassell v. City and County of San Francisco, 11 Cal.2d 168, 170, 78 P.2d 1021, 1022. In other words, the trial judge had the function not only of ascertaining the effects, if any, of defendants' quarry operations upon plaintiffs and their properties, but also of determining whether or not those effects, under all the circumstances, constituted a nuisance. The ordinance does not declare that violation of its provisions is a nuisance; it merely imposes criminal penalties upon the violator.

Several of the witnesses complained of traffic conditions on Page Mill Road, between the side road to the quarry and the major highways. They said there was a marked increase in traffic since these quarry operations began. To Mrs. Johnson, the increase in traffic appeared very hazardous, apparently the principal untoward effect of the quarry operations as it seemed to her. Mrs. Malmgren also said the truck traffic is heavy on Page Mill Road and that the trucks raise a great deal of dust. Mr. Stegner said the truck hazard is an element of injury and changes the character of the neighborhood. The trucks on the road cause noise but not vibration. Mrs. Kuehn seemed to consider the increased traffic on Page Mill Road a major result of quarry operations.

[5] None of the evidence in the record demonstrates that this traffic obstructs or interferes with the exercise of the right of ingress or egress of any plaintiff whose lands abut the road. Nor does the evidence indicate that the increased truck traffic "unlawfully obstructs the free passage or use, in the customary manner, of any * *

highway * * *." Civ.Code, § 3479. See Rose v. State of California, 19 Cal.2d 713, 727–728, 123 P.2d 505, and Lane v. San Diego Electric R. Co., 208 Cal. 29, 33–34, 280 P. 109, for a discussion of the nature of an abutting property owner's rights in a highway,—a public right which he enjoys in common with all other citizens and certain private rights which arise from his ownership of property contiguous to the highway and which are not common to the public generally. Accordingly, the evidence does not authorize a reviewing court to overrule the trial court's findings and conclusions that the increased traffic on the road does not furnish a basis for enjoining quarry operations at the instance of these plaintiffs in this action. Plaintiffs invoke Voorheis v. Tidewater Southern R. Co., 41 Cal.App. 315, 182 P. 797, in support of their contention that, as they put it, "the surcharged use of the highway was a substantial interference with the property rights of plaintiffs in Page Mill Road." We do not so interpret that decision. The case was an appeal after the sustaining of a demurrer to the complaint which alleged, among other facts, that the defendant railway company in violation of the terms and conditions of its franchise, had permitted freight cars to stand on the street for more than five minutes in one block and for more than half an hour at a time, " 'thereby obstructing and impeding travel and traffic on said streets * * *' " to the injury and detriment of the public and abutting property owners, including the plaintiff. 41 Cal.App. at page 317, 182 P. 797 at page 798. The court viewed these allegations as a sufficient showing of an unlawful obstruction of a highway and an interference with plaintiff's "private easements" in the street. This is clearly indicated by the discussion on page 322 of 41 Cal.App., 182 P. 797, including the quotations from Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330, and Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343, and the comment that it "would have strengthened the complaint had plaintiff been more specific in showing in what way the railroad company's acts caused injury to his property in particular and bestowing less attention to its acts in affecting the public in general or other private property. But we think enough is shown to entitle her to such relief as the facts proven may warrant." 41 Cal.App. at pages 322–323, 182 P. at page 800. That case furnishes no basis for overruling the trial court's conclusion that the asserted surcharged use of the highway does not furnish a basis for enjoining the operation of the quarry in the instant case.

[6–8] Failing to prove that the operation of the quarry constitutes a nuisance and failing to prove that the operation of the quarry results in legal injury to them, plaintiffs are in effect seeking, solely and simply, to enforce a penal law. No such remedy is available to them. "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition." Civ.Code, § 3369. "This statutory enactment is but the expression of the fundamental rule that courts of equity are not concerned with criminal matters and they cannot be resorted to for the prevention of criminal acts, except where property rights are involved." Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, 671, 275 P. 787, affirming a judgment which dismissed a suit to enjoin the erection and maintenance of a mausoleum in a residence district in violation of a municipal ordinance. This principle is one of long standing, as indicated by the earlier authorities reviewed in the Perrin case, and has been consistently adhered to throughout the years. "It is elementary that violation of a penal ordinance does not of itself create a private nuisance *per se,* and it is likewise elementary that, in the absence of special injury, an injunction will not be granted on the application of a private individual merely to prevent violation of a penal statute." Carter v. Chotiner, 210 Cal. 288, 291, 291 P. 577, 578. See also Smith v. Collison, 119 Cal.App. 180, 184, 6 P.2d 277; Biber v. O'Brien, 138 Cal.App. 353, 357–358, 32 P.2d 425. "It is a general rule * * * that the violation of a penal statute does not constitute a nuisance unless the doing of the prohibited acts would constitute a nuisance in the absence of the statute." People ex rel. Chiropractic League of California v. Steele, 4 Cal.App.2d 206, 208, 40 P.2d

959, 41 P.2d 946. Equity is "loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." People v. Lim, 18 Cal.2d 872, 880, 118 P.2d 472, 476. See also International Ass'n of Cleaning and Dye House Workers v. Landowitz, 20 Cal.2d 418, 421–423, 126 P.2d 609. Plaintiffs cite Sapiro v. Frisbie, 93 Cal.App. 299, 270 P. 280, Smith v. Collison, supra, 119 Cal.App. 180, 6 P.2d 277, and McIvor v. Mercer-Fraser Co., 76 Cal.App.2d 247, 172 P.2d 758, in support of their contention that violation of a zoning ordinance is a nuisance per se and actionable at the instance of private property owners. A sufficient answer is that in each of those cases injuries to the properties of the plaintiffs were involved. We do not find in them a sound basis for holding the general rule inapplicable in the instant case.

In view of these conclusions, it is unnecessary to consider other questions discussed by the parties upon this appeal.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

126 Cal.App.2d 378

PEOPLE v. HILL.

Cr. 5109.

District Court of Appeal, Second District,
Division 2, California.

June 30, 1954.

Defendant was convicted of violating sections 288 and 288a, Penal Code. From the judgment of the Superior Court, Los Angeles County, Edwin L. Jefferson, J., defendant appealed. The District Court of Appeal, Fox J., held that the evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law 🔑747

It is the duty of the trier of the facts not only to evaluate the credibility of the witnesses and determine the weight of their testimony but also to resolve the conflicts in the evidence and inconsistencies of an individual witness.

2. Criminal Law 🔑553

The judge or jury may accept as true a portion of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its correctness.

3. Criminal Law 🔑1144(13)

On appeal that portion of the evidence, not inherently improbable, which supports the judgment must be accepted, and not that which tends to defeat it.

4. Criminal Law 🔑260(11)

On appeal from conviction, the court could not reweigh the evidence and draw inferences contrary to those drawn by trial court.

5. Infants 🔑20

Sodomy 🔑6

Evidence was sufficient to sustain conviction for violation of sections 288 and 288a of Penal Code. Pen.Code, §§ 288, 288a.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of violating sections 288 and 288a, Penal Code. He appeals from the ensuing judgment on the ground of the insufficiency of the evidence.

The victim, a newsboy eleven years of age, was folding his newspapers, at about 6:00 o'clock Sunday morning, July 13, 1952, in the vicinity of the 1000 block on North San Fernando Road, Burbank, in preparation for delivering them, when defendant drove up. He told the boy he should not be out there, that he should go home, and offered to drive him there. The boy declined his invitation and defendant drove off. He came by a second time and bought a paper.

He came by again while the boy was delivering his papers and asked the boy "to come with him." He refused. Defendant then exhibited a revolver and the boy "went with him in the car." After driving some 45 minutes defendant parked "in a little clearing." He had the boy at least partially undress. The boy testified to the commission by defendant of the acts denounced by sections 288 and 288a, Penal Code. Defendant let the boy shoot his gun once, then he fired the remaining shells at a stick. Defendant removed a box of shells from underneath the seat of his car to reload the gun. The boy also saw another gun in the glove compartment. Defendant drove the boy back to the place of their original meeting around 7:00 a.m. The boy took the license number of defendant's car. He later identified defendant in the police show-up. The boy's mother testified that between 7:30 and 8:00 o'clock that morning her son complained to her of defendant's misconduct.

When questioned at his home and later at the police station by Officer Ostroff of the Burbank police department, defendant denied any knowledge of the incident. When confronted face to face with the boy, defendant denied ever having seen him before. Two days later, however, while being questioned by the chief of police after first asserting his innocence, he then admitted the commission of the acts charged. At the trial defendant denied making the admissions to which the officer testified.

Defendant's story at the trial was that he left his motel in Sun Valley at about 5:30 or 5:45 on the particular Sunday morning and went down into Burbank to fill up his car with gas. He stopped to buy a paper from a newsboy and to lower the top of his Buick convertible. There were two revolvers on the back seat of his car. He placed them in the glove compartment. The boy accused him of being drunk and asked him for money, saying he could make trouble for him. The boy was not in his car. Defendant drove back to his motel to get a canteen of water and then out in the hills beyond Seminole Hot Springs for some target practice

The officers found two revolvers and a box of shells in defendant's living quarters. They also found a box of Kleenex in defendant's car which the boy had seen there.

The testimony of the complaining witness, that of his mother and the police officer, together with the items discovered in defendant's home and car, furnish ample support for the verdict and judgment.

Defendant argues that the testimony of the boy "is not worthy of any credence whatsoever." He bases this argument upon inconsistencies in his testimony in three respects: (1) as to whether defendant drove up two or three times before he got into defendant's car; (2) the circumstances under which he entered defendant's car; and (3) the extent to which he undressed.

[1-3] It is, of course, the duty of the trier of the facts not only to evaluate the credibility of the witnesses and determine the weight of their testimony, but also to resolve the conflicts in the evidence and inconsistencies in the testimony of an individual witness. People v. Frankfort, 114 Cal.App.2d 680, 700, 251 P.2d 401; People v. White, 115 Cal.App.2d 828, 831, 253 P.2d 108. The judge or jury may accept as true a portion of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its correctness. People v. Dragoo, 121 Cal.App.2d 322, 324, 263 P.2d 90. It should be pointed out that the preliminary hearing was held on August 1, 1952, but due to the fact that defendant had been committed to a mental institution, pursuant to section 5512, Welfare and Institutions Code, for observation and diagnosis for a 90-day period, the trial was not held until February 3, 1953. The trial court may well have concluded that the inconsistencies between the boy's initial testimony and that given by him six months later were largely due to his tender years and the lapse of time. On appeal that portion of the evidence (unless it is inherently improbable) which supports the judgement must be accepted, and not that which would tend to defeat it. People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836. In view of these rules it is clear there is no potency in defendant's argument when addressed to an appellate court.

[4, 5] Defendant attempts to discredit the testimony of the police officer on the ground that it was inconsistent with the report he prepared after the defendant's interview in the chief's office. We fail to find any substantial basis for this argument.

The basic difficulty with defendant's argument is that he would have this court reweigh the evidence and draw inferences contrary to those drawn by the trial court. Under firmly established principles we are not at liberty to do this, People v. Gould, 111 Cal.App.2d 1, 8, 243 P.2d 809.

The purported appeal from the order denying defendant's motion for a new trial is dismissed since it does not appear that any such motion or order was made.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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126 Cal.App.2d 421

ADLER v. CAMPBELL et al.

Civ. 4823.

District Court of Appeal, Fourth District, California.

July 6, 1954.

Rehearing Denied July 26, 1954.

Hearing Denied Sept. 2, 1954.

Action for dissolution of a joint venture, whereby plaintiff was to construct buildings on land owned by defendant and receive share of profits from sale of developed property, for accounting of profits on two undeveloped parcels sold, and for declaration as to rights and duties of parties in relation to the contract. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained findings to effect that it was understood and agreed by the parties, at time agreement was executed, that plaintiff was to have no interest in the lots to be developed unless buildings were constructed thereon and that defendants were free to sell the undeveloped lots.

Judgment affirmed.

1. Joint Adventures 🔑5(2)

In action for dissolution of joint venture, whereby plaintiff was to construct buildings on lots owned by defendants and receive share of profits from sale of developed property, for an accounting of profits on two undeveloped parcels sold, and for declaration as to rights and duties of both parties in relation to contract, evidence sustained findings to effect that it was understood and agreed by parties, at time agreement was executed, that plaintiff was to have no interest in the lots unless buildings were constructed thereon, and that defendants were free to sell the undeveloped lots.

2. Evidence 🔑461(1)

Where joint venture agreement, under which contractor was to develop land owned by landowners and receive share of profits from sale of developed property, was entirely silent with respect to what should happen in event no building operation should be carried on, evidence with respect to intention of parties in that regard, at time contract was entered into, was admissible for purpose of determining true intent of parties with respect to matter on which contract was entirely silent.

3. Joint Adventures 🔑5(2)

In action for dissolution of a joint venture, whereby plaintiff was to construct buildings on land owned by defendants and receive share of profits from sale of developed property, for an accounting of profits on two undeveloped parcels sold, and for declaration as to rights and duties of parties in relation to the contract, evidence sustained finding that amount of time spent by plaintiff in planning for the development of the lots was negligible.

Crittenden, Holley & Gibbs, San Diego, Irene Brooks Adler, Glendale, Phillip Crittenden, San Diego, for appellant.

David H. Thompson, Sweet, Ault & Warner, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for dissolution of a joint venture, for an accounting, and for declaratory relief.

On November 12, 1951, these parties entered into a construction contract under which the plaintiff, as contractor, agreed to build an 8-unit apartment house on "Law Street" for the defendants. Construction started in February, 1952, and was completed in September, 1952. That project is not directly involved in this action.

Shortly after November 12, these parties discussed the possibility of a joint venture in the erection of other buildings. On November 26, 1951, they signed an agreement which was drawn by the plaintiff's wife, who was admitted to practice law but who was in charge of the plaintiff's office and who, through the period in question, took a leading part in carrying on his business affairs.

This agreement, after designating the defendants as owners and the plaintiff as contractor, recited that the owners "have heretofore purchased and are now purchasing" three described vacant lots for the purpose of having buildings erected thereon "for sale, exchange, rental or other income producing development", and that the owners are desirous of engaging with the contractor jointly, "in the business of developing the said lots." It was then provided, so far as material here, that the owners were to furnish all funds required in the various projects, including necessary funds from lending institutions; that the contractor should furnish his services in the construction involved and should assist the owners in the selection of suitable building sites; that the net profits arising from said projects should be equally divided between the owners and contractor; that all expenses of every kind, except any allowance to the contractor or to the owners for their services, should be chargeable in computing the net profit; that the "net profit shall be the difference between lot cost, cost of plans, construction costs"; that upon the final inspection by the building department of "any" construction under the contract the owners shall cause the title to be transferred so as to stand in the name of both parties; that "any project developed hereunder" should be sold only at a net profit of at least 20% above the total cost, including the cost of construction, unless the parties agreed in writing to a smaller profit; and that this agreement should not apply to the apartment being erected under the agreement of November 12.

The three lots covered by the contract, referred to as Parcel 1, Parcel 2, and Parcel 3, were purchased by defendants with their own funds. During the construction of the Law Street apartments the defendants became dissatisfied with plaintiff's services because of the way in which the work was done and because in order to complete that project, they were compelled to put in a much larger amount of money than had been represented to them as necessary by the plaintiff. About the first of June, 1952, and several times later, the defendants told the plaintiff that they would not go ahead with any other building deals with him. In July, the defendants sold Parcel 2 and turned over the proceeds to the plaintiff to provide additional funds required to complete the Law Street apartments. In September, 1952, the defendants agreed to sell Parcel 3 at a substantial profit and went into escrow thereon.

In this action the plaintiff alleged that the parties had entered into a joint venture agreement "for the purpose of developing" these parcels of land, and had agreed to divide the profits resulting from "said projects"; that the plaintiff had duly performed his part of the contract; and that the defendants had attempted to repudiate "said joint adventure", and had refused to allow plaintiff to continue his services. Judgment was asked for dissolution of the joint venture, for an accounting of the profits on the two parcels sold, and for a declaration as to the rights and duties of both parties in relation to said contract. The defendants admitted the execution of the contract on November 26, and that they had refused to allow plaintiff to continue his services, but denied that any sale of lots was in violation of the agreement, and denied that plaintiff was entitled to any profits from the joint venture. It was further alleged that, under the terms of their agreement, they are under no obligation to the plaintiff unless said properties are, in fact, improved and a sale then made at a profit; and that defendants had rescinded the contract before any of the property was sold.

The court found that the defendants purchased Parcel 1 on November 16, 1951, and still own it; that the plaintiff contributed nothing to its purchase and it is still unimproved; that they purchased Parcel 2 on November 13, 1951, and the plaintiff contributed nothing thereto; that defendants sold Parcel 2 in July, 1952, for a net profit of $112.13; that it was necessary for defendants to sell said lot in order to meet obligations arising from the construction work on the Law Street property; that the defendants offered to purchase Parcel 3 on November 13, 1951, and exercised their option on January 14, 1952; that the plaintiff contributed nothing to said purchase; that the defendants sold Parcel 3 on September 26, 1952, at a considerable profit, the exact amount being yet undetermined; that it was necessary for the defendants to sell Parcel 3 for the reason that they were unable to meet the payments called for by a trust deed on the property; that at the time the agreement of November 26, 1951, was executed it was understood and agreed by the parties that the plaintiff had no interest in these lots unless and until construction thereon was completed, and that the defendants could sell any of said property in an unimproved condition without plaintiff's consent and without any liability to plaintiff for any part of the profit derived from such sale; and that the amount of time spent by plaintiff in planning for the development of this real property was negligible. As conclusions of law, it was found that the plaintiff was not entitled to share in the profits in the sale of Parcels 2 and 3; that the plaintiff has no right or interest in any of the three parcels; and that plaintiff take nothing by his complaint. Judgment was entered that the plaintiff take nothing by reason of his complaint, and this appeal followed.

The main contention here made is that the findings to the effect that it was understood and agreed by the parties, at the time the agreement was executed, that appellant was to have no interest in these lots unless buildings were constructed thereon, and that respondents were free to sell the lots, are not supported by any admissible evidence. It is argued that this contract is unambiguous and contains no such provisions, and that under the Parol Evidence Rule evidence was not admissible for the purpose of adding a provision which was not even mentioned in the agreement.

[1, 2] The contract in question strongly indicates on its face that it was intended to provide for a joint venture in construction projects on these three lots. Its stated purpose was the erection of buildings on these lots. The net profits from such projects only were to be divided, and these net profits were defined as being the difference between the amount received and the total costs, including construction costs. Transfer of title was not to be made until after final inspection of any construction, and it was provided that any project developed thereunder should be sold only for a price giving a net profit of at least 20% above all costs, including construction costs. While indicating that this joint venture was one in certain building operations, rather than one involving lot speculation, the contract is entirely silent with respect to what should happen in the event no such building operations should be carried on. In this situation the court admitted evidence with respect to the intention of the parties in this regard, at the time the contract was entered into. The evidence received in that connection amply supports the findings complained of. That evidence was not admitted to vary the terms of a written contract and did not serve that purpose. It was admitted for the purpose of determining the true intent of the parties with respect to a matter on which the contract is entirely silent. Under well established rules, that evidence was admissible. Universal Sales Corp. v. California Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; MacIntyre v. Angel, 109 Cal.App.2d 425, 240 P.2d 1047; Bartel v. Associated Dental Supply Co., 114 Cal.App.2d 750, 251 P.2d 16; Schmidt v. Macco Construction Co., 119 Cal.App.2d 717, 260 P.2d

230. This evidence, with the contract itself, supports the findings made.

[3] It is next contended that another finding, that the amount of time spent by the appellant in planning for the development of these lots was negligible, is not supported by the evidence. Not only is this finding supported by respondents' evidence, but additional support appears from the improbable nature of appellant's evidence in that regard.

The further contentions, that the court erred in failing to make findings with respect to the termination of the agreement, and with respect to appellant's damage caused by the termination of the agreement, are without merit. No damages were alleged or proved and in view of the other findings and the evidence received, no possible prejudice appears. It may be further observed that the evidence would have supported a finding that this contract, whatever its meaning, was rescinded by mutual consent before any of the lots were sold.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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126 Cal.App.2d 194

SMITH v. SMITH.

Civ. 16000.

District Court of Appeal, First District,
Division 2, California.
June 23, 1954.

Action on an oral contract to leave property to plaintiff in consideration of services to be rendered and in quantum meruit, instituted against executor of estate of one of promisors. From adverse judgment of Superior Court, Alameda County, A. J. Woolsey, J., the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that complaint alleging an agreement by plaintiff's aunt and uncle to leave property to plaintiff in consideration for his services for operating their farm, was insufficient to state a cause of action when it was not alleged the period of time for which the services were to be rendered.

Judgment affirmed.

1. Appeal and Error 🔑102

No appeal lies from an order sustaining a demurrer.

2. Specific Performance 🔑45

To enforce an oral contract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, that consideration adequate, that character of services is such that money payment would not furnish adequate compensation, and that there is such a change in the plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

3. Executors and Administrators 🔑443(1)

Complaint alleging an agreement by plaintiff's aunt and uncle to leave property to plaintiff in consideration for his services in operating their farm was insufficient to state a cause of action when there was no allegation of the period of time for which the services were to be rendered.

4. Frauds, Statute of 🔑138(5)
Trusts 🔑103(2)

Where plaintiff had expended $10,000 on development and improvement of property which he was managing under an oral agreement of his aunt and uncle to leave all their property to plaintiff in return for his services in managing the property, such expenditures could be recovered in quantum meruit and they did not give rise to a resulting trust. Probate Code, § 716.

5. Executors and Administrators 🔑443(7)

Complaint alleging an oral agreement between plaintiff and his aunt and uncle whereby plaintiff was to receive all their property upon the death of the survivor of the two in return for his services in managing their property did not state a cause of action for the value of plaintiff's services rendered during the years he managed the property when it was not alleged that a claim had been filed against the estate. Probate Code, § 716.

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Enrico Dell'osso, Oakland, for appellant.

Haley, Schenone & Tucker, Hayward, for respondent.

NOURSE, Presiding Justice.

This is an action on an oral agreement to leave property to plaintiff in consideration of services to be rendered and in quantum meruit, instituted against the executor of the estate of one of the promisors. The court by order of May 20, 1953, sustained a demurrer to plaintiff's second amended complaint without leave to amend. Notice of appeal from said order was filed on July 10, 1953. On October 15, 1953, a judgment for defendant was entered on the demurrer sustained.

[1] Since no appeal lies from an order sustaining demurrer, Taliaferro v. Wampler, 118 Cal.App.2d 391, 257 P.2d 674, we interpret the notice of appeal as intended to take an appeal from the judgment as that is what the parties have assumed.

The second amended complaint was in two counts. The first count alleged in substance that on or about October 14, 1918, John E. Geary and Mary E. Geary, husband and wife, were the owners of certain real and personal property in Alameda County, that they had no children and wished plaintiff, their nephew, who had lived with them since he was three years old and who was then approximately eighteen years old and completing his last year in high school, to assume the responsibility for the management, cultivation, planting, development and improvement of their property and for the management, direction, breeding, development and sale of live stock, milk and milk products from their herds of stock and that he should establish a residence of his own on their premises for that purpose as they would have had a son of their own do. That in return for said services John and Mary Geary would each make a will which would leave all of their property to the survivor of them and all remaining at the death of the survivor to plaintiff; moreover, plaintiff was to receive $200 per month as wages.

That plaintiff entered into this oral agreement and in reliance thereon gave up his plan for further education and a career in the field of business and banking, with knowledge of which plans his uncle and aunt had helped to finance his high school education, moved on their premises and performed all services in accordance with said agreement from October 14, 1918, until December 1, 1932. That appellant during that period expended $10,000 on the development and improvement of the property with the approval of the Gearys, who assured him that the oral agreement would be carried out and that he eventually would have all of the property.

That plaintiff's change of position was of great detriment to him and of great benefit to his uncle and aunt. That because of his close relationship to them the services rendered by him are not measurable by any money standard. That plaintiff has performed all that was required under said oral agreement. That the Gearys never repudiated the agreement or informed appellant that they did not intend to perform it. That in reliance on the agreement plaintiff did not commence action during the lifetime of either of them.

That John E. Geary died on October 20, 1949, leaving by his last will all his estate to Mary E. Geary. That Mary E. Geary died on January 27, 1952, leaving a last will which left all her estate to her husband and if he should predecease her to his nephews John Kerwin Smith and Leland Gary Smith and their mother Mary K. Smith, or the survivor or survivors of them in equal parts. That John Kerwin Smith qualified as executor of the estate of Mary E. Geary, deceased.

The prayer, among other things, is that the executor be ordered to specifically perform the agreement stated above, that he account for the rents and profits of the properties and that he and the beneficiaries under the will of Mary E. Geary be declared constructive trustees for the benefit of appellant.

The second count incorporates all the allegations of the first count and further alleges that the reasonable value of plaintiff's services and of the materials and supplies provided by him is $43,600, of which he did not receive any part, with prayer for that amount with interest.

[2, 3] Normally oral agreements to devise or bequeath any property or to make any provision for any person by will are unenforceable under the statute of frauds in the absence of a written memorandum thereof. Civil Code, § 1624, subd. 6; Code of Civil Procedure, § 1973, subd. 6. However, under special circumstances which cause an estoppel to assert the statute of frauds, quasi-specific enforcement of such an oral contract will be permitted on an equitable basis. Appellant concedes that "To enforce an oral contract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, the consideration adequate * * * that the character of the services is such that a money payment would not furnish adequate compensation to the plaintiff, that there is such a change in the plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him * * *." Walker v. Calloway, 99 Cal.App.2d 675, 681, 222 P.2d 455, 459, and cases there cited. The allegations of the first cause of action, which is of the character described as for quasi-specific performance, do not satisfy the above requirements.

The first defect is the absence of all determination of the duration of the services to be rendered. Literally interpreted the contract would not require appellant to do more than start his service on the property and continue it for any period he would desire, however short. Evidently such a performance would be a completely inadequate consideration for the very valuable promises of the decedents. Normally agreements of this kind require the party who is promised property to be left by will to continue his services until the death of the testator. Chahon v. Schneider, 117 Cal.App.2d 334, 336, 256 P.2d 54. This is not the case here. The services of appellant were terminated in a manner and for a reason not alleged nearly twenty years before the death which allegedly entitled him to receive the remaining property of the promisors. If neither a performance terminable at the will of either party nor a performance until the death of the last surviving promisor was intended, then there is in the agreement no measure whatever for the duration of the required performance. In that respect the contract is indefinite and uncertain, and the uncertainty as to appellant's duty under the contract causes his promise to be an inadequate consideration for the decedents' promise to leave all their remaining assets to him and causes the alleged contract to be unfair. Even independent from the statute of frauds similar defects were held to justify the sustaining of a demurrer to a complaint for quasi-specific performance of an agreement to bequeath all property by will in Parsons v. Cashman, 23 Cal.App. 298, 137 P. 1109, 1111; Owens v. McNally, 113 Cal. 444, 451, 45 P. 710, 33 L.R.A. 369 and Baumann v. Kusian, 164 Cal. 582, 587, 129 P. 986, 987, 988, et seq., 44 L.R.A., N.S., 756.

Appellant relies mainly on Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737. The family venture to which the promisee in that case devoted his life in reliance on the promise that it would finally become his own was so successful that an investment of $4,000 yielded approximately $100,000 worth of property. Here there is no allegation as to any success of plaintiff's management which benefited the decedents and therefore no allegation of unjust enrichment by his services. There is nothing in Palmer v. Phillips, 123 Cal.App.2d 291, 266 P.2d 850, that can aid the appellant.

[4] The expending of $10,000 on the development and improvement of the property is not stressed on appeal. Correctly so. Such expenditures can be recovered in quantum meruit and did not give rise to a resulting trust but at most to an equitable

lien upon the property for the amount of the advances. Restatement, Trusts, § 454, Comment o. No action on such lien in accordance with section 716, Probate Code with waiver of recourse against other property of the estate is instituted in this case. It is not even alleged that the property on which the improvements were made still formed part of the estate of decedent.

[5] The second count of the complaint, in quantum meruit, which does not allege the filing of a claim against the estate, for that reason alone fails to state a cause of action. Palmer v. Phillips, supra, 123 Cal.App.2d 291, 266 P.2d 855; Chahon v. Schneider, supra, 117 Cal.App.2d at page 346, 256 P.2d at pages 61, 62; Morrison v. Land, 169 Cal. 580, 585, 147 P. 259; De Mattos v. McGovern, 25 Cal.App.2d 429, 433, 77 P.2d 522.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

43 Cal.2d 201

COMPLETE SERVICE BUREAU et al.
v.
SAN DIEGO COUNTY MEDICAL SOC. et al.
SAN DIEGO COUNTY MEDICAL SOC. et al.
v.
COMPLETE SERVICE BUREAU et al.
L. A. 22535.

Supreme Court of California, in Bank.
July 9, 1954.
As Modified on Denial of Rehearing
Aug. 4, 1954.

Action by nonprofit medical service corporation against county medical society and its members for damages for conspiracy in restraint of trade, and cross-action raising question whether corporation and physicians and laymen associated therewith were engaged in the unlawful practice of medicine. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment denying injunction sought by cross-complainants, and they appealed. The Supreme Court, Shenk, J., held, inter alia, that the evidence failed to show that plaintiffs were engaged in the unlawful practice of medicine.

Affirmed.

Spence and Edmonds, JJ., dissented.

Prior opinion, 260 P.2d 1038.

1. Appeal and Error 🔑1107

On appeals involving injunction decrees, law in effect when appellate court renders its opinion must be applied. Business and Professions Code, § 2436.

2. Appeal and Error 🔑1107

Even if parties at time of filing cross-complaint to enjoin alleged unlawful practice of medicine did not have capacity to maintain such action, where, prior to determination of appeal, statute was enacted conferring such right of action upon such parties, cross-claim would be decided on merits. Business and Professions Code, § 2436.

3. Injunction 🔑114(2)

Statute conferring right of action upon Board of Medical or Osteopathic Examiners or 10 or more persons holding physician's and surgeon's or chiropodist's certificates to enjoin unlawful practice of medicine did not confer such right of action upon county medical society. Business and Professions Code, § 2436.

4. Corporations 🔑14(1)

The public policy prohibiting middleman from intervening for profit in establishing professional relationship between doctors and members of public is not contravened by permitting group of interested persons to form nonprofit corporation to secure for themselves medical services at low cost. Corporations Code, § 9200.

5. Corporations 🔑14(1)

A nonprofit medical service corporation may be formed either under Corporation Code, § 9200, authorizing formation of nonprofit corporations generally, or Corporation Code, § 9201, authorizing formation of nonprofit corporation for purpose of defraying or assuming cost of professional services of licentiates under Business and Professions Code. Corporations Code, §§ 9200, 9201.

6. Injunction 🔑128

Evidence, on question whether nonprofit medical service corporation and corporation which owned property used by medical service corporation and individual who was entitled to percentage of medical service corporation's income were unlawfully engaged in corporate and lay practice of medicine by controlling group practice of medicine carried on by medical service corporation, established that only licensed physicians engaged in practice of medicine or surgery, directly or indirectly. Insurance Code, § 1 et seq.; Corporations Code, §§ 9200, 9201; Business and Professions Code, §§ 2000 et seq., 2008.

7. Corporations 🔑387(2)

Questions concerning exercise of corporate power cannot be raised collaterally by third person, but only by state in quo warranto proceedings.

8. Physicians and Surgeons 🔑10

Facts that doctors associated with nonprofit medical service corporation were compensated according to units system, and that layman manager received percentage of corporation's income did not constitute splitting fees with unlicensed persons not entitled to practice medicine or surgery. Business and Professions Code, § 2000 et seq.; Corporations Code, § 9200; Insurance Code, § 1 et seq.

9. Physicians and Surgeons 🔑10

Statute declaring all advertising of medical business having tendency to deceive public to be unprofessional conduct applies to nonprofit medical service corporations. Business and Professions Code, § 2380; Corporations Code, §§ 9200, 9201.

10. Physicians and Surgeons 🔑10

Fact that two nonprofit medical service corporations used the same type of advertising was merely to be considered in determining the standard exacted by statute prohibiting advertising having tendency to deceive public and was not determinative of question whether advertising in question was in violation of statutory prohibition. Business and Professions Code, § 2380; Corporations Code, §§ 9200, 9201.

11. Physicians and Surgeons 🔑10

The phrase "prepaid medical plan," used in advertising to describe program of nonprofit medical service corporation, did not tend to mislead the public, though the program required members to pay scheduled fees for certain types of care and treatment, in view of fact that literature explained such program. Business and Professions Code, § 2380; Corporations Code, §§ 9200, 9201.

12. Physicians and Surgeons 🔑10

Nonprofit medical service corporation's advertisement announcing 24-hour medical-surgical service for only $2.50 a month was not violative of statute regulating advertising of medical business, in view of fact that all members of corporation were advised that such amount merely entitled them to medical care at rates prescribed by schedule which was part of their contract. Business and Professions Code, § 2380; Corporations Code, §§ 9200, 9201.

13. Physicians and Surgeons 🔑10

Nonprofit medical service corporation's advertisement that money received from members went for medical care and other health services exclusively was not violative of statute prohibiting advertising which tends to deceive public, though some of the money received from members was used to pay business manager and to pay rent. Business and Professions Code, § 2380; Corporations Code, §§ 9200, 9201.

14. Physicians and Surgeons 🔑10

Statute declaring all advertising of medical business in connection with which holder of any certificate fails to use his name to be unprofessional conduct was not applicable to nonprofit medical service corporation, since it did not hold medical license and did not advertise in behalf of any particular doctor. Business and Professions Code, § 2380.5.

15. Physicians and Surgeons 🔑10

Activities of nonprofit medical service corporation in securing members was not "procuring practice for practitioner" within statute making such procurement unprofessional conduct. Business and Professions Code, § 2399.

See publication Words and Phrases, for other judicial constructions and definitions of "Procuring Practice for Practitioner".

16. Trade-Marks and Trade-Names and Unfair Competition 🔑88

Statute providing for injunction against unfair competition conferred standing upon medical society and its members to bring action for unfair competition against nonprofit medical service corporation. Civ.Code, § 3369; Corporations Code, §§ 9200, 9201.

17. Trade-Marks and Trade-Names and Unfair Competition 🔑93(3)

Evidence of county medical society and its members failed to establish unfair competition on part of nonprofit medical service corporation. Civ.Code, § 3369; Corporations Code, §§ 9200, 9201.

18. Injunction 🔑128

In cross-actions involving propriety of certain acts of nonprofit medical service corporation, evidence supported findings that none of the policies or activities of the corporation was harmful, injurious, or inimical to public health or welfare, or tended to demoralize medical profession or to lower standards of medical profession or to prevent establishment and maintenance of adequate or reasonable standards. Civ.Code, § 3369; Corporations Code, §§ 9200, 9201.

◆

Brooks Crabtree, San Diego, Peart, Baraty & Hassard, San Francisco, Gray, Cary, Ames & Frye, San Diego, and Howard Hassard, San Francisco, for appellants.

Sloane & Fisher and Harrison G. Sloane, San Diego, for respondents.

Thelen, Marrin, Johnson & Bridges, Los Angeles, and Hansen, Hazen & Lynch, St. Paul, Minn., amici curiæ on behalf of respondents.

SHENK, Justice.

This is an appeal from a judgment for the Complete Service Bureau and certain physicians and laymen connected with it as cross-defendants. Equitable relief was denied to the San Diego County Medical Society and 32 individual physicians as cross-complainants. The general problem is whether the activities of the cross-defendants constitute the unlawful practice of medicine as alleged in the cross-complaint.

On October 16, 1948, Complete Service Bureau, hereinafter called CSB, and three of the physicians associated with it filed a complaint against the San Diego County Medical Society and several of its members. The complaint alleged that the defendants in conjunction with the California Medical Association and the American Medical Association were engaged in a conspiracy in restraint of trade. It prayed for damages and equitable relief. The defendants answered and filed a cross-complaint. The cross-complaint alleged that CSB, Group Property, Incorporated, and William David Parmer were unlawfully engaged in the corporate and lay practice of medicine by controlling the group practice of medicine carried on by CSB; that the physicians connected with CSB were unlawfully aiding and abetting the lay practice of medicine; that fees paid to CSB for medical services were, in effect, fee splitting with an unlicensed person and that such a practice is unlawful; that CSB obtains patients through intensive solicitation; that the commercialization of the practice of medicine is inherent in the activities of CSB, Group Property, and Parmer; that this is harmful to the public health and welfare and in addition constitutes an invasion of the property rights of the San Diego County Medical Society and the individual cross-complainants; that much of the advertising engaged in by the defendants is misleading; and that the practices engaged in by the cross-defendants amount to unfair competition with respect to the members of the San Diego County Medical Society.

It appears that in 1939 William David Parmer, Lester Seaman, and Robert Perrott, all laymen, organized CSB under the general nonprofit corporation law, now Corporations Code section 9200. The articles of incorporation stated that the main purposes of CSB were to establish a fund by periodic payments on the part of its members to be used to defray the costs of medical services and hospital care; to supply or procure for members and their families medical, hospital, and other services at the lowest cost, and to furnish these services to its members "without profit to any agency."

After its incorporation in 1939 CSB arranged with Doctor Stevenson and his associates to do the medical work for its members. Originally the contracts issued to the members were in the name of Doctor Stevenson or his group. After 1946, subscribers were given agreements in the name of CSB. These agreements stated that CSB agreed to provide medical, surgical, and hospital services according to the provisions set forth; that the dues were $2.50 per month; that the subscriber was entitled to up to 30 days hospitalization for each illness or injury, and was entitled to ambulance service up to $10 for each illness or injury, and that the subscriber was entitled to medical services in accordance with the schedule of fees listed. The fee schedule ran from $1.50 for an office visit to $95 for minor or major surgery.

CSB now has a panel of 10 licensed physicians to treat its subscribers. Included among these physicians are Doctor Chester J. Antos, who is a former Director of Maternal and Child Hygiene of the Missouri Board of Health, a former instructor at the Washington University Medical School, and a licentiate of the American Board of Pediatrics; Doctor Marcus G. Kelly, who is a past president of the Gila County, Arizona, Medical Society, a fellow of the American College of Surgeons, and a fellow of the American Medical Association; Doctor Grant W. Lee, who is an associate of the International College of Surgeons; and Doctor George R. Stevenson, who is a life member of the American College of Surgeons. These and the other physicians included in the panel are compensated according to a unit system. The patients are billed by CSB for the services performed by the doctors and the bills are collected by CSB, which now has approximately 10,000 members. Some of them have voting rights and all of them are entitled to those rights within a certain period of time.

In 1939 CSB entered into a contract with Parmer to employ him as business manager for twenty years. CSB occupies a medical building under an oral lease with Group Property. Parmer and Doctor Stevenson were the two principal shareholders of Group Property, which is a stock corporation. Under the lease CSB pays as rental 10 percent of its income. Group Property has spent about $100,000 in remodeling, fixtures, and furnishings for the medical building. No salaries are paid by Group Property and no dividends have been declared or paid.

From October, 1948, until September, 1951, the parties were engaged in matters of pleading in the superior court. The defendants and cross-complainants moved to have the equity issues tried by the court before submitting the law issues to the jury. This motion was granted. The trial commenced on September 12, 1951. Shortly thereafter the plaintiffs dismissed the equity features of their complaint with prejudice. The trial was then directed to the equitable issues raised by the cross-complaint. At the conclusion of the trial the defendants moved for a judgment on the pleadings with respect to the plaintiffs' complaint, contending that with the equity features removed it did not state a cause of action. The trial court denied the motion and rendered its decision on all the equitable issues raised by the cross-complaint in favor of the cross-defendants. Findings of fact and conclusions of law were made and filed upon which judgment was entered. The cross-complainants appeal from the judgment. Since the appeal was taken Mr. Parmer has passed away and his wife, as administratrix, has been duly substituted in his place.

[1-3] Whether an action such as this may be prosecuted in behalf of the physicians of California to prevent the illegal practice of medicine seems never to have been decided by the courts of this state. Chalmers-Francis v. Nelson, 6 Cal.2d 402, 404, 57 P.2d 1312. It is unnecessary to decide that question now for, on September 9, 1953, section 2436 of the Business and Professions Code went into effect. Stats. 1953, p. 1423. That section provides: "Whenever any person has engaged or is about to engage in any acts or practices which constitute or will constitute an offense against this chapter, the superior court of any county, on application of the board or of 10 or more persons holding physician's and surgeon's or chiropodist's certificates issued under this chapter, may issue an injunction or other appropriate order restraining such conduct. Proceedings under this section shall be governed by Chapter 3 of Title 7, Part 2, of the Code of Civil Procedure, except that no undertaking shall be required in any action commenced by the board." This law is applicable to the questions presented on this appeal for "whatever may be the law applicable to appeals generally, the rule is well settled that on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied." Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 527-528, 45 P.2d 972, 987; see also Doctor Miles California Co. v. Sontag Chain Stores Co., 8 Cal.2d 178, 179, 64 P.2d 726. It is not disputed, and the trial court found as a fact, that the in-

dividual cross-complainants were all licensed physicians. There are more than ten of them and they are entitled under section 2436 of the Business and Professions Code to bring an action to enjoin a violation of chapter 5 of that code. Section 2436 does not confer a right of action upon the San Diego County Medical Society for that section applies only to "the board [of medical or osteopathic examiners] or * * * 10 or more persons holding physician's and surgeon's or chiropodist's certificates * * *." Because of our conclusions on the merits of the appeal as raised by the individual cross-complainants, it is unnecessary to decide whether the county medical society has any standing, apart from the statute, to prosecute this action.

The cross-complainant physicians do not question the competency of the medical services rendered by the physicians connected with CSB, but they contend that the activities of the cross-defendants violate chapter 5 of the Business and Professions Code. The basis for this contention is the claim that a nonprofit medical service corporation may only be formed under Corporations Code section 9201, and that CSB is incorporated under Corporations Code section 9200, and allegedly inapplicable section.

Corporations Code section 9200 was formally section 593 of the Civil Code. This section was enacted in its original form in 1870. Stats. 1870, pp. 46, 402. Since 1939 it has provided that: "A nonprofit corporation may be formed * * * for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves, such as * * * for rendering services, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. Carrying on business at a profit as an incident to the main purpose of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits, or dividends to any of its members as such except upon dissolution or winding up."

[4] The immediate question is whether a nonprofit medical service corporation may be formed under section 9200. A somewhat similar situation was presented to the United States District Court for the District of Columbia in Group Health Association v. Moor, D.C., 24 F.Supp. 445. The court there stated at page 446 of 24 F.Supp.:

"The plaintiff is not of course practicing medicine in the sense that it is itself prescribing for the sick, and it contends that it only enters into contract with duly licensed physicians who themselves attend the members of the corporation and if necessary prescribe for them.

"I see no reason why an individual may not without violating the statute [District of Columbia Healing Arts Practice Act] contract with a physician for medical services for a stipulated period at fixed compensation; and it would seem that a group of individuals might make the same arrangement with a group of physicians. It would seem that this group of individuals might incorporate themselves for their own mutual benefit for the same purpose."

It was said in Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, at page 595, 52 P.2d 992, at page 994, that "professions are not open to commercial exploitation as it is said to be against public policy to permit a 'middleman' to intervene for profit in establishing the professional relationships between the members of said profession and the members of the public." However, this principle is not contravened by permitting a group of interested persons to form a nonprofit corporation to secure for themselves medical services at a low cost.

It is argued, however, by the cross-complainants that although it may have been permissible to form a nonprofit medical service corporation under section 9200 in the past, the Legislature has expressly provided that such corporations may only be organized under section 9201.

In 1941 the Legislature enacted section 593a of the Civil Code which is now Corporations Code section 9201. That section provides: "A nonprofit corporation may be formed under this part for the purposes of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 of the Business and Professions Code or of rendering such services, but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless all of the following requirements are met: (a) At least one-fourth of all licentiates of the particular profession become members. (b) Membership in the corporation and an opportunity to render professional services upon a uniform basis are available to all licensed members of the particular profession. * * *"

[5] Section 9201 did not purport to repeal any portion of section 9200. The language of section 9201 is permissive and not mandatory. There would therefore seem to be no valid objection to the formation of a nonprofit medical service corporation under section 9200 as well as 9201. A contrary conclusion might lead to serious legal difficulties. For example, the evidence in this case shows that on February 2, 1939, California Physicians Service (hereinafter referred to as CPS) was incorporated as a nonprofit medical service corporation under section 9200, although it now claims to operate under section 9201. CSB was incorporated under section 9200 in July of 1939. Apparently the Kaiser Foundation Health Plan, amicus curiae, and many fraternal and beneficial organizations which provide medical services to their members are incorporated under section 9200. These organizations, and particularly CSB, which were incorporated under section 9200 prior to the enactment of section 9201, entered into contracts with subscribers and other persons to effectuate their purposes. If the Legislature by enacting section 9201 had intended to eliminate the preexisting nonprofit medical service corporations formed under section 9200 a question of the impairment of contracts might arise. In addition, the evidence in this case shows that CPS is sponsored by the California Medical Association and all of the county medical societies. If section 9201 should be held to be the only section under which a nonprofit medical service corporation may incorporate CPS might exercise a monopoly in that field and thus raise other legal problems. It is unlikely that the Legislature was considering fraternal and other mutual nonprofit corporations when it enacted section 9201; for it seems unreasonable that the Legislature would require fraternal and other nonprofit organizations to include as members "one-fourth of all licentiates of the particular profession" or that these limited groups must provide "an opportunity to render professional services * * * to all licensed members of the * * * profession." See Accounting Corp. v. State Board of Accountancy, 34 Cal.2d 186, 208 P.2d 984.

In Maloney v. American Independent Medical and Health Association, 119 Cal. App.2d 319, 259 P.2d 503, the defendant corporation appealed from a judgment in behalf of the Insurance Commissioner appointing a liquidator to take charge of the defendant's business. The defendant health corporation in that case was incorporated under Corporations Code section 9200, but the trial court there found that it was actually transacting an insurance business for profit and that it was insolvent. The judgment of the trial court which ordered the appointment of a liquidator pursuant to the provisions of the Insurance Code was properly affirmed. However, the opinion in that case stated that a nonprofit medical service corporation may only be organized under Corporations Code section 9201. This statement was unnecessary to the decision, is inconsistent with the holding of the present case, and is disapproved.

[6] It is next contended by the cross-complainants that even if a nonprofit medical service corporation may be organized under Corporations Code section 9200, and therefore the activities of the cross-defendants are not illegal, the cross-defendants are violating certain sections of chapter 5 of the Business and Professions Code and that these alleged violations should be enjoined.

The cross-complaint alleged that CSB was practicing medicine, which if true would be a violation of Business and Professions Code section 2008. That section prohibits a corporation from practicing medicine except where certain requisites have been met and no charge for the medical services rendered is requested.

Doctor George Stevenson, a member of the CSB medical staff, was called as a witness by the cross-complainants under section 2055 of the Code of Civil Procedure. He testified that he had never encountered any lay interference with his medical practice while associated with CSB. Doctor Joseph Loucks, who had been associated with CSB from 1946 to 1948, also called as a witness by the cross-complainants, testified that while connected with CSB: "We handled the patients medically as we saw fit." Doctor Robert Williams, a former member of the CSB medical staff, and Doctors Livingstone, Riddell, Ivens, and Burak, members of the CSB medical staff, were called as witnesses by the cross-defendants and testified that at no time during their association did they encounter any lay interference with their practice of medicine.

It is apparent that the testimony of the above mentioned members of the medical profession constitutes substantial evidence to support the trial court's finding that: "None of the cross-defendants. except the licensed physicians, George R. Stevenson and Chester J. Antos, has ever engaged in, nor is he now engaged, directly or indirectly, in the practice of medicine or surgery."

The cross-complaint also alleged that CSB and its medical staff were engaged in fee splitting which, if true, could be a violation of section 2392 or section 2399 of the Business and Professions Code. To substantiate this charge the cross-complainants point to Parmer's management contract with CSB; CSB's rental contract with Group Property; the unit system by which the medical staff of CSB is compensated; and the disposition of the dues collected by CSB.

In 1939 CSB entered into a contract with Parmer employing him as manager for twenty years. This contract was made assignable and inheritable. The contract provided that Parmer was to receive as compensation 25 percent of the monthly dues paid by the members of CSB and 25 percent of all gross revenue received by CSB from any source; that Parmer need not devote his full time to CSB; that he might employ such assistants as he saw fit, their salaries to be paid by CSB; and that he be granted an option to purchase at any time any or all of the real and personal property owned by CSB at its original cost less depreciation. In 1946, Parmer's contract with CSB was changed so that his percentage of dues was reduced to 10 percent, and he waived his right to receive 25 percent of CSB's revenues from other sources.

[7] We are here concerned with the operations of the cross-defendants under the contract. As to the power of CSB to execute such a contract it has been held that "questions concerning the exercise of corporate powers cannot be raised collaterally by a third person, but by the state in *quo warranto* proceedings. (Citations.)" Vesper v. Forest Lawn Cometery Ass'n, 20 Cal.App.2d 157, 169, 67 P.2d 368, 374. Under that rule the cross-complainants would have no standing to attack any of the internal transactions, as such, between CSB and Parmer and the other directors in this action. However, if the result of such intra-corporate activity would be a violation of chapter 5 of the Business and Professions Code the mere fact of incorporation under Corporations Code section 9200 cannot protect the cross-defendants. See Maloney v. American Independent Medical and Health Association, supra, 119 Cal.App.2d 319, 259 P.2d 503, where the fact of incorporation under section 9200 did not preclude an action against the corporation for violating provisions of the Insurance Code. The question is whether Parmer's operations under the contract resulted in fee splitting.

[8] The cross-complainants state that Parmer received $99,800 under the management contract in the twelve years from July 1, 1939 to July 31, 1951. Doctor Clifford Loos, a partner in the Ross-Loos

Medical Group in Los Angeles, was called as a witness by the cross-complainants. He qualified as an expert in the field of co-operative medical groups. Doctor Loos testified that the salary for a lay business manager for a small clinic ranged from $6,000 to $15,000 a year. On redirect examination he testified that he thought the average salary for a manager for a clinic the size of CSB was about $6,000 a year. Parmer's salary under the contract averaged approximately $8,320 a year, well within the salary range testified to by Doctor Loos, and only $2,320 above the specific estimate given by the doctor.

As previously stated, CSB occupies a medical building under an oral lease from Group Property, a stock corporation of which Parmer and Doctor Stevenson were the principal shareholders. Under the lease CSB pays as rental 10 percent of its income. Again, we are concerned in this action with the question whether the lease was a device for fee splitting. As hereinbefore stated no salaries are paid by Group Property, no dividends have been declared or paid, and Group Property has spent about $100,000 in remodeling, fixtures, and furnishings for the medical building which CSB occupies.

The cross-complainants contend that the fact that CSB bills the private patients of the doctors on its medical staff and only remits half of the fee so collected to the doctor who treated the patient shows that CSB is engaged in fee splitting. Doctor Stevenson testified that the 50 percent went for overhead and that this was a proper amount for the reason that most men who "have practiced medicine a number of years, have found that [it] is substantially what it costs a man to operate his private business, about fifty percent of his income, to maintain proper offices and personnel, and all of equipment and depreciation, cost him about fifty percent of his income to practice medicine." Doctor Loos testified that: "For any practice that grosses under $10,000 a year, fifty per cent of that is usually allocated for overhead"; that the Ross-Loos Clinic bills the private patients of the doctors connected with it; that fifty percent of the amount collected is given to the doctor; and that the other fifty percent is retained by the clinic as the amount allocated for overhead.

Doctor Stevenson testified that except for their first year with CSB all the doctors were compensated according to a unit system; that dues and fees collected from patients according to the contract schedule paid for "all of the services in the entire medical setup"; and that a portion of the dues was allocated to a fund to provide for hospitalization of members entitled to it.

It is customary for medical groups to pay rent, employ business managers, and compensate members on a unit basis. Group Medical Practice, 4 Stan.L.Rev. 401, 409, 411, 413; Hunt and Goldstein, Medical Group Practices in the United States: III, 135 A.M.A.J. 904, 906. There is substantial evidence to support the trial court's finding and conclusion that: "No one of cross-defendant physicians and surgeons has ever engaged in splitting fees with unlicensed persons not entitled to practice medicine or surgery in the State of California."

In the cross-complaint it was alleged that: "Cross-defendants have been and now are engaged in misleading advertising. * * *" Section 2380 of the Business and Professions Code, part of chapter 5 of that code, provides: "All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons and so be harmful or injurious to public morals or safety constitutes unprofessional conduct within the meaning of this chapter."

[9] The cross-defendants, aside from contesting this allegation on the merits, claim that section 2380 is not applicable to them. They argue that this section is only applicable to members of the medical profession and not to nonprofit medical service corporations such as CSB and CPS; and that the standard for nonprofit medical service corporations should be the general rule against misleading advertising in that activity—a different standard. However, it seems reasonable to conclude that the language "all advertising of medical busi-

ness" is sufficient to include nonprofit medical service corporations.

[10] Numerous advertisements by CSB were introduced in evidence. Likewise many advertisements of CPS were received to show the type of advertising used by nonprofit medical service corporations. In The T. J. Hooper, 2 Cir., 60 F.2d 737, Judge Learned Hand stated at page 740: "There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence * * *. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." The fact that CSB and CPS used the same type of advertising is merely to be considered in determining the standard exacted by section 2380.

[11, 12] In a memorandum opinion the trial court correctly stated: "The phrase 'prepaid medical plan' is employed by both CSB and CPS in their advertising. Neither one really offers what might be called a fully prepaid medical plan—a plan which entitles a member to full medical service on prepayment of his dues. The member understands that the prepayment of his dues entitles him to participate in the plan. He knows that for certain types of care and treatment he will have to pay the scheduled fee. The literature explains all this. No one is deceived, no one is misled."

Among the statements made in advertisement by CSB which are attacked are: "Surprise! A 24-hour Medical-Surgical Hospital Service For Only $2.50 a month" and "You will be surprised how much medical, surgical and hospital care you can buy for $2.50 a month." It is alleged that these statements falsely indicate that the $2.50 pays for some medical services whereas the subscriber must pay an additional charge for medical services in accordance with a fee schedule. As the trial judge pointed out, no subscriber thinks he is going to receive complete medical, surgical, and hospital care by prepaying $2.50 a month. All of CSB's members were advised of the medical fee schedule which was part of their contract. By paying $2.50 a month they were able to get medical care at the fee schedule and in that way it contemplated lower medical costs. Part of the $2.50 went in rental to Group Property, which has expended over $100,000 on the medical building which houses CSB; and because the doctors used the building the overhead expenses were reduced thereby permitting the lower schedule of medical fees. The two above quoted advertising statements are not objectionable and the trial court properly refused an injunction as to them.

[13] The cross-complainants also attack another advertising statement made by CSB. It reads: "Your money goes for Medical Care and other Health Services exclusively." It is admitted that Parmer received a certain amount of the dues as his salary for being business manager and that a certain portion was paid as rent to Group Property. As above indicated it is customary for medical groups and clinics to pay rent and employ business managers. The CPS follows this practice. Whether CSB's subscribers should have assumed this when reading the above quoted statement is conjectural. It probably made no difference to them. It cannot be said as a matter of law that this statement violated section 2380. No abuse of discretion on the part of the trial court in denying an injunction as to that statement has been shown. There is substantial evidence to support the trial court's finding that: "None of the cross-defendants has been, nor is, engaged in false or misleading advertising."

[14] Section 2380.5 of the Business and Professions Code provides: "All advertising of the medical business in connection with which the holder of any certificate fails to use his name constitutes unprofessional conduct within the meaning of this chapter." This section is not applicable to nonprofit medical groups because they do not hold medical licenses and are not advertising in behalf of any particular

doctors. In the case of CSB the evidence shows that the affiliation of a doctor may be terminated by him or by CSB upon 60 days' notice; and that there were many doctors affiliated with it since its inception. The names of these doctors could not be used because they were not obligated to stay with CSB for more than 60 days.

[15] The cross-complaint alleged that the cross-defendants solicited business through hired solicitors. Section 2399 of the Business and Professions Code provides: "The employment of 'cappers' or 'steerers' or other persons in procuring practice for a practitioner of a system or mode of treating the sick or afflicted provided for in this chapter constitutes unprofessional conduct within the meaning of this chapter." The evidence shows that nonprofit medical service groups solicit members. CPS has a radio program. Both CSB and CPS engage in newspaper advertising to secure new members. CPS and CSB have "membership drives." CPS has local civic committees to encourage membership. CSB admits using paid solicitors. A letter from CPS to its doctor members which was received in evidence states: "In order that our physician members may have the maximum benefit from this district office we are asking you to take advantage of the sales personnel in the office by forwarding notice of sales leads." It is clear that the activities of the nonprofit medical service corporations in securing members is not "procuring practice for a practitioner" as contemplated by section 2399. As stated the personnel of the doctors affiliated with CSB is not constant. This indicates that the members are being solicited to join the group and not for any particular practitioner.

[16, 17] Certain portions of the cross-complaint alleged in substance that the activities of the cross-defendants amounted to unfair competition. Civil Code section 3369 confers standing upon the cross-complainants to bring an action for unfair competition. There is no evidence in the record which would support a finding of unfair competition and the trial court correctly found against the cross-complainants on this point.

In addition to defending on the merits the cross-defendants pleaded laches and unclean hands. The court made no finding as to laches. There was some evidence introduced on the question of unclean hands. The court found as a fact that: "Cross-Complainants, through their sponsorship of and participation in California Physicians Service, a non-profit corporation, engage in substantially the same policies and practices which they enumerate as unethical and unlawful acts on the part of cross-defendants in connection with advertising by said corporation of medical services, soliciting of patients through hired solicitors, paying unlicensed persons not entitled to practice medicine or surgery in the State of California out of monies collected from patients, and using the name California Physicians Service for advertising purposes in connection with named physicians." The trial court's finding was to the effect that both the cross-complainants and the cross-defendants are engaged in substantially similar practices; and it has been held that these activities are legal. The question of unclean hands is not in this case in any substantial sense.

[18] Finally, the trial court made the following general finding: "None of the policies or activities of Cross-Defendants is harmful, injurious or inimical to the public health or welfare. None of them tends to demoralize the medical profession in the County of San Diego or elsewhere. None of them does or will prevent the establishment and maintenance of adequate or reasonable standards. None of them does or will lower the standards of the medical profession or degrade the practice of medicine, to the detriment of health of anyone." There is sufficient evidence in the record to support the findings and conclusions of the trial court which in turn support the judgment denying the injunction.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concur.

SPENCE, Justice (dissenting).

I am in general accord with the views expressed in the dissenting opinion of Mr. Justice EDMONDS but desire to add certain additional observations.

The majority opinion recognizes that the real question here does not involve primarily a determination of the general powers of a so-called non-profit corporation but rather a determination of the legality of the general plan adopted as evidenced by the particular contractual arrangements existing between Complete Service Bureau and the other cross-defendants. As to the contract with Parmer, it is said: "We are here concerned with the operations of the cross-defendants under the contract"; and as to the lease with Group Properties, it is said: "Again, we are concerned in this action with the question whether the lease was a device for fee splitting." But having thus defined the real issues involved, the majority opinion ignores the uncontradicted evidence concerning these contractual arrangements and affirms a judgment which places the stamp of approval upon a plan whereby Parmer and certain lay associates developed a commercial venture for profit, in which venture Parmer and his lay associates solicited patients for a limited panel of doctors selected by them and split the medical fees and other income derived from these activities. In other words, the uncontradicted evidence conclusively shows that Parmer, acting individually and through Group Properties, a profit corporation which he controlled, was intervening as a "middleman" for profit in establishing the professional relationships between a group of approximately ten doctors and members of the public. Arrangements of this type have been consistently condemned. People ex rel. State Board of Medical Examiners v. Pacific Health Corporation, 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284; Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 52 P.2d 992, and authorities cited.

It seems entirely clear under the rules established by the cited authorities that the incorporators of the nonprofit corporation, as individuals, could not have lawfully developed the profit-making plan under the type of agreements disclosed by the evidence. It necessarily follows that the development of such profit-making plan could not be made lawful by the mere device of forming a so-called non-profit corporation which corporation, rather than the individual or individuals, entered into similar unlawful agreements. In this connection, it is significant to note that non-profit corporations formed under section 9200 of the Corporations Code can only be formed for "lawful purposes * * * for which individuals lawfully may associate themselves * * * subject to laws and regulations applicable to particular * * * lines of activity." It should also be noted that if the mere device of forming such a corporation could legalize activities which were otherwise illegal, then such corporations could be organized for the purpose of permitting laymen and lay agencies, through similar contractual arrangements with such corporations, to intervene for profit in establishing the relations between members of the public and a single practitioner or a limited group of practitioners in any of the learned professions, including the legal profession. Heretofore such arrangements have always been declared to be against the public policy of this state, and if any change in policy is to be made, that change should be declared by the Legislature rather than by the courts.

EDMONDS, Justice (dissenting).

The law applicable to associations which perform the service of bringing together licensed practitioners and persons desiring medical treatment has been reviewed in other cases. See California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306; People ex rel. State Board of Medical Examiners v. Pacific Health Corp., 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284. Generally, there can be no valid objection upon legal grounds to the formation of a non-profit corporation or cooperative association for the purpose of obtaining medical service for its members. Such service may be provided by contracting with a group of practitioners to supply it, whether upon the basis of fixed period payments or according to a schedule of charges. But the present record establishes additional elements of lay participation which, in my opinion, unquestionably constitute unlawful medical practice.

One of the charges made by the medical association against Parmer and Complete Service Bureau is that the financial arrangements made with the physicians employed by the bureau, in legal effect, amount to the splitting of fees with a layman or a corporation composed of laymen. It has been held that professional fee-splitting occurs "where a member of a profession divides the compensation he receives from a patient with another member of the same profession or any person who has sent the patient to him or has called him into consultation." Lieberman v. Connecticut State Board of Examiners in Optometry, 130 Conn. 344, 34 A.2d 213, 216.

Fee-splitting agreements between professional men and laymen as a reward for procuring employment tend to commercialize the profession, are contrary to public policy and are void. See annotation 86 A.L.R. 195. Otherwise stated, the professions "are not open to commercial exploitation as it is said to be against public policy to permit a 'middleman' to intervene for profit in establishing the professional relationships between the members of said professions and the members of the public." Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 595, 52 P.2d 992, 994.

The record shows without contradiction these facts:

Each member of a non-profit corporation pays to it a monthly membership fee of $2.50, for which he is entitled to receive certain hospital service. If he desires other medical service, he must pay to the bureau an additional amount based upon a fixed schedule of fees. Depending upon the type of treatments involved, the physicians on the bureau's panel receive about 50 percent of the amount paid to the corporation, which they distribute among themselves according to a unit system. These physicians also treat "private" patients, unconnected with Complete Service Bureau, and pay to it about 50 percent of the fees received from such patients.

Under his manager's contract, Parmer, or the person who inherits his contractual rights, is entitled to receive 10 percent of the membership dues, with a minimum guarantee of 25 cents per month per member. And, although since 1946 he has waived the right to claim it, under his contract he is entitled to an additional 25 percent of the gross receipts of the bureau *from all other sources.* These rights stem from a contract under which there are no fixed duties to be performed by the manager, and which is expressly made assignable and inheritable.

Additionally, Group Properties Inc., a stock corporation for profit of which Parmer, until his death, was president and majority stockholder, is entitled to receive as rent for the real property occupied by the bureau and for all the medical equipment used by it another 10 percent of all income received *from all sources.*

Under this arrangement, the business manager of the bureau and the corporation, principally owned and controlled by him, receive a direct commercial advantage in establishing the relationship of doctor and patient. The legal devices of stock ownership, and a manager's contract which fixes no duties should not obscure the significance of the arrangement as one in which a layman may use the professional relationship of doctor and patient as a source of commercial profit. That profit increases not only with the number of members in the bureau, but also with the frequency and extent of their medical treatments, factors which the manager as the controlling officer of the bureau is in a position to influence.

One reason suggested for holding that these practices do not amount to fee-splitting is that the present record does not show that Parmer and Group Properties have received an excessive amount under the arrangement. It is suggested that Parmer has received no more than the average business manager, and Group Properties has expended large sums in remodeling but has declared no dividends. But there is considerable doubt as to whether, in view of the vague nature of his duties, the amount paid Parmer under the contract can be said to be compensation. And it is not an answer to the charge of commercialization that Group Properties has declared no dividends. Certainly, the net worth of the corporation has been increased by "rental" payments and the value of its property increased by improvements, and, as controlling shareholder, Parmer or his successor easily may tap those resources merely by declaring a dividend. In any event, it is a novel proposition of law that one who receives funds from an improper source, or gains them in an improper manner, may be excused from legal consequences if he does not take too much.

The nature of Parmer's participation as one of commercial exploitation is made evident from a history of his dealings with the bureau, dealings which have been exceedingly profitable. His contract with the bureau enables him to maintain almost complete control of it. Almost continuously, Parmer has been president of the bureau and a member of its board of trustees. The trustees, other than Parmer, have been his secretary, and either a close friend of Parmer or one of his employees. His contract as manager has entitled him to a percentage of the bureau's total income as well as a guaranteed minimum income from the dues of members.

The premises now occupied by the bureau, originally owned by Parmer, were sold to it in 1940 for $31,000, but with an option to Parmer to repurchase them and all fixtures and equipment owned by the bureau at their original price less depreciation. Six years later, he exercised the option, paying the bureau with stock of Group Properties. He then resold the property to Group Properties for $102,500 in stock. In short, these dealings demonstrate Parmer's complete control and participation in Complete Service Bureau for commercial advantage.

The basis for the refusal of the trial court to consider these factors appears to have been its belief that the appellants were without standing to challenge them as an unlawful practice of medicine. In his memorandum opinion, the trial judge stated "what the terms of the management contract should be, what salary should be paid or is paid, what the rent should be, what property the corporation is to purchase, what the members shall pay as dues, what the employees shall do or what pay they shall receive, are matters for the stockholders or members of the corporation to decide, and are not open to inquiry by SDCMS, CPS, or any other corporation or person not connected with CSB. * * * The State, by a proceeding in the nature of *quo warranto*, may proceed to forfeit and dissolve the corporate existence for acts of usurpation of powers, or may proceed in like manner against any usurpation of franchise by any corporation or person, or the State or a shareholder may proceed by injunction against a corporation or its officers."

By the present decision the cross-complainants are given legal standing to challenge Parmer's participation in Complete Service Bureau as an unlawful medical practice, but it is held that the evidence supports the conclusion of the trial court that there was no fee splitting. Plainly Parmer's participation was not considered by the trial court in this connection.

Many people who advocate increased availability of medical service to persons of low or moderate incomes may welcome the establishment of plans similar to the present one without a discriminate inquiry into their business bases. However, in the long run, to ignore unlawful practices incident to them will benefit neither the public nor the profession. I would hold that Complete Service Bureau's division of the medical fees received by it with its business manager and Group Properties on a percentage basis constitutes an unlawful medical practice, and enjoin its continuance.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting.

43 Cal.2d 222

PAONESSA
v.
STATE BAR OF CALIFORNIA.
L.A. 23031.

Supreme Court of California.
In Bank.
July 9, 1954.

Disciplinary proceeding against attorney. The Board of Governors of the State Bar found attorney to have acted improperly and he petitioned for review. The Supreme Court held that evidence justified suspension from practice of law for period of two years.

Order in accordance with opinion.

Attorney and Client ⚿58

In disciplinary proceeding against attorney, evidence justified suspension from practice of law for period of two years. Business and Professions Code, §§ 6067, 6068, 6103, 6107; Rules of Professional Conduct, rule 11.

◆

Leonard Wilson, Los Angeles, and Robert P. Dockeray, Burbank, for petitioner.

Garrett H. Elmore, San Francisco, Karl F. Geiser, Beverly Hills, and Jack A. Hayes, San Francisco, for respondent.

PER CURIAM.

Petitioner, a member of the Bar, was charged in five counts with conduct allegedly requiring discipline. In count one it was claimed he had represented Mrs. Olive Jean Deveux in an annulment action against her husband, and that he had prepared the complaint so as to allege that before marriage Deveux falsely represented he desired children but after marriage had refused to cohabit so as to cause children to be conceived; that petitioner knew at the commencement of the action that the parties had a child but petitioner instructed Mr. and Mrs. Deveux not to disclose the child's existence and instructed plaintiff to testify that Deveux refused to cohabit with or have children by her.

Count two charged similar conduct in connection with petitioner's representation of Louis Stander in an annulment action by him against his wife. The parties to that action had two children as issue of the marriage, but petitioner instructed Stander to testify that there were none.

Count three charged that in the annulment action in count two petitioner caused, without authorization, Stander to sign Mrs. Stander's name to a document filed in the action, called a general appearance and acknowledgment of service of process, and did not disclose the false signing to the court.

Count four charged that over a period of time petitioner filed 40 annulment actions in Riverside County and in many of them made the same allegations of promise of children and refusal to cohabit mentioned in the first two counts; that some of the parties resided in Los Angeles County, rather than Riverside.

Count five was a general allegation charging no specific acts of misconduct.

The local administrative committee found all of the charges to be true and recommended two years' suspension. The Board of Governors of The State Bar dismissed the third, fourth and fifth counts, but adopted the findings on counts one and two and recommended suspension for two years on the theory that petitioner had violated his oath and duties as an attorney, Bus. & Prof.Code, §§ 6103, 6067, 6068, and Rule 11 of the Rules of Professional Conduct, 26 Cal.2d 35, and had committed acts involving moral turpitude, Bus. & Prof. Code, § 6106.

Petitioner contends that the evidence was insufficient to support the findings on counts one and two, and in that connection, that the great time elapsing between the annulment actions and the disciplinary proceedings placed him at a disadvantage in preparing his defense. There is no dispute as to either of the counts that petitioner represented the persons mentioned in the annulment actions; that those actions were based on the fraud alleged with reference to bearing children as heretofore set forth; that witnesses were called to prove the allegations, and that there were children which were the issue of the marriages involved in those cases and that the annulments were granted. Petitioner asserts the evidence is insufficient to show he knew of the children when he prepared the complaints and tried the actions.

In the Deveux matter, Deveux, although not having a very clear memory on the subject, testified that prior to the commencement of the action, he went to petitioner's office with his wife at her suggestion and signed papers and that petitioner said there was "supposed to be no child involved in the case at all"; that he told petitioner they had a child, but petitioner "didn't want to state in the case, I guess, that there was a child involved"; that petitioner said they should arrange for the child's care between them and it "was not going to be on the papers"; that when they were in petitioner's office, he brought up the subject of the child and "He just came out and told me we would have to make arrangements between us about the child and it would not show on the annulment." The parties had been married in 1945 and consulted petitioner in 1948, when the action was commenced. For corroborating circumstances, respondent refers to petitioner's failure to question his witness, Mrs. Claraday, his stenographer at the time, concerning the matter while he did question her about the Stander case; that he handled both the Deveux and Stander cases within three months of each other; that he told his clients where the marriage was of long standing, the judge might not be willing to grant an annulment.

Petitioner first testified that he had no recollection of the case or conversations in connection therewith except the name of the client and that he prosecuted the action. Later he testified that he did not know of the child and had not told Deveux not to mention it. This testimony was argumentative however. For example, he said, "I never made any such statement at all. Why would I tell him [Deveux]? Perhaps you might say I might tell his wife, my client, but why would I tell him? Why would I tell him this is so? * * *

"I don't know, but I remember such a conversation, but it couldn't have been this case. But if it was, if that was the case, then it wasn't his child. As I say, I can't say this is it, but I remember of a person coming in that had a child, but it was not the child of the man." Again he testified that he remembered the occasion when Mrs. Deveux called at his office in connection with the annulment.

In the Stander case it appears that the Standers had been married in 1927 and separated in 1947, and Stander consulted petitioner in 1948 (the annulment action was filed and judgment obtained in that year). There were two children as issue of the marriage, Robert, 18 or 19, and Joan, 15, when the action was filed. An indictment was returned against petitioner for subornation of perjury, but the criminal proceedings were dismissed before trial. Stander testified that he consulted petitioner and stated that he wanted a divorce. Petitioner suggested an annulment and Stander inquired how he could get an annulment after 20 years of marriage and two children. Petitioner said he could get one. Stander told petitioner of the length of the marriage and the children. A property settlement agreement mentioning the children was admittedly prepared in petitioner's office by his secretary. Stander said it was prepared by petitioner. There was some conflict in his testimony.

Mrs. Stander testified, with reference to the property settlement agreement, that she telephoned petitioner after her husband had left the agreement to be signed by her: "* * * I asked him how come his name wasn't signed. He said it wasn't necessary for his signature to be there. I said it was very strange, and he said not to worry about it. I said, 'Is that an agreement?' He said, 'Yes, it is.' I said, 'Well, my husband brought it to me and I want to know about the part about the money, to see that we get money, my children and I.' He said everything would be taken care of and not to worry. * * *

"Mr. Redwine: But you said, 'Isn't there going to be money for me and the children?

"Mrs. Stander: Yes, I said, 'The part of the agreement about the money, is that going to take care of the children and I?'

He said, 'Yes' and not to worry, but I can see now I did a foolish thing by signing it."

Petitioner testified that he did not know the Standers had any children. This was corroborated by petitioner's then secretary Mrs. Claraday and a Miss Forler, a friend of Stander's, who were present at the conference between Stander and petitioner. Mrs. Claraday also testified with reference to the property settlement agreement that Stander brought it in for her to type; that there was mention of children therein but Stander said he doubted they were his and not to tell petitioner about them.

Duber, an investigator employed by petitioner when the grand jury was investigating charges against him, testified that when he first contacted Stander as to whether he had told petitioner of his children, Stander said it was "dog eat dog" and it was either him or petitioner. Later, when promised the sum of $2,000 he told Duber, and made an affidavit to the effect, that he had not told petitioner about the children. Petitioner claims that little credit may be given to Stander's testimony. He does not mention Mrs. Stander's testimony concerning the telephone conversation she had with petitioner in regard to the agreement. This testimony was not impeached.

With reference to the lapse of time between the offenses and the proceedings be fore The State Bar, it appears that the offenses were committed in 1948. Investigations leading to criminal proceedings were pending in 1949. The hearings before The State Bar began in 1952 and continued in 1953. It does not appear, however, that petitioner was under any greater handicap with reference to recalling past events than the witnesses respondent relied upon. Moreover petitioner eventually recalled the Deveux matter and did remember the Stander case.

The evidence appears to support the charges of unprofessional conduct contained in counts one and two and the only question would appear to be the one of discipline. As stated above the local administrative committee found that all five counts were sustained and recommended that petitioner be suspended for a period of two years. The Board of Governors dismissed counts three, four and five but found that petitioner was guilty of the charges contained in counts one and two and recommended suspension for two years.

The evidence appears ample to sustain the charges contained in counts one and two, and there can be no question that petitioner's conduct as delineated in those counts amounted to moral turpitude. Such being the case the discipline recommended by the Board of Governors of two years' suspension is amply justified.

It is therefore ordered that petitioner be suspended from the practice of law for the period of two years. This order to take effect 30 days after the filing of this opinion.

43 Cal.2d 173

In re WELCH'S ESTATE.

FAIRCHILD v. ADAMS.

L. A. 22681.

Supreme Court of California.

July 2, 1954.

Rehearing Denied July 28, 1954.

Proceeding by brother of testatrix to admit will to probate. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., entered judgment on jury's finding of undue influence denying probate of will, and proponent appealed. The Supreme Court, Spence, J., held that the evidence was insufficient to sustain finding that handwritten will and codicil were procured by undue influence.

Judgment reversed.

Schauer and Carter, JJ., dissented.

Prior opinion, 261 P.2d 18.

1. Wills 🔑155(1)

The "undue influence" which will justify setting aside a will must have been such as in effect to destroy testator's free agency and substitute another person's will for his own.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

2. Wills ⚷163(1)

In action to set aside will for undue influence, evidence must be produced that pressure was brought to bear directly on the testamentary act.

3. Wills ⚷155(1)

Mere general influence, however strong and controlling, will not authorize setting aside will for undue influence, if it does not bear on the testamentary act, and the influence must be used directly to procure the will and must amount to coercion destroying testator's free agency.

4. Wills ⚷155(1)

Mere opportunity to influence mind of testator, though coupled with an interest or a motive to do so, will not authorize setting aside will for undue influence.

5. Wills ⚷166(1)

To justify setting aside will on ground of undue influence, circumstances inconsistent with voluntary action by testator must be shown, and merely proving circumstances consistent with exercise of undue influence is not sufficient.

6. Wills ⚷166(2)

In proceeding to admit to probate will executed by elderly widow shortly after death of husband bequeathing all her property to brother, though brother lived with testatrix at time will was executed and until her death, evidence failed to establish that such testamentary act was the result of any confidential relationship existing between testatrix and brother.

7. Wills ⚷157

Consanguinity does not of itself create a fiduciary relationship between testator and beneficiary under will.

8. Wills ⚷163(6)

That testatrix bequeathed all her property to a brother to the exclusion of a sister and nephews did not make will unnatural as basis for inference of undue influence.

9. Wills ⚷160(1)

Addition of holographic codicil to handwritten will, on the same paper, naming sole beneficiary under will as executor and republishing will, two years after execution thereof, had the effect of re-execution of will and removed any possible taint of undue influence with respect to procurement of will, in absence of any evidence that codicil was the product of undue influence.

10. Wills ⚷166(2)

In proceeding to admit to probate will executed by elderly widow shortly after death of husband bequeathing all her property to a brother who lived with testatrix at time will was executed and until her death, though sole beneficiary may have had opportunity to unduly influence testatrix, evidence was insufficient to sustain finding that handwritten will and codicil were procured by undue influence, in absence of evidence bearing upon the testamentary act or indicating coercion or lack of free agency of testatrix at time will was executed.

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Robert A. Jarrott, Los Angeles, LeRoy Thomas, Berkeley, for appellant.

Austin, Austin, Jones & Chaffee, Irving P. Austin, Compton, for respondent.

SPENCE, Justice.

This is an appeal by proponent Arthur A. Fairchild from a judgment denying probate of a will and codicil.

Myrtle F. Welch died December 22, 1951. She was a widow at the time of death, her husband having died January 21, 1947. She had no children. Her heirs at law and next of kin were two brothers and a sister. By a will dated February 27, 1947, she left all her property to one brother, Arthur A. Fairchild; and by a codicil dated December 26, 1949, she named him to serve as executor without bond. Arthur Fairchild presented the will and codicil for probate. Geraldine F. Adams, the sister of the deceased, contested their probate on the following grounds: (1) unsoundness of mind; (2) undue influence exerted by proponent; and (3) lack of due execution. At the trial following the proponent's prima facie showing of due execution of both the will and the codicil, the third ground of contest was dismissed on motion of the contestant. At the close of contestant's case, the court granted proponent's motion for a nonsuit as to the first ground of contest, leaving for trial only the issue of undue influence. By a vote of 10 to 2 the jury found, in answer to special interrogatories, that both the will and the codicil were procured by the undue influence of the proponent. Judgment denying their probate was thereupon entered; and from such judgment proponent appeals.

Appellant contends that the evidence was insufficient to support the jury's finding of undue influence, and that the trial court committed prejudicial error in the giving and the refusal of certain instructions. It will be unnecessary to discuss this latter assignment of error, for it appears that appellant's contention that the evidence was insufficient to support the jury's finding must be sustained.

[1-4] In Re Estate of Arnold, 16 Cal. 2d 573, at page 577, 107 P.2d 25, at page 27, the rules governing the determination of whether a testamentary instrument is the product of undue influence are stated as follows: "In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. In re Estate of Motz, 136 Cal. 558, 583, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. * * * mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. In re Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.

" 'The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." ' In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872." See, also, In re Estate of Carithers, 156 Cal. 422, 428, 105 P. 127; In re Estate of Lingenfelter, 38 Cal.2d 571, 586-587, 241 P.2d 990; In re Estate of Spaulding, 83 Cal.App.2d 15, 19-20, 187 P.2d 889; In re Estate of Llewellyn, 83 Cal.App.2d 534, 563-564, 189 P.2d 822, 191 P.2d 419; In re Estate of Greenhill, 99 Cal.App.2d 155, 168, 221 P.2d 310; In re Estate of Williams, 99 Cal.App.2d 302, 310, 221 P.2d 714; In re Estate of Dobrzensky, 105 Cal.App.2d 134, 143, 232 P.2d 886. In the light of these settled principles, the evidence viewed most favorably to contestant must be examined.

The testatrix Myrtle, her husband, and her brother Arthur had lived together for a number of years. Arthur was a prospecting mining engineer, and his work took him out of town for weeks at a time. When Myrtle's husband died January 21, 1947, Arthur was not living with them. Myrtle's sister Geraldine made the funeral arrangements. In accordance with Myrtle's wishes, Arthur was not notified of the death until two or three days after the funeral. Meanwhile Myrtle and Geraldine decided that Myrtle should sell her home in Compton and live with Geraldine in Long Beach. Myrtle listed her home for sale with a real estate broker. Each of the sisters then made a handwritten will dated January 28, 1947. Geraldine thereby gave Myrtle the use of her house (not exclusively) for life, with the residue of the estate to go to one of Geraldine's sons. Myrtle left to Geraldine all of her property excepting $6,500, which sum Geraldine was to hold as trustee for Arthur. Both Myrtle and Arthur had received $6,500 from their parents' estate, and thereafter, as they made successive wills over the years, each always bequeathed to the other this amount of family inheritance.

About February 1, 1947, while the two sisters were packing Myrtle's belongings to move to Geraldine's home, Arthur appeared at Myrtle's house in response to Myrtle's letter. Geraldine testified that she saw the letter before it was mailed, and that in it Myrtle asked Arthur to come and take his things out of the garage. Arthur testified that he had long before taken all his belongings from the garage, and that Myrtle had simply written to ask him to come to her at that trying time following her husband's death. The letter was not produced at the trial. Immediately upon Arthur's arrival, a heated discussion developed. Geraldine testified that "the first thing" Arthur said was "Myrtle, now that Fred is gone, you will have to make out a new will, and if you will everything you have to me, I will will everything I have to you." Arthur pleaded with Myrtle to stay where she was and make a home for him. Geraldine had a tantrum. Myrtle and Arthur then went for a ride in his car. When they returned, Arthur told Geraldine "Take your things and get out of here. I am going to stay with Myrtle." Then Arthur and Geraldine began to argue, whereupon Myrtle beckoned Geraldine to come into the yard and Myrtle said: "I have stood all I can stand of fighting. You will just have to do as he says. * * * I will stay here until he gets his things out of the garage, then I will ease him out without fighting."

Thereafter Myrtle and Arthur lived together in Myrtle's home until Myrtle died. The real estate listing was cancelled; and within a few weeks after Arthur's return, Myrtle and Arthur made new wills. Myrtle made the will here involved on February 28, 1947. She thereby left all her property to Arthur. Its approximate value was $18,000. At that time she was 68 years old. Arthur's will left to Myrtle $25,000, part cash and part mining claims of speculative value but apparently all that he had. Then almost two years later and on December 26, 1949, when Myrtle was 70 years old, Myrtle made the codicil here involved naming Arthur executor. At the same time Arthur named Myrtle to act as executrix of his will. No one except Myrtle and Arthur was present when the wills and codicils were executed.

Myrtle was of a mild disposition and tried to avoid quarrels with Arthur. There were disputes with the relatives over the prevailing home arrangements between Myrtle and Arthur, and Arthur systematically excluded Geraldine and her sons from the house. However, Myrtle surreptitiously visited Geraldine in Long Beach when Arthur was away on his frequent mining trips. There was testimony that about two weeks before Myrtle died, Arthur arranged with a mortician for an inexpensive burial service for her rather than the usual funeral; that despite Myrtle's illness of some weeks, Arthur did not summon a doctor until a few hours before Myrtle died; that the mortician found Myrtle's body filthy and emaciated in an unkempt bed; and that when the relatives heard of Myrtle's death, they arranged a proper funeral for her at their own expense, which funeral Arthur did not attend.

Upon this evidence the jury found that Myrtle's proposed will and codicil were the result of the undue influence of Arthur. Motions for judgment notwithstanding the verdict and for new trial were denied. Arthur appeals from the judgment entered on the verdict. He properly maintains that the evidence upon which the jury determined that the disposition which Myrtle made of her property by her will and codicil should be set aside falls far short of the requirements relating to the showing of undue influence under the established rules.

[5–7] It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances must be *inconsistent* with voluntary action on the part of the testator. In re Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816. Arthur, in living alone with Myrtle, may have had the opportunity to unduly influence her but there was no evidence produced by the contestant bearing upon the testamentary act or anything indicating coercion or lack of free agency on the part of Myrtle when she executed the will. The heated discussion among the relatives upon Arthur's appearance at Myrtle's home, when it was finally decided that he and Myrtle should live together, occurred about February 1 and more than three weeks elapsed before Myrtle made her will of February 27, 1947. While by that will Myrtle chose to make her brother Arthur sole beneficiary to the exclusion of her sister Geraldine and certain nephews, such testamentary act does not appear to stem from a confidential relationship existing between Arthur and Myrtle. Rather, the evidence adduced by contestant was all to the contrary, affirmatively and effectively establishing considerable quarreling and bickering among the relatives and Myrtle's attempt to keep peace by not provoking any unnecessary arguments. Consanguinity of itself does not create a fiduciary relationship. In re Estate of Llewellyn, supra, 83 Cal.App.2d 534, 562, 189 P.2d 822, 191 P.2d 419. Myrtle's mental and physical condition was not shown to have been such as to permit a subversion of her freedom of will or to negate her independent management of her own affairs. On the contrary, so far as appears from the record, Myrtle was at all times a clear thinking, deliberate woman, aware of her property holdings and financial situation, and it was not until a few days before her death that her general condition deteriorated.

[8, 9] There was no evidence that Myrtle at any time after making the will expressed any testamentary intentions at variance therewith. While she thereby preferred one relative, her brother Arthur, as beneficiary to other relatives, her sister Geraldine or nephews, such discrimination did not make the will unnatural. In re Estate of Llewellyn, supra, 83 Cal.App.2d 534, 566, 189 P.2d 822, 191 P.2d 419; see, also, In re Estate of Arnold, supra, 16 Cal.2d 573, 588, 107 P.2d 25. Arthur as heir of Myrtle's estate valued at approximately $18,000 did not unduly profit from her will, for he had made his will leaving his property to her, $25,000 in cash and mining claims. He and Myrtle had discussed his mining interests, and she presumably was aware of their speculative nature and the basis of their valuation as a prospective inheritance. Arthur was absent on frequent mining trips for several weeks at a time, when Myrtle might have changed her will, and yet there was no evidence that she ever wished or undertook to do so. Rather, almost two years after execution of the will, Myrtle added a handwritten codicil to her handwritten will, on the same paper, merely appointing Arthur as executor. Manifestly the testamentary disposition of her property was then drawn to her attention, and yet Myrtle did not elect to make any change. While Geraldine argues that Arthur's conduct upon moving into Myrtle's home following the death of Myrtle's husband operated to coerce Myrtle into making the will in question *over three weeks later*, there was no semblance of a showing of any pressure or overpowering activity on his part at or near the time of her execution of the codicil. The latter act had the effect of re-execution of the will and removed any possible taint of undue influence which might be argued with respect to its original procurement. In re Estate of Baird, 176 Cal. 381, 385, 168 P. 561; also annotation 21 A.L.R.2d 823, 831.

Contestant cites the cases of In re Estate of Snowball, 157 Cal. 301, 107 P. 598, and In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384, as authority for affirmance of the finding of undue influence here. But the facts of those cases clearly distinguish them from the present situation. In re Estate of Snowball the contestant, a son of the testatrix, was practically disinherited by his aged mother, who was under the domination of her daughter and made the will in response to her daughter's continued importunities and in conformity with the latter's wishes. There was evidence of the testatrix' declaration of helpless submission to her daughter's control in the daughter's presence, which was not denied. Also false representations relative to the contestant's previous inheritance from his father's will were shown to have been made by the daughter for the purpose of affecting the mother's disposition of her property by the will. In re Estate of Teel the testatrix disinherited the contestant, her only daughter by a former marriage, and left all her property—most of which had been acquired from her former husband, the contestant's father, on his death—to her second husband, to whom the testatrix had been married but a few months and who was the proponent of the will in question. There was evidence that the testatrix had serious mental defects including a suicidal mania, and that she did commit suicide some eighteen days after execution of the will. Under circumstances showing the fiduciary relationship existing between the proponent and the testatrix as husband and wife, his "unduly profiting by the will, * * * its being unnatural, and [his] activity * * * in procuring its execution," it was held that there was "persuasive evidence of undue influence" as found by the jury. 25 Cal.2d 528, 154 P.2d 388.

[10] At most, the record here shows no more than that Arthur was so situated as to have had an opportunity to unduly influence the mind of Myrtle, and that his actions and conduct at times might be regarded as suspicious; but to say that from such evidence it may be found that Arthur "overpowered the mind and bore down the volition of the [testatrix] at the very time the will was made" would be to permit Myrtle's will to be overturned not upon proof but upon speculation. In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872. Moreover, the final testamentary act in question was Myrtle's execution of the holographic codicil republishing her will, and as to which there was not the slightest basis for finding that it was the product of undue influence by Arthur. See In re Estate of Dobrzensky, supra, 105 Cal.App.2d 134, 144, 232 P.2d 886. Under the settled rules, it must be held that there is not sufficient evidence in the record on the issue of undue influence to sustain the jury's verdict, and the will and codicil here in question should have been admitted to probate as the last will and testament of the decedent Myrtle F. Welch.

The judgment is reversed.

SHENK, Acting C. J., EDMONDS and TRAYNOR, JJ., and BRAY, Justice pro tem., concur.

SCHAUER, Justice (dissenting).

In my view the evidence, construed favorable to sustaining the judgment (see In re Estate of Bristol (1943), 23 Cal.2d 221, 223–224, 143 P.2d 689; In re Estate of Teel (1944), 25 Cal.2d 520, 526, 154 P.2d 384; In re Estate of Jamison (1953), 41 Cal.2d 1, 13, 256 P.2d 984), amply supports all essential implied findings of the jury. Accordingly, I would affirm the judgment.

CARTER, Justice (dissenting).

I dissent.

Section 19 of article VI of the Constitution of California provides: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. *The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.*" (Emphasis added.) And section 371 of the Probate Code provides: "Any issue of fact involving * * * the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by a jury, unless a jury is waived * * * ."

The foregoing provisions make it abundantly clear that fact finding in cases involving wills is as essentially the province of a jury as in any other field of the law. I expressed my views in this respect in my dissent in Re Estate of Lingenfelter, 38 Cal.2d 571, at page 588, 241 P.2d 990, and I cannot refrain from reiterating here that the majority of this court has, in this field of the law probably more than in any other, violated express constitutional and statutory mandates by assuming the role of the fact finder and reversing judgments based upon jury verdicts which have not only been approved by the trial judge but have been affirmed by a unanimous decision of a District Court of Appeal and where this court has been divided on the very issue of the sufficiency of the evidence to support the verdict. In this case, we have ten jurors rendering a verdict on the issue of undue influence; we have an able and outstanding trial judge denying motions for a nonsuit, directed verdict, judgment notwithstanding the verdict and for a new trial; and three able and eminent jurists of the District Court of Appeal rendering a unanimous decision affirming the judgment, In re Estate of Welch, Cal.App., 261 P.2d 18—holding the evidence sufficient to establish the issue of undue influence. In addition to the above we have Mr. Justice Schauer and myself on this court—a total of six judges in addition to the ten members of the jury—all of the opinion that the evidence is sufficient to support a finding of undue influence.

It is impossible for me to rationalize or reconcile the position of the majority here with any concept of the well recognized and traditional rule that an issue of fact becomes an issue of law only where the evidence is such that only one conclusion can be reached by reasonable minds. In other words if the evidence is such that reasonable minds might differ as to the conclusion to be reached, the issue is one of fact and not law, and an appellate court is bound by the determination of the trier of fact. I say that I cannot rationalize or reconcile the position of the majority in this case with such a rule when we have ten jurors and six judges taking the position that there is sufficient evidence that the will and codicil were procured by undue influence, and only five justices of this court taking the position that there is no substantial evidence to this effect.

I think it is time that this court should speak more frankly in cases of this character and honestly state the basis or its refusal to recognize the well settled and traditional rule with respect to the question of when there is an issue of fact to be determined. In the case at bar it is obvious that the majority of this court has weighed the evidence and come to the conclusion that it is insufficient to support a finding of undue influence. In so doing the majority has violated the Constitution of this state in depriving the litigants in this case of their right to a trial by jury. The majority has done this by substituting its view as to the weight of the evidence for that of the jury, the trial judge, the three members of the District Court of Appeal and two members of this court. There is no question in my mind but that the majority decision in this case is based solely upon the view that it and not the jury or the trial judge should determine factual issues in cases of this character. This view is in direct conflict with the Constitution and statutes of this state, and in my opinion a judge of this court who concurs in such a decision is violating his oath of office.

To say that there is no evidence of undue influence exercised by the proponent of the will and codicil over the testatrix in this case is shocking to my sensibilities. The evidence shows that when Arthur returned after the death of Myrtle's husband she had made up her mind to sell her home and live with her sister Geraldine. Arthur told her she should not do so. At that time he said to her, "Myrtle, now that Fred is gone, you will have to make out a new will, and if you will everything you have to me, I will will everything I have to you." He then told Geraldine to "Take your things and get out of here. I am going to stay with Myrtle." He then lived with Myrtle and kept her under his surveillance and refused to permit any of her relatives to visit her. She made a will in accordance with his demands within three weeks thereafter. He continued to live with her and keep her under his surveillance for approximately two years and then she executed a codicil naming him as executor without bonds. He permitted her to lie in a filthy bed without medical or nursing care when she was sick and dying and would not permit her relatives to visit her. To say that an inference of undue influence could not be drawn from such conduct is to disregard that which any fair and reasonable minded person would be justified in concluding if they believed the evidence on behalf of contestants.

To my mind the evidence of undue influence in this case is overwhelming, and the reversal of the judgment denying probate to the will and codicil here involved will result in a rank miscarriage of justice. I would therefore affirm the judgment.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

126 Cal.App.2d 804

SAN DIEGO COUNTY
v.
WILLIAMS.
Civ. 4847.

District Court of Appeal, Fourth District,
California.
July 29, 1954.

Action by county to enjoin landowner from violating zoning ordinances passed after landowner had obtained property in question, upon assurances that it was not zoned, for purpose of a trailer park. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment denying injunction, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that the ordinances were unreasonable, arbitrary, discriminatory and void, insofar as they affected defendant's land.

Judgment affirmed.

1. Evidence ⚷25(2)

In zoning matter, court could take judicial notice of the natural effect of some of the considerable business use which had long existed in the block in question, and of the traffic on a nearby railroad and highway, upon the area in question in relation to its desirability for residential use.

2. Municipal Corporations ⚷122(4)

In action by county to enjoin landowner from violating zoning ordinances passed after landowner had obtained land in question, upon assurances that it was not zoned, for purpose of a trailer park, evidence sustained finding that the ordinances were unreasonable, arbitrary, discriminatory and void, insofar as they affected defendant's land.

James Don Keller, Dist. Atty., Bertram McLees, Jr., Deputy Dist. Atty., San Diego, for appellant.

Charles E. Burch, Jr., Brooks Crabtree, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying an injunction in a zoning case involving unincorporated territory.

In April, 1953, the defendant purchased a parcel of land for $23,000, for the purpose of constructing and operating a trailer park, after being assured by the County Planning Commission that the land was not zoned. On April 15, 1953, his request for a building permit was denied. He was told that petitions to zone the property were being circulated, and that the board of supervisors had instructed the building department not to issue the permit.

On April 23, 1953, he filed an action in the superior court against the board of supervisors and the county's Director of Planning and Director of Public Works, seeking a writ of mandate. An alternative writ was issued returnable at 2:00 P. M. on April 29. At 10:00 A. M. on April 29, the board of supervisors adopted an interim ordinance (No. 1299) purporting to zone an area in which this land is located for residential and agricultural use only. The defendants in the mandate action filed an answer setting up this ordinance. A supplement to the petition for the writ was then filed alleging that this ordinance was unfair and discriminatory.

After a hearing, the court found that Williams' land was unzoned up to April 29; that he had purchased the land with the intent of constructing and operating a trailer park, and had expended considerable sums in preparing for that construction; that numerous business enterprises had existed for years in the block in which his property was located; that there was no general or comprehensive plan of zoning covering the area described in the interim ordinance; and that, for specific reasons the interim ordinance was invalid and void, and of no force or effect insofar as Williams' land is concerned. A judgment granting a writ of mandate was entered on May 6, 1953, and such a writ was issued and served on the same day. The defendants in that action filed notice of appeal on May 8, 1953. On May 18, Williams was given a permit by the County Director of Public

Works. On May 20, he was given the necessary permit by the state division of housing. On June 9, 1953, the defendants' appeal in the mandate action was dismissed on motion in this court.

Upon the dismissal of that appeal Williams immediately began construction of the trailer park. On June 23, 1953, the board of supervisors adopted an ordinance (No. 1317) which became effective July 23, 1953, providing the same zoning for the area covered by the interim ordinance (No. 1299). This ordinance contained a saving clause making it inapplicable where construction had been commenced under an existing permit. On July 3, 1953, the "County" brought this action to enjoin Williams from violating Ordinance No. 1299, and Ordinance No. 1317 when it became effective, and to enjoin him from using this property for the purpose of a trailer park.

After a trial the court found the general facts above stated, and found that pursuant to the permits issued subsequent to the mandamus proceeding Williams had commenced construction about June 9, 1953, which had continued up to the date of trial, and that he had expended $6260 pursuant to said permits and had obligated himself for a further sum of more than $10,000.00. It was further found that it is true, "as previously adjudicated in the prior action", that the interim ordinance (No. 1299) is unreasonable, discriminatory and void as to the defendant's land for the following reasons: (1) that other properties in the block in which that land is located have for several years been used for business purposes, including an existing trailer park, a cement brick manufacturing company, a feed store with associated corrals, a licensed truck depot, and a paint store, with a market across the adjoining street to the north; (2) that the adjacent land had been presented for zoning on two occasions, in 1938 and 1947, both of which resulted in a failure to zone; (3) that defendant's land is immediately adjacent to the main line of the Santa Fe Railroad between Los Angeles and San Diego; (4) that said land is immediately adjacent to U. S. Highway 101, with various businesses established on the westerly side of said highway; and (5) that due to its proximity to the railroad and the highway defendant's land is subject to obnoxious noises and vibrations of traffic inconsistent with the zoning restrictions of said interim ordinance. It was further found that at the time of the adoption of the interim ordinance (No. 1299) there was no general or comprehensive zoning plan contemplated by the zoning commission of San Diego County concerning the area covered by that ordinance; that Ordinance No. 1317, which did not become effective until July 23, 1953, is unreasonable, arbitrary, discriminatory and void as to defendant's land for each and every reason set forth in connection with Ordinance No. 1299, and because of the saving clause therein since a permit had been issued and construction had been begun prior to its passage; that the board of supervisors in passing these two ordinances had exercised its power in such a manner as to constitute an unreasonable, oppressive and unwarranted interference with defendant's property rights; and that, insofar as said ordinances are made applicable to defendant's property, the passage thereof has no reasonable relation to the public welfare. A judgment was entered decreeing that defendant's construction of a trailer park on his land is being done under permits lawfully obtained; that Ordinances No. 1299 and No. 1317, and each of them, is null and void and of no force and effect insofar as defendant's land is concerned; and denying an injunction to the plaintiff. From this judgment the county has appealed.

The land included in the interim ordinance (No. 1299) lies between Vulcan Avenue on the west and another road on the east. Its north and south distance along Vulcan Avenue is 2500 feet, and it extends easterly 2370 feet on the north and 1260 feet on the south. There are no east and west roads across that area, but there are three north and south roads easterly from Vulcan Avenue. The Santa Fe tracks are immediately west of Vulcan Avenue, and Highway 101 is immediately west of the railroad right of way. The land immediately west of the highway is zoned for business. The area covered by Ordinance No. 1299 is divided by the north and south roads into four irregularly shaped blocks. Nearly half of that area is in the westerly of these blocks, which faces on Vulcan Avenue, for a distance of 2500 feet. The westerly 300 feet of this long block, along Vulcan Avenue, is zoned under these ordinances as R–3 (Dwelling Groups Zone). This classification includes, among other things, bungalow courts and boarding and lodging houses. The remainder of the area is zoned R–2 (Small Lot Residence Zone). In Ordinance No. 1317, the property to the east of this area is also zoned as R–1 (Large Lot Residence, permitting one dwelling for each 10,000 square feet of area.) The defendant's property fronts on Vulcan Avenue near the middle of that long block, its southerly 300 feet being thus zoned R–3 for dwelling groups, and its northerly and wider 300 feet being thus zoned R–2 for small lot single residences.

The appellant contends that the evidence does not support the findings; that there were few existing businesses in this area in proportion to the number of residential dwellings; that a comprehensive zoning plan is not needed in rural areas, with a small population, as much as it would be in a city; that a zoning plan for an unincorporated area would be equally comprehensive if it includes a substantial area which has undergone sufficient development to justify separate consideration; that in following its policy of formulating zoning plans only in those areas in which "there was substantial evidence of landowner interest" the planning commission was not disregarding its duty to prepare a master plan for the county, as required by Government Code Section 65200, and was not doing anything other than to comply with the statutory mandate that it promote the public interest; that a large discretion is vested in the board of supervisors in the enactment of zone regulations, and every intendment is in favor of such enactments; that zoning regulations had been adopted for areas south of the area in question before April 29, 1953; and that the area easterly from Williams' property was entirely residential and agricultural.

[1] The evidence supports the findings made. The surrounding territory to the east of the highway and railroad track was largely agricultural, as was recognized in both of the zoning ordinances which were passed. The trial court pointed out that a number of businesses had long existed in the long block in which the defendant's land is located, some of which were particularly unfavorable to residence use; that this particular long block was the only area along that side of the highway for a distance of 2 or 3 miles, in which business interests have been permitted to come in; and that, with respect to that block, "The area is not residential; it never will be residential." The correctness of this observation seems to have been largely recognized by the county supervisors and planning authorities since the two zoning ordinances adopted provided for a strip along the westerly side of this entire long block, 300 feet wide at the north and somewhat narrower at the south, in which bungalow courts, boarding and lodging houses and other dwelling groups were permitted, with small lot residences permitted to the east of that strip, and large lot residences provided for in the property east of the property covered by the interim ordinance. The area on the west side of the railroad right of way and highway, opposite this long block, was also zoned for business. Not only was there evidence that considerable business use had long existed in this block but the court could take judicial notice of the natural effect of some of that business, and of the traffic on this railroad and highway, upon the area in question in relation to its desirability for residential use.

[2] There was also evidence that the area covered by the interim ordinance was unzoned until after an alternative writ of mandate was issued. The plaintiff had bought this land for this particular purpose, the escrow being conditioned upon the availability of the land for that use. Upon being informed by the county authorities that the land was not zoned he completed the purchase, and prepared for building, at a considerable expense. When the permit was then refused he brought the

mandate action, and the interim ordinance was passed a few hours before that action was set for hearing. That ordinance was held invalid insofar as defendant's land was concerned, and a writ of mandate was issued directing the board of supervisors and the county's Director of Planning and Director of Public Works to issue a permit for the construction of this trailer park. A permit was then issued in compliance with the writ, and the judgment in that action became final. Construction was started pursuant to that permit before the other ordinance was passed, and that ordinance provided that it should be inapplicable where a permit had been issued and construction started.

The appellant contends that the judgment in the mandate action is not binding upon it since the "County", as such, was not a party to that action. The county's officers and agents, its board of supervisors, Director of Planning and Director of Public Works, being the only agents through which it could act with respect to these matters, were made parties to the former action and the writ of mandate issued was directed to them. In practical effect it was the county, acting through these agents, which obeyed the writ of mandate and issued the permit. "The voice is Jacob's voice but the hands are the hands of Esau." In any event, the facts in connection with that proceeding have an evidential value.

This was an action in equity and, under the circumstances shown by the evidence, the court was justified in finding that such a zoning ordinance was unreasonable, arbitrary, discriminatory and void insofar as it affected the defendant's described land, and in refusing to give the plaintiff the equitable relief which it sought.

A motion to receive certain additional evidence, in the form of inspection reports and additional permits, made and issued by the county's Building Department subsequent to the appeal, was also submitted. This motion is granted and said items, lodged with the court, are made a part of the record.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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126 Cal.App.2d 590

HARLAN v. OTT.

HARLAN v. OTT et al.

Civ. 4830.

District Court of Appeal, Fourth District, California.

July 16, 1954.

Rehearing Denied Aug. 9, 1954.

Hearing Denied Sept. 8, 1954.

Action for money had and received by defendant and to impress a trust upon stock purchased with the money. From adverse judgment of Superior Court, San Diego County, John A. Hewicker, J., the plaintiff appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained finding that money received by defendant was in repayment of amounts due from plaintiff to defendant and defendant was not indebted to plaintiff.

Judgment affirmed.

1. Money Received 🔑18(3)

In action for money had and received by defendant, who had previously made loans to plaintiff, evidence sustained finding that money received by defendant was in repayment of amount due from plaintiff and that defendant was not indebted to plaintiff.

2. Interest 🔑10

In action for money had and received by defendant, who had made loans to plaintiff but had not stipulated in writing against interest thereon, interest was properly considered in determining that money received by defendant was in payment of amount due from plaintiff to defendant. Civ.Code, § 1914.

3. Money Received 🔑18(3)

In action for money had and received by defendant, who was ten years younger than plaintiff and who worked as a domestic servant whereas plaintiff was a well-educated person, evidence was insufficient to establish that defendant, who had made loans to plaintiff, had breached a confidential relationship and unjustly benefited at plaintiff's expense.

4. Joint Tenancy 🔑8

Where defendant regarded money paid to her as her own and in settlement for money loaned to plaintiff, and defendant used the money to purchase stock, title to which she took in her own name, fact that the money had been deposited in a joint account with plaintiff did not reinvest plaintiff with title to one-half the money or the issue thereof.

5. Trusts ⚷89(5)

Plaintiff, who claimed ownership of stock to which defendant held title, must establish by clear and convincing evidence that the stock was held in trust by defendant for the plaintiff.

6. Appeal and Error ⚷1009(2)

Whether the evidence in any particular case is sufficiently clear and convincing must be determined by the trial court, and its determination thereon will be accepted by reviewing court as conclusive.

Joseph S. Campbell, San Diego, for appellant.

Jack L. Oatman and Holt & Macomber, San Diego, for respondent.

MUSSELL, Justice.

On September 23, 1952, plaintiff filed an action, No. 176019, against Anna K. Ott alleging in count one that defendant became and is indebted to plaintiff in the sum of $15,000 for and on account of money had and received by her for the use and benefit of plaintiff, and in a second count that defendant appropriated and converted said sum to her own use. On November 12, 1952, plaintiff filed another action, No. 177113, against Anna K. Ott and the San Diego Gas and Electric Company alleging that plaintiff was the owner of 400 shares of stock in said company, which stock was placed, as a matter of convenience, in the names of plaintiff and defendant as joint tenants; that plaintiff caused said stock to be transferred to the name of the defendant upon an understanding and agreement that defendant would hold said stock for the use and benefit of plaintiff; that defendant then and there became and is trustee of plaintiff for the purpose of holding title to said stock for the use and benefit of plaintiff; that plaintiff was by reason of mental incompetence incapable of transferring said stock and defendant has refused to transfer it to plaintiff. In a second count plaintiff sought to quiet her title to the stock involved. The two actions were by stipulation consolidated for trial.

The court found in the first action that defendant was not indebted to plaintiff in the sum of $15,000 or any other sum and that it was not true that defendant had converted said sum or any other sums belonging to plaintiff to her own use. In the second action the court found that Anna K. Ott purchased said 400 shares of stock from her own funds; that she is the beneficial and record owner of said stock and that plaintiff has no right, title or interest therein; and that plaintiff was not mentally incompetent at the time said stock was transferred in the name of defendant. Judgment was entered that plaintiff take nothing in each of these actions and plaintiff appeals therefrom.

Defendant, who was 71 years of age and unmarried at the time of the trial of this action, came to America in 1899. She worked in New York for about 11 years and there saved approximately $1,000. She then went to Salt Lake City and worked in one home for 8 years at a salary of $50 per month and in another for 5 years at a salary of $60 per month. Defendant testified that she saved all her money, put it in a Salt Lake bank and bought some stock. She met Mr. and Mrs. Harlan in Salt Lake. They were both dentists and all three were affiliated with the Christian Science Church and were close friends. In October or November, 1925, defendant went to Long Beach, California, and at about that time the Harlans moved to San Diego. Defendant testified that at the time she moved to Long Beach she had saved some $6,000 to $8,000 and that the Harlans borrowed $1,000 or $1,500 from her before coming to San Diego and the further sum of $4,333.20 which she had in a bank in Salt Lake City. Defendant worked as a domestic in Long Beach for 5 years at a salary of $100 per month, during which time the Harlans borrowed small amounts of money from her. Defendant testified that she came to

San Diego in the latter part of 1930 or early part of 1931 and at this time she again loaned to the Harlans all the money she had saved, which money was in a joint bank account in Long Beach under her name and that of Mrs. Harlan; that the amount loaned at this time, April 8, 1931, was the sum of $2,105.15.

The bank records of the Salt Lake bank show that defendant had a balance of $4,333.20 on deposit on December 30, 1925, and that the account was closed on that date. The Long Beach account in the Security Trust and Savings Bank was opened in 1925 and closed in 1931 by the withdrawal of $2,105.15. There is testimony in the record indicating that the money borrowed from defendant was used by the Harlans for building purposes. Mr. Harlan died in 1931 and defendant, who was then living with Mr. and Mrs. Harlan, continued to live with Mrs. Harlan until September, 1952. The two ladies were good friends for many years. Defendant worked in the house and yard and also worked at various small tasks for other persons. In 1945 Mrs. Harlan sold a building in San Diego and received approximately $20,000 for her interest therein. On January 15th of that year she wrote a check on her personal bank account, payable to Anna K. Ott, for the sum of $15,000. She delivered the check to defendant and on the same date defendant opened a new account in the First Trust and Savings Bank in San Diego by depositing this check. The signature card which was signed by defendant and Mrs. C. K. Harlan provides that the sums deposited in the account were to be owned by the parties as joint tenants and subject to the order of or withdrawal by either of the parties. The deposit slips indicate that the deposits in this account were made by defendant and the bank records show that the account was closed by defendant on October 19, 1950. The record indicates that the 400 shares of stock involved in the second action filed by plaintiff were issued to Anna K. Ott on September 28, 1950, and other stock certificates issued to Mrs. Harlan and defendant were surrendered at the time. Apparently the purchase money for these certificates came from the joint bank account in the First National Trust and Savings Bank of San Diego.

Mrs. Harlan was adjudged to be incompetent on or about March 23, 1951, and Lucille L. Lassiter was appointed guardian and brought the present actions.

Appellant's first contention is that there were no loans by defendant to plaintiff; or, if any, no intent by defendant to charge interest thereon. However, there is substantial evidence in the record to support a finding that the $15,000 paid to defendant by plaintiff was in fact a repayment of loans made by defendant to the Harlans. Defendant testified that she had loaned them between $14,500 and $15,000 and the bank records indicate that she withdrew $4,333.20 from the Salt Lake bank account on December 30, 1925, and $2,105.15 from the Long Beach bank on April 8, 1931. Defendant testified that she had no writing from the Harlans to show that they owed her money; that she "used to ask" Mrs. Harlan for a note; that they were close friends and she trusted them; that

> "I wanted Mrs. Harlan—I always said to Mrs. Harlan I should have something to show for that. Well Mrs. Harlan said, 'You are secured, Anna.' She had a sister in Michigan, whose daughter is present with us now, and she trusted her, and she said, 'Now, Lottie Rumsey knows about this money that you loaned us, and if anything happened to me that I should pass away, you are secured because she knows about it and she will come out and settle with you.' And she told me that many times. That is the only security I had."

[1] L. D. Reddard, plaintiff's nephew, testified that he had discussions with plaintiff during the last ten years in which Mrs. Harlan stated that she was indebted to or obligated to the defendant; that during the trial he talked with Mrs. Harlan about the $15,000; that she said it was Anna's money and she had returned it to her. Mr. Reddard's daughter testified that on this occasion she heard plaintiff tell her father that the money belonged to Anna. Under the circumstances shown, the trial court's

finding that defendant was not indebted to plaintiff was supported by substantial evidence.

[2] In determining whether defendant was indebted to plaintiff, the trial court indicated that interest on the amounts withdrawn by defendant from the two banks in 1925 and 1931 should be taken into consideration and stated that if interest was allowed on the two loans of $4,333.20 and $2,105.15, the total of principal and interest would amount to the sum of $15,000. Plaintiff contends that no interest was intended and that none should have been allowed. However, section 1914 of the Civil Code provides:

> "Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing." See also New York Cloak & Suit House v. Coston, 94 Cal.App. 94, 270 P. 695.

Since there was no stipulation in writing in the instant case, interest was properly considered in determining that the $15,000 involved was in repayment of amounts due from plaintiff to defendant.

[3] Appellant next contends that defendant breached a confidential relationship and has not overcome the legal presumption that she unjustly benefited at plaintiffs' expense. This argument is without merit. Plaintiff was about ten years older than defendant and was well educated, while defendant was employed for many years as a domestic servant. The two were close friends. Defendant loaned her savings to the Harlans and trusted them to repay her. There is no evidence of fraud or coercion and the evidence introduced is insufficient to support a finding that there was a breach of the confidential relationship by the defendant.

Appellant finally contends that the joint tenancy bank account reinvested plaintiff with title to one-half of the $15,000 and the issue thereof. In this connection appellant cites the case of Paterson v. Comastri, 39 Cal.2d 66, 244 P.2d 902, 905, as sustaining her contention. However, the court in that case in discussing section 15a of the California Bank Act, 1 Deering's Gen. Laws 1937, Act 652, pp. 221–222, said:

> "This section, which was copied from the New York Bank Act, has been construed by the courts of this state and of New York to set up two presumptions: First, that a deposit in the names of the depositor and another person 'in form to be paid to' either or the survivor of them, becomes the property of such persons as joint tenants. This first presumption is not conclusive, and may be overcome by proof that the owner-depositor, when making the deposit, had no intention to create a true joint tenancy. The second presumption, that in the absence of fraud or undue influence, it was the intention of the depositors to vest title in the survivor, is conclusive. In order that the conclusive presumption may be applicable, however, there must be survivorship, and even then it applies only in favor of the survivor to monies still remaining in the account at the time of death. It does not apply in respect to monies withdrawn by either of the depositors during life, even if one of the depositors has subsequently died. Wallace v. Riley, 23 Cal.App.2d 654, 661, 74 P.2d 807; Moskowitz v. Marrow, 251 N.Y. 380, 396, 167 N.E. 506, 512, 66 A.L.R. 870; Matter of Porianda's Estate, 256 N.Y. 423, 425–426, 176 N.E. 826; Matter of Juedel's Will, 280 N.Y. 37, 40, 19 N.E.2d 671; Walsh v. Keenan, 293 N.Y. 573, 578, 59 N.E.2d 409."

It was there held that the statutory presumption of equality of interest arising from the form of a joint account is rebuttable by competent evidence showing the true character and ownership of the monies deposited where one codepositor withdrew funds from the account during the lives of the codepositors and on page 72 of 39 Cal.2d, on page 906 of 244 P.2d it is said:

> "Since its enactment, section 15a of the Bank Act has been deemed a part of each contract creating a joint bank account. Wallace v. Riley, supra, 23

Cal.App.2d 654, 666, 74 P.2d 807. The presumptions created by that section are therefore applicable regardless of the unequivocal nature of the deposit agreement; and to the extent that parol evidence of intention becomes admissible in certain types of controversies to overcome the rebuttable presumption and to show the 'realities of the ownership'. Wallace v. Riley, supra, 23 Cal.App.2d at page 664, 74 P.2d at page 813, the section effects a statutory modification of the parol evidence rule with respect to bank accounts established in the statutory pattern. To hold otherwise 'would do violence to intention, for those who open such accounts have seldom any thought of restricting their enjoyment of the fund, their right to draw and spend, by the shackles of a formula. * * * It would foster litigation, for each of the two depositors, the one opening the deposit as fully as the other, would be subject to an accounting for moneys afterwards withdrawn, and forced to make division on the footing of equality.' Cardozo, Ch. J., in Moskowitz v. Marrow, 251 N.Y. 380, at page 397, 167 N.E. 506, at page 512, 66 A.L.R. 870. See, also, Spear v. Farwell, supra, 5 Cal.App.2d 111, 42 P.2d 391; In re Kellogg, supra, 41 Cal.App.2d 833, 107 P.2d 964."

[4] In the instant case there is evidence that the defendant regarded the $15,000 involved as her own money and that it was paid to her in settlement for money loaned to the Harlans. She testified that she never invested any part of the $15,000 for Mrs. Harlan's benefit and the fact that she took title to the stock involved in her own name indicates that she did not intend to give half of the proceeds of the $15,000 check back to Mrs. Harlan.

[5, 6] The burden was upon plaintiff to prove by clear and convincing evidence that the stock involved was held in trust by defendant for plaintiff, where, as here, the stock was in defendant's name. Palmer v. Burnham, 72 Cal.App.2d 626, 165 P.2d 50. And as was said in that case, 72 Cal.App.2d at page 628, 165 P.2d at page 51: " 'Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive.' " (Citing cases.) In Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3, 6, the court said:

> " 'It is fundamental that where a judgment is attacked on the ground that it is not supported, the power of the appellate court ends when it shall once have determined that there is substantial evidence which will support the conclusions of the trial court.' Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478. And that rule is applicable where the action is one to enforce a resulting trust. Whether the evidence to prove the existence of the trust is clear, satisfactory and convincing 'is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' Stromerson v. Averill, supra, 22 Cal.2d at page 815, 141 P.2d at page 736. See, also, Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. Likewise, in such cases the credibility and weight of the evidence are exclusively for the trial court."

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

126 Cal.App.2d 487

DOLBERG

v.

PACIFIC ELECTRIC RY. CO. et al.

Civ. 19908.

District Court of Appeal, Second District, Division 1, California.

July 13, 1954.

Hearing Denied Sept. 8, 1954.

Action by truck driver against railway company for damage resulting from collision between truck and electric train. The Superior Court, Los Angeles County, Stanley Mosk, J., after verdict for railway, entered order granting truck driver new trial. The Railway appealed. The District Court of Appeals, Drapeau, J., held that trial court's ruling that hearsay declarations of train motorman, made 10 to 15 minutes after accident and admitted in evidence, were not spontaneous and were made so long after time of accident as to indicate probability of deliberate design and were therefore inadmissible, did not constitute abuse of discretion.

Order affirmed.

1. Evidence ⚿121(1)

The rule that hearsay declaration, made under immediate influence of occurrence to which it relates and so near time of such occurrence as to negative probability of fabrication, is admissible as part of res gestae must be administered with sound judicial discretion.

2. Evidence ⚿121(1)

Hearsay declarations to be admissible in evidence under res gestae rule must have been spontaneous and unreflected, must have been made before there was time to contrive and misrepresent, and must have been related to circumstances of occurrence preceding them.

3. Appeal and Error ⚿970(2)

Ruling of trial judge upon admissibility of hearsay declarations under res gestae rule will not be disturbed on appeal unless he abused his discretion.

4. Evidence ⚿123(10)

In action for damage resulting from collision between truck and electric train wherein jury returned verdict for defendant railway, trial court's ruling, that hearsay declarations of train motorman, made 10 to 15 minutes after accident and admitted in evidence, were not spontaneous and were made so long after time of accident as to indicate probability of deliberate design and were therefore inadmissible, did not constitute abuse of discretion.

Spray, Gould & Bowers and Malcolm Archbald, Los Angeles, for appellants.

Paul Braslow, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff, Sam Dolberg, was driving his Chevrolet panel truck across the right of way of defendant, Pacific Electric Company, when he was struck by defendant's 2-car electric train. Plaintiff's action for damages, tried by a jury, resulted in a verdict for defendant.

The trial court determined it was error in law to have permitted testimony of statements made by the motorman of defendant's train to a police officer. For that reason plaintiff's motion for a new trial was granted. Pacific Electric Company appeals from the order granting a new trial.

Whether or not this testimony was hearsay or was admissible under the res gestae rule is the only question for decision in this case.

The officer and his partner were notified of the accident at approximately 6:50 p. m. They arrived at the scene at approximately 6:55 p. m. No one testified as to the exact time of the accident.

Five or ten minutes after his arrival the officer found the motorman of the train, and talked with him. Over plaintiff's objection the officer stated in detail what the motorman told him. The officer testified that the motorman said, "He estimated that his speed at the time was approximately 25, and he felt that the car was going about 25 to 30. He noticed at that time that the car was skidding, appeared to be stopping; and just as it came to a stop on the tracks the train hit it. He estimated that his speed at the time was approximately 15 miles an hour on impact."

The officer further testified that the motorman told him that "he hit his emergency air brakes" as soon as he saw the automobile approaching and that he felt that he was doing approximately 25 miles an hour as he approached the intersection.

Without repeating all of the hearsay, it may fairly be said that the testimony of this witness, corroborative of the motorman's testimony on the trial, must have materially added to the weight of defendant's case with the jury.

Pacific Electric Company relies upon the leading case of Showalter v. Western Pacific Railroad Co., 16 Cal.2d 460, 106 P.2d 895. In that case the California rule first enunciated in People v. Vernon, 35 Cal. 49, is repeated and approved, 16 Cal.2d at page 465, 106 P.2d at page 898:

"Declarations which are voluntary and spontaneous and made so near the time of the principle act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible."

Many cases decided after People v. Vernon departed from the rule above stated. These cases applied an improper test, to-wit: that the utterances must have been made before the principal act itself was completed. See cases cited 16 Cal.2d at page 465, 106 P.2d 895 in the Showalter case.

So the narrow rule of these cases was disapproved. "* * * where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication, said declaration is admissible." Showalter case, 16 Cal.2d at page 467, 106 P.2d at page 899.

[1] But it is to be remembered, as Mr. Justice Carter points out in the Showalter case, that this more liberal rule of necessity requires the exercise of a judicial discretion by the trial court. Thus we have a scientific legal approach to the proper application of the rule of res gestae —a basic rule to be administered with sound judicial discretion.

[2] The element of time alone is not and should not be controlling. To determine whether or not hearsay declarations are admissible in evidence it is the duty of the trial judge to consider and to say whether or not all of the elements necessary to the application of the res gestae rule are present. Was the utterance spontaneous and unreflected? Was it made before there had been time to contrive and misrepresent? And was it related to the circumstances of the occurrence preceding it? Wigmore on Evidence, 2d Ed., sec. 1750.

[3] In the Showalter case the corollary to the basic rule is also stated: That the trial judge before whom the witness has appeared is better prepared to pass upon the admissibility of such statements than is an appellate court, and the ruling of the trial judge will not be disturbed unless he has abused his discretion. See also Coryell v. Clifford F. Reid, Inc., 117 Cal.App. 534, at page 536, 4 P.2d 295.

[4] The judge's ruling in this case was to the effect that the declarations were not voluntary and spontaneous, and were made so long after the time of the accident as to indicate the probability of deliberate design. This Court finds no abuse of discretion in that ruling.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

126 Cal.App.2d 468

BERNSTEIN v. MAIMES (two cases).

Civ. 19818, 19819.

District Court of Appeal, Second District, Division 3, California.

July 8, 1954.

Hearing Denied Sept. 2, 1954.

Consolidated actions for malicious prosecution. The Superior Court, Los Angeles County, Stanley Mosk, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Parker Wood, J., held, inter alia, that evidence presented question for jury as to whether defendant had probable cause in procuring institution of criminal proceedings against plaintiffs.

Affirmed.

1. Malicious Prosecution ⚿71(2)

Evidence in malicious prosecution action presented question of fact as to whether defendant, who instigated criminal prosecution of plaintiff on ground that plaintiff had been an employee and had taken money belonging to defendant, in which prosecution plaintiff claimed to have been a partner in the business, had probable cause for the prosecution.

2. Malicious Prosecution ⚿3

One may be civilly liable for malicious prosecution without personally signing complaint initiating criminal proceeding.

3. Malicious Prosecution ⚿64(1)

Evidence was sufficient in malicious prosecution case to support implied finding of jury that defendant had procured prosecution of plaintiff, though criminal complaint had been signed by city prosecutor, not defendant.

4. Trial ⚿252(6)

In malicious prosecution case, court did not err in refusing to give instructions to effect that if defendant, in procuring institution of criminal proceeding, had acted in good faith upon advice of counsel after having made full and fair statement of facts of case to counsel, he was not liable, in absence of evidence that defendant had been advised by counsel.

5. Evidence ⚿318(2)

Letter, written by city prosecutor, advising addressee that as result of investigation, city prosecutor's office was prepared to file criminal complaint against named persons charging petty theft from addressee, was hearsay and was properly excluded in malicious prosecution action against addressee, who offered letter to show that unsuccessful criminal proceedings were instituted by city prosecutor on his own initiative without pressure from addressee.

6. Malicious Prosecution ⚿72(1)

Evidence in malicious prosecution case was sufficient to justify instruction that defendant had caused criminal complaint to be issued against plaintiff.

7. Malicious Prosecution ⚿71(2)

When evidence in malicious prosecution case is in conflict on question of probable cause, it is province of jury to determine whether facts exist which warrant or reject inference of probable cause, but if there is no dispute concerning existence of facts relied on to show want of probable cause, trial judge must then determine, as matter of law, whether such undisputed facts do or do not warrant inference of want of probable cause.

8. Appeal and Error ⚿882(12)

Appellant could not complain of instructions given at his request.

9. Malicious Prosecution ⚿72(2)

In malicious prosecution case, instructions as to probable cause were adequate.

10. Malicious Prosecution ⚿69

Award of $9,115, to person who was arrested in his store in presence of customers, who was kept in jail for approximately six hours, whose prosecution extended over period of two weeks, whose inactive tubercular condition was reactivated, who was not able to become active in business again until two months after criminal trial, during which time he incurred payroll expenses of $192 a week though business did not have income during such period, and who paid $140 to court reporter and $75 for bond and who became obligated to pay $1,400 for attorney's fees, was not excessive for malicious prosecution.

11. Malicious Prosecution ⚷69

Award of $2,300, to person who was arrested on petty theft charge, whose earnings prior to arrest were about $75 a week, who after arrest was unable to attend to business for approximately six weeks, who received no income during six weeks period, whose earnings thereafter were about $35 a week, and who paid $250 for attorney's fees and $50 for bond, was not excessive for malicious prosecution.

12. New Trial ⚷99

Where there was sharp conflict in evidence, claimed to be newly discovered, as to authenticity of the evidence, and there was meager showing as to exercise of due diligence in effort to produce such evidence at trial, and evidence would have been cumulative, there was no abuse of discretion in denying motions for new trial.

◆

A. Brigham Rose and Irving Sulmeyer, Los Angeles, for appellant.

David Schwartz, Arthur S. Wolpe, Beverly Hills, and Merton L. Schwartz, Los Angeles, for respondents.

PARKER WOOD, Justice.

These two actions for damages for malicious prosecution were consolidated for trial and, in a trial by jury, judgments were for plaintiffs. Defendant appeals from the judgments and the orders denying his motions for new trials.

Plaintiff Samuel Bernstein (referred to herein as Samuel) and defendant Maimes had been acquaintances about fifteen years. In the view of the evidence most favorable to plaintiffs, some of the facts are as follows: In 1949, Samuel told Maimes that he intended to open an upholstering business. Maimes, who intended to open a furniture and upholstering business on Pico Boulevard in Los Angeles, suggested that they go into the upholstering part of the business together on a fifty-fifty basis. The furniture store was to be in the front part of the building and the upholstering department was to be in the rear part. A few days thereafter they had a conversation in which Maimes said they would open the upholstering shop; that Samuel would be the outside man and would produce the business and Maimes would take care of the inside and they would "split half and half." It was also said in that conversation that Samuel would use his own truck in the business and would not charge for the wear and tear expense of it; that Maimes would not charge rent for the upholstering part of the store building; that no expenses would be charged to the upholstering department except the cost of labor and material.

Samuel testified, on cross-examination, that he was the sole producer of the business in the upholstering department and that Maimes was to get fifty per cent of the business produced by Samuel after deducting cost of labor and material.

In May, 1950, they opened the upholstering department for business—as a part of the Maimes Furniture and Upholstering Company (referred to as Maimes Company).

In July, 1950, plaintiff Benjamin Bernstein (referred to herein as Benjamin), who is the brother of Samuel, was employed as a salesman in the upholstering department upon a commission basis of 12%.

Samuel obtained orders for upholstering, and at times Maimes gave him $50 or $80 or $100 but, according to the testimony of Samuel, Maimes never gave him an accounting as to the profits. Samuel testified that he kept insisting on an accounting and that he told Maimes if he did not get an accounting he would leave and open a store of his own; that in January, 1951, after Maimes had failed for thirteen weeks to give any figure at all, he (Samuel) left that business, and in February, 1951, he opened an upholstering store in Santa Monica. Benjamin also left the Maimes Company in January, 1951.

While Samuel was at the Maimes Company he obtained orders for upholstering in the approximate amount of $30,000. In taking such orders it was the custom to take them in the name of the company, and it was the custom in paying for the orders to make the checks payable to the company. During the time Samuel was with the company he received orders for upholstery work from a Mrs. Lawson in the amount of approximately $800. In making payments on account of the orders, she gave him five checks which, at his request, were made payable to "cash." The checks were for the total amount of $709.90. He cashed four of the checks (totaling $634.90); and his brother, Benjamin, cashed one of them—the $75 check.

About March 1, 1951, Maimes went to the office of the district attorney and told a deputy district attorney that Samuel and Benjamin had stolen the money which Mrs. Lawson had paid for upholstery work. After conferring with the deputy district attorney (as hereinafter shown in the testimony of the deputy), the deputy told him to see the City Prosecutor of Santa Monica. Maimes then went to the office of the city prosecutor and conferred with him. He issued a complaint charging Samuel with four counts of petty theft and charging Benjamin with one count of petty theft. The complaint was signed by a police officer. The city prosecutor was too ill to appear as a witness in the present case.

On March 13, 1951, Samuel and Benjamin were arrested upon said charges, were put in jail for approximately six hours, and then released on bond. In a trial upon the charges they were acquitted.

The complaints for damages in the two present cases were based upon the prosecution and acquittal in said criminal action. Samuel contended at the trial of the present case that he was a partner of Maimes in the upholstery business. Maimes contended that Samuel was an employee of the company.

Samuel testified that he paid to Jack Maimes, the son of defendant Maimes, $306 of the money he received from Mrs. Lawson. (Jack is the manager of the Maimes Company.) Samuel also testified that Benjamin cashed the $75 check for Samuel; that he (Samuel) retained money from the Lawson job because he needed it, and in each instance when he took money on that job he told Jack Maimes or defendant Maimes.

Mrs. Lawson, called as a witness by defendant, testified that on August 22, 1950 she ordered certain upholstery work from Samuel; he asked her to make the check "to cash" because he was going to the upholstery material place to buy material and prices were going higher and he had to say, at the door of the place, how many yards he wanted; she complied with his request and made the check for $182.40; on August 23, 1950, she gave him another order with the understanding that the work would be done at a later date; he told her that prices were going higher and that if she would give him the money for the material he would buy it and hold it until time to do the work; he asked her to make the check "to cash"; she complied with his request and made the check for $252.50; on December 15, 1950, he told her that he would like to have $75 for labor and that he would start the work at once; he asked that the check be made "to cash"; she complied with his request and made the check for $75; on February 13, 1951, he told her he wanted $100 for labor and asked that the check be made "to cash"; she complied and gave him a check for $100; on February 16, 1951, at his request, she gave him another check for $100 which was payable "to cash." She also testified that in August, 1950, when she gave Samuel the first order, he wrote the order and gave her a document (customer's yellow copy from the order book—Exhibit B) and the top of it had been torn off (the torn off top contained the name, address, and telephone number of the Maimes Company); that Samuel wrote his telephone number on the document.

Maimes testified that in April, 1950, Samuel came to the building on Pico Boulevard where Maimes was getting ready to open a store and asked for employment as a salesman; Maimes replied that he knew from the way Samuel had transacted business in Detriot he (Maimes) did not care to be associated with him; Samuel said that he would change his way of doing business and Maimes would not have any trouble with him; Maimes finally said that he would employ him upon a commission of 10 per cent; Samuel said he wanted 12 per cent because he would use his own truck; Maimes replied that he would give him 12 per cent but he wanted it understood that any deposit a customer gave him would be paid to the Maimes Company; there was no change thereafter in the arrangement regarding employment; Samuel did not have a drawing account but occasionally Maimes gave him money in advance, which was to be deducted from his commission when a job was completed; Samuel obtained orders in the amount of approximately $24,000 while he was with the Maimes Company; Maimes never received an order blank from Samuel for the Lawson job; in the latter part of February, 1951, Maimes saw the Lawson order blank (Exhibit B, with the top torn off) at Mrs. Lawson's home; he never received any of the money represented by the five checks signed by Mrs. Lawson; when he showed the five checks to Samuel, he (Samuel) said that he was guilty and that he had taken the money because he wanted to go into business for himself; Maimes presented to the city prosecutor the information Maimes had regarding the Lawson matter; he told the prosecutor the "same thing" he had told the deputy district attorney; the testimony of the deputy district attorney, as to what Maimes told him, was correct; it was at the trial of the criminal case, that Maimes first learned that Samuel claimed to be a partner; he (Maimes) had been convicted of a felony; with reference to notations on several checks which Maimes had drawn in favor of Samuel, the notations "Salesman's expenses" or "Commissions in Full to date" or similar words which are thereon, above the endorsement of Samuel, were not on the checks when the checks were given to Samuel; Maimes wrote those notations above Samuel's endorsement during the trial of the criminal case, after he (Maimes) learned that Samuel was claiming to be his partner; he (Maimes) testified in the criminal case that those notations were on the checks at the time the checks were given to Samuel.

Jack Maimes, called as a witness by defendant, testified that he is manager of the Maimes Company; during May, 1950, Samuel asked Maimes on two occasions, in the presence of Jack, for a job as upholstery salesman; on the second occasion Maimes said he would hire Samuel and pay him a commission of 10 per cent; Samuel asked him to make it 12 per cent; Samuel never reported to Jack that he (Samuel) was deducting money from deposits on upholstery jobs; the Lawson furniture was not brought to the store under Mrs. Lawson's name: Samuel said the furniture belonged to Mrs. Korchek and Mrs. Brady, that since they had not selected the fabrics he did not have any deposit from them, and he would make out the bills later; Samuel did not tell Jack that he had received any money on the Lawson job; Samuel did not pay any money to him in connection with that job; on February 27, 1951, Jack went to the home of Mrs. Lawson and learned for the first time that the furniture which was in the names of Korchek and Brady actually belonged to Mrs. Lawson; on two occasions Samuel said "[L]et's figure up and see what my commission is"; Jack never heard Samuel ask for an accounting.

Mr. Aggeler, the deputy district attorney, testified that Maimes and Mrs. Lawson came to his office about March 1, 1951; Maimes said that he ran a furniture store and that Sam and Ben Bernstein work for him; Mrs. Lawson had furniture in his store for repairs; Sam had solicited upholstery work from Mrs. Lawson and collected money from her by check and had not turned it in to Maimes Company; Maimes asked Sam about collecting the money and Sam said, "Well, I have stolen your money" and "I am a thief"; Maimes said he wanted Sam and Ben Bernstein prosecuted; four checks signed by Mrs. Lawson were presented to him (Mr. Aggeler); he asked Maimes if Sam and Ben were his employees; Maimes replied that they were, and that they were working on a commission basis; he asked Maimes if they were his partners, he replied that they were not; he (deputy) said: "I have had experience * * * where one person claims the other stole from him, and when your prosecution has been started, the fellow who is supposed to have done the stealing turns out to be the other man's partner. * * * Is there anything here of a partnership arrangement, because I don't want to start the ball rolling on a prosecution and have it blow up in my face"; Maimes replied that they were not partners, that they work for him and are his employees; he (deputy) said that since four of the checks were for amounts under $200 he thought it would be better to have four petty theft counts than to have one grand theft count and, for that reason, he would telephone the City Prosecutor of Santa Monica and tell him that he was sending Maimes to see him; then he called the city prosecutor and said he was sending Maimes to see him.

[1] Appellant contends that as a matter of law there was probable cause for the prosecution. He refers to several undisputed facts (such as requesting that checks be made payable to cash, cashing the checks, failure to remit all the money, handing Mrs. Lawson a purported copy of order with the top torn off) and asserts that those facts were sufficient as a matter of law to show the existence of probable cause. This contention is not sustainable. There were questions of fact as to whether Samuel was an employee or partner, whether he told Maimes that he received the money and was applying it on account of money due him, whether the top of the order blank was torn off accidentally in removing the blank from the book, and whether Maimes believed that theft had been committed. The matter of Maimes' good faith in charging theft was brought seriously into question by his testimony in the present case to the effect that he made notations on several checks, above the endorsement signature of Samuel, for the purpose of creating evidence that Samuel was an employee. Under such circumstances it cannot be said that as a matter of law probable cause existed.

[2, 3] Appellant also contends that the evidence shows, as a matter of law, that he did not procure the institution of the criminal proceeding. His argument is that he did not sign the complaint and that the proceeding was instituted by the city prosecutor. "One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding." Centers v. Dollar Markets, 99 Cal.App.2d 534, 544, 222 P.2d 136, 143. It was also said on page 544 of 99 Cal.App.2d, on page 144 of 222 P.2d of the case just cited: "'[T]he test of liability in an action for malicious prosecution is whether the defendant was actively instrumental or was the proximate and efficient cause of maliciously putting the law in motion.'" It was a question of fact as to whether appellant procured the prosecution. The evidence was sufficient to support the implied finding of the jury that he did procure the prosecution. This contention is not sustainable.

[4] Appellant also contends that the court erred in refusing to give two instructions, requested by appellant, regarding advice of counsel to the effect that it is a defense in a malicious prosecution action if the defendant acted in good faith upon the advice of counsel after having made a full and fair statement of the facts of the case to the counsel. This contention is not sustainable. The evidence does not show that Mr. Aggeler, the deputy district attorney, gave Maimes advice as to whether a criminal proceeding should be commenced. The deputy district attorney merely told him to see the city prosecutor. There was testimony by Maimes that he told the city prosecutor the "same thing" he had told the deputy district attorney, but there is no evidence as to what the prosecutor told Maimes. It was stipulated that the prosecutor was too ill to be a witness. Since there was no evidence that appellant was advised by counsel, the court was not required to give an instruction regarding advice of counsel.

[5] Appellant also contends that the court erred in sustaining plaintiffs' objection to his offer in evidence of a letter (defendant's Exhibit M for identification) which purportedly was written by the city prosecutor. The letter, dated March 13, 1951, and addressed to Maimes, stated in part: "This office has reviewed the activities of the above subjects [Sam and Ben Bernstein]. * * * As a result of our investigation, we are preparing to file a

criminal complaint against Sam Bernestine and Ben Bernestine, charging four counts and one count respectively of petty theft from you. * * * J. Leroy Irwin Deputy City Attorney City Prosecutor." Appellant argues that the statement therein which begins with the words "As a result of our investigation" shows that the city prosecutor instituted the criminal proceeding on his own initiative and that there was no pressure by appellant. The objection to the offer of the letter was sustained on the ground that the letter was hearsay. There was no evidence as to the authenticity of the letter. The court did not err in sustaining the objection.

[6] Appellant contends further that the court gave an inaccurate instruction. The instruction so referred to is set forth below.[1] Appellant's counsel asserts that the instruction "is false in stating that defendant did cause the complaint to be issued." Contrary to that charge of falsity by Mr. Rose (counsel for appellant), the record does show that defendant said that he caused the prosecution and the issuance of the complaint. Appellant's counsel at the trial (Mr. McCarthy) asked appellant the following question: "At the time that you caused the prosecution of Sam and Ben Bernstein, did you believe that they had embezzled your money?" Appellant answered: "I knew it." Thereafter the question was read and appellant's counsel said: "I am referring now to when you caused the issuance of the complaint through the City Prosecutor's office." Appellant then said: "I knew it, yes." Thereafter his counsel asked: "Then at that time that you caused the complaint to be issued through the City Prosecutor's office—I assume it was in March, 1951—." Appellant said: "Yes, it was in March." It thus appears that the said statement in the instruction was not inaccurate.

[7–9] Appellant contends further that the court erred in permitting the jury to pass on the issue of probable cause. He argues that the question of probable cause is one of law to be determined by the court; and that the opinion of the jury as to the existence of facts involved in the determination of probable cause may be obtained (1) by use of the special verdict or (2) by submitting "the question of probable cause to the jury with hypothetical instructions as to what facts in the particular case do or do not amount to probable cause." At the trial the appellant did not request the use of the special verdict, as now suggested; nor did he request instructions embodying such hypothetical matters, as now suggested by him. "When the evidence bearing on the question of probable cause is in conflict, it is the province of the jury to determine whether facts exist which will warrant or reject an inference of probable cause. However, if there is no dispute concerning the existence of the facts relied on to show want of probable cause, the trial judge must then determine, as a matter of law, whether such undisputed facts do, or do not, warrant an inference of want of probable cause." Centers v. Dollar Markets, supra, 99 Cal.App.2d 534, 541, 222 P.2d 136. The court herein gave an instruction that plaintiffs must prove, by a preponderance of the evidence, that defendant was guilty of malice and was without probable cause in prosecuting the plaintiffs. It also gave instructions as shown below.[2] A notation at the bottom of the instructions is "Requested by Defendant Given as Modified." The modifications were not materially signifi-

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[1] "In this case the defendant has stated that he related all the facts which were the basis of the criminal proceeding against the plaintiffs, to the City Attorney, and that he did, in fact, cause the complaint to be issued. If you find that in causing the issuance of a criminal complaint against the plaintiffs that the defendant made false and incorrect statements, or intentionally withheld material facts relating to the alleged offense of the plaintiffs, this may be considered by you in determining whether or not there was a lack of probable cause."

[2] "Probable cause is defined under our law as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

"Probable cause for the institution of an action does not mean legal cause therefor, but only an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong cant.[3] It thus appears that appellant (defendant) requested instructions which are the kind of instructions that he now asserts should not have been given. The instructions, so requested by him, were given after being modified in minor respects. Appellant cannot complain of instructions given at his request. Bivens v. Haber, 105 Cal.App.2d 628, 629, 233 P.2d 923. In Siffert v. McDowell, 103 Cal.App.2d 373, 229 P.2d 388, which was for damages for malicious prosecution the trial court, at the request of defendant, gave an instruction properly defining probable cause and other elements of malicious prosecution. Upon appeal by defendant therein, defendant contended that probable cause was not a question of fact for the jury but was one of law for the court. The court on appeal said, 103 Cal.App.2d at page 377, 229 P.2d at page 390: "With only minor changes appellants' requested instructions on probable cause, etc. were given by the trial court. These instructions embraced proper definitions and explanations of the elements of malicious prosecution which were to be applied by the jury to the facts in evidence." The evidence herein regarding probable cause was conflicting and the determination of the question of probable cause was for the jury. The instructions as to probable cause were adequate.

[10, 11] Appellant also contends that the amounts of damages awarded were excessive. Judgment for Samuel was for $9,115 and judgment for Benjamin was for $2,300. They were arrested in their store in Santa Monica in the presence of customers and were taken to the police station where they were fingerprinted, photographed, and kept in jail for approximately six hours, and then were released on bonds. The trial of the criminal case was commenced on March 28, 1951 and extended over a period of two weeks. Samuel testified that prior to the arrest he had had tuberculosis and that after the arrest the tuberculosis was reactivated; he was not able to become active in business again until two months after the criminal trial; during the time he was absent from his business he did not earn anything but he kept an upholsterer and a seamstress on his payroll and paid them $125 and $67 a week

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to warrant a reasonable man in believing that such action is proper.

"What is or is not probable cause is measured and determined by the usual and common standard of human judgment and conduct, the true test being whether or not a reasonable man, possessing all of the information within the knowledge of the prosecutor, would be justified in entertaining the suspicion that the charge is true, and this measure of the knowledge of the prosecutor must be applied as of the time that the prosecution was instituted, and, in addition, it must be shown that the prosecutor did at the time he verified the criminal complaint actually believe that the crime charged had been actually committed by the accused."

"It is not necessary that the prosecuting witness shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether the accused has any defense to the charge; nor is he required to exhaust all sources of information bearing upon the facts which have come to his knowledge.

"It is the policy of the law that, whenever a citizen shall have reasonable cause to believe that a crime has been committed, he shall be protected in his efforts to secure the punishment of the offender, and he is not to be mulcted in damages, because the defendant is able at the trial to establish his innocence, if he caused the arrest in good faith and without malice, and the facts within his knowledge were of such a character as to induce in the mind of a reasonable man the honest belief that a crime was committed."

[3] Prior to modification, the first instruction referred to below contained a first paragraph which was as follows: "You are instructed that if the defendant Sam Maimes had probable cause to support the prosecution of the plaintiffs Sam Bernstein and Ben Bernstein then your verdict must be for the defendant Sam Maimes." The modification consisted of: (1) striking out said first paragraph; (2) striking out the words "follows: Probable cause may be defined as" which were in the second paragraph line one, after the word "as"; and, in the second instruction referred to below, changing the words "prosecutrix" and "she" to "prosecutor" and "he".

respectively; he became obligated to pay $1,400 for attorney's fees; he paid $140 to a court reporter and $75 for a bond; the arrest and prosecution caused him humiliation and embarrassment. Benjamin testified that prior to his arrest his earnings were about $75 a week; after his arrest he was unable to attend to business for approximately six weeks and he received no income during this period; when he returned to work his earnings were about $35 a week; he paid $250 for attorney's fees and $50 for a bond; the arrest and prosecution caused him to be very upset. The amounts awarded as damages were not excessive.

[12] Appellant also contends that the court erred in denying his motions for new trials. In support of his motion for a new trial, appellant filed an affidavit wherein he stated that since the rendering of the verdict on October 9, 1952, affiant has discovered written evidence which could not, with reasonable diligence, have been produced at the trial; a part of the written document is in the handwriting of plaintiff (Samuel), and a photostatic copy of the document is attached to the affidavit; the document was found on October 11, 1952; affiant knew of its existence before the trial and diligently searched for it but was unable to find it until after the verdict; that all the writing on the photostatic copy is in the handwriting of plaintiff, except the dates opposite the amounts of money and except the words: "The above 10 customers' commissions refigured and all paid in full."; the word "Sam" on the exhibit is in the handwriting of plaintiff; the document would have been material evidence to prove that plaintiff was not a partner but was an employee; the names listed on the exhibit represent customers of defendant and were obtained by plaintiff while he was an employee of defendant; if a new trial is granted plaintiff will produce the original of the exhibit.

In opposition to said motion, plaintiff filed an affidavit stating, among other things, that said document was given to defendant by plaintiff prior to the opening of defendant's books so that defendant could have a record of sales made by plaintiff; at the time the document was given to defendant the words: "The above ten customers commissions refigured and all paid in full" did not appear on said document, nor were the dates on said document.

Appellant argues that the court abused its discretion in refusing to admit such newly discovered evidence. The evidence was admitted on the motion. The said affidavits show that there was a sharp conflict in the evidence as to the authenticity of the writing. Also, there was a meager showing as to the exercise of due diligence in an effort to produce the writing at the trial. In any event, the evidence would have been cumulative. There was no abuse of discretion in denying the motions.

Other contentions on appeal do not require discussion.

The judgments are affirmed. The purported appeals from the orders denying motions for new trials are dismissed.

SHINN, P. J., concurs.

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126 Cal.App.2d 453

PEOPLE v. NELSON.

Cr. 5191.

District Court of Appeal, Second District,
Division 2, California.

July 7, 1954.

Prosecution for burglary. The Superior Court, Los Angeles County, Mildred L. Lillie, J., rendered judgment against defendant and denied motion for new trial and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1023(10)

There can be no appeal from a sentence.

2. Burglary ⚿42(3)

Mere possession of stolen property is not sufficient to connect a defendant with a burglary, but is merely a circumstance to be considered by trier of fact along with other evidence, such as failure of accused to account for such possession, inability to find person from whom defendant claimed to have received property, and conflicting statements tending to show a consciousness of guilt; and such evidence need be but slight, provided it is convincing.

3. Burglary ⚿45

When defendant makes an explanation as to how he came into possession of stolen property, the question as to whether he is telling the truth rests solely with the trier of the facts, and even where there is no direct contradiction of his story, it is still for jury to say whether he shall be believed.

4. Burglary ⚿41(1)

In prosecution for burglary, evidence sustained conviction.

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Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

This is an appeal from the "judgment and sentence rendered against" the defendant, and from the order denying the motion for a new trial.

[1] There can be no appeal from the sentence, and this purported appeal must be dismissed. People v. Broady, 120 Cal.App.2d 901, 902, 262 P.2d 669; People v. Millum, 42 Cal.2d 524, 267 P.2d 1039.

On a Sunday in October 1953, one Sam Katz, proprietor of the Curb Coffee Shop in Los Angeles, locked his money and checks in a cash box, locked it in his desk, and his manager locked the doors of the shop. Before five a. m. of the following morning, the coffee shop was burglarized. Six hundred seventy two dollars in cash and several checks were taken. Entry had been obtained by boring a hole in the side door, slipping the hand inside, turning the knob of the door. The following Tuesday, October 27, the defendant Nelson cashed one of the stolen checks as payment for repair on his automobile. Shortly thereafter he was arrested on the charge of burglary.

The defendant told the arresting officer that he had won the check in a crap game on Sunday afternoon, October 25, with several persons, none of whom could be named by him. At the trial he stated that there was only "one fellow" involved in the crap game, and that the check was obtained between ten and twelve o'clock the evening of the twenty-fifth. This change was after he was confronted with the proof that the check was in the owner's possession until five o'clock on Sunday. He testified that he passed it to the mechanic for repairs to his car on the following Tuesday, but he did not explain the absence of indorsement of the check by the prior possessor and his own failure to indorse it to the mechanic on October 27. He contradicted the officer's testimony that appellant had said he won the check on Sunday afternoon.

[2, 3] It is true that mere possession of stolen property is not sufficient to connect a defendant with a burglary, it is merely a circumstance that is to be considered by the trier of fact along with the other evidence. There must be other corroborating circumstances such as "failure of the accused to account for such possession * * * inability to find the person from whom defendant claimed to have received the property" and conflicting statements tending to show a consciousness of guilt. The evidence need be but slight provided that it is convincing. When the defendant makes an explanation as to how he came into possession of the stolen property, the question as to whether he is telling the truth rests solely with the trier of the facts. People v. Taylor, 4 Cal.App.2d 214, 217, 40 P.2d 870.

Even where there is no direct contradiction of his story, it is still for the jury to say whether he shall be believed. People v. Russell, 34 Cal.App.2d 665, 669, 94 P.2d 400; People v. Conrad, 125 Cal.App.

2d 184, 270 P.2d 31. Possession of the check was a corroborative circumstance. People v. Russell, supra.

Defendant's citations of People v. Brittain, 142 Cal. 8, 75 P. 314, and People v. Barry, 94 Cal. 481, 29 P. 1026 are both distinguishable. They both define criminal intent in regard to burglary as perpetrated during business hours.

[4] The appeal from the sentence is dismissed.

The judgment and the order denying a motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

BERTCH et al.
v.
SOCIAL WELFARE DEPARTMENT. *

Civ. 16056.

District Court of Appeal, First District,
Division 2, California.

July 13, 1954.

Appellants Petition for Rehearing
Denied Aug. 12, 1954.

Respondents Petition for Rehearing
Granted Aug. 12, 1954.

Proceeding for writ of mandate to review administrative order of state Social Welfare Board. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that it was substantial error for state Social Welfare Board, in contested case heard by hearing officer alone, to make its own findings on issue of whether applicants for old age pensions were in need of financial support from state, without giving applicants notice and opportunity to be heard as required by provisions of Government Code.

Judgment reversed and remanded.

Dooling, J., dissented in part.

1. Social Security and Public Welfare 🔑43

Need of individual is criterion by which liability of state under old age pension law must be determined. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; Const. art. 4, §§ 22, 31.

2. Social Security and Public Welfare 🔑68

It was error for state Social Welfare Board, in contested case heard by hearing officer alone, to make its own findings, on issue of whether applicants for old age pensions were in need of financial support from state, without giving such applicants notice and opportunity to be heard as required by provisions of Government Code. Government Code, § 11517(b, c); Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.

Howard B. Crittenden, Jr., San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondents.

NOURSE, Presiding Justice.

This is an appeal from a judgment of the superior court denying a petition for a writ of mandate to review an administrative order of the state Social Welfare Board. The only allegation in the petition which states a cause of action is: "That said defendant Board on January 17th, 1952, made its own findings, not the findings of the Hearing Officer, Division of Administrative Proceedings who heard said appeals, which are contrary to the evidence adduced therein, and against the weight of the evidence; that said plaintiffs were and are receiving necessities of life to the extent of $17.00 per month, and no more, from their religious society, there being no legal responsibility or obligation of said religious society to so provide said necessities * * *."

The admitted facts are that all the appellants belonged to a society named Christ's Church of the Golden Rule which demanded and received all the warrants issued by the State under the old age pension law and paid out to the pensioners such sums for their support as the society determined was necessary. Although all these facts are admitted on this appeal they were not admitted before the hearing officer of the state agency or on the appeal from his decision to that agency. This presents the only material ground on this appeal.

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* Subsequent opinion 276 P.2d 891.

Preliminarily it should be said that there is no issue of religious discrimination involved in any stage of the proceedings and that the repeated efforts of the appellants to make that an issue are unconscionable and unfair to the state agency and to the superior court. In a memorandum opinion the learned trial judge stated: "The facts as disclosed by the entire record indicate that the action of the Social Welfare Board is not based on any religious ground whatsoever." Manifestly the issues do not relate to any question of religion in any form—no more than if the appellants were members of a tribe of Indians or of a fraternal or social group which appropriated the warrants from the State for its own use and benefit and cared for the individuals as it saw fit.

The sole issue in this appeal is whether the state board committed substantial error in changing the findings of the hearing officer on the question of "need" without giving the appellants notice and an opportunity to be heard. These findings—numbered V, VI and VII—went directly to the controlling issue of whether the appellants were in need of financial support from the State. They were all changed by the state board without notice to or appearance by any of the appellants.

Section 11517(b) and (c) of the Government Code reads:

> "(b) If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.
>
> "(c) If the proposed decision is not adopted as provided in subdivision (b) each party shall be furnished with a copy of the proposed decision. The agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of such proposed decision shall be furnished to each party. The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself no agency member may vote unless he heard the additional oral evidence."

[1, 2] If these findings had been properly made they would have ended the controversy because the need of the individual is the criterion by which the liability of the State must be determined. This is so because section 31 of article IV of the Constitution prohibits the grant of any public money "to any individual". To enable the State to care for "aged persons in indigent circumstances" section 22 of article IV of the Constitution was enacted. In the federal Social Security Act, 42 U.S.C.A. § 301 et seq., the Congress likewise provided for assistance "to aged needy individuals". 42 U.S.C.A. § 301. For these reasons we say that if the state agency had properly found that none of these individuals were in need of financial support, its decision would have been unassailable.

Since the procedural provisions of the act were not followed the cause must be remanded to the state agency for a further hearing and an explicit finding on the issue whether, under all the circumstances of the case, the applicants were in need of financial support under the terms of the act.

Inasmuch as this error might have been readily corrected by application to the state agency in the first instance, it is only reasonable that both parties bear their own costs.

Judgment reversed and remanded to the Social Welfare Department for further proceedings.

KAUFMAN, J., concurs.

DOOLING, Justice (concurring in part and dissenting in part).

I concur in the order reversing the judgment on the ground that the State Social Welfare Board violated the provisions of section 11517, Government Code in adopting new findings without following the procedure outlined in that section. I pass the question whether there is any sound basis for the claim of religious discrimination but I cannot agree that the argument in apparent good faith of this question is "unconscionable and unfair" to anybody. Nor can I agree that the error in procedure for which we are reversing "might have been readily corrected by application to the state agency" in view of the fact that the attorney general acting for the agency has not admitted that there was any error in procedure. I would therefore leave the matter of costs to follow the usual course.

I dissent from the entire discussion of the question of "need".

The majority opinion goes beyond the findings of the Board in its sweeping statement that Christ's Church of the Golden Rule "demanded and received all the warrants issued by the State under the old age pension law". The Board found (Finding VI):

> "That all or *a major portion* of any grant of Old Age Security made to the appellants would not be devoted to meeting their individual and personal needs * * * but would * * * be devoted systematically and continuously to the advancement of the objectives of Christ's Church of the Golden Rule." (Emphasis mine.)

The Board also did not find that appellants are not "in need". Instead it found inferentially that they are "in need". Finding V reads (in part):

> "That to the extent that any of the appellants *were in need* within the meaning of the Old Age Security Law, they were so as a result of a continuing voluntary acceptance of lower standards of living in accordance with their adherence to the precepts" of their church. (Emphasis mine.)

On the findings as made the question is squarely presented whether the measure of need under the Old Age Security Law is the amount which the needy person is voluntarily willing to use for his needs if he elects to live in a substandard manner or the measure fixed by section 2020, Welfare and Institutions Code (as amended by sec. 2020.001 temporarily increasing the allowance from $75 to $80 per month). Section 2020 provides:

> "The amount of aid to which any applicant shall be entitled shall be, when added to the income * * * of the applicant from all other sources, seventy-five dollars ($75) per month."

In its second sentence the section provides for a greater allowance if "in any case it is found the actual need of an applicant exceeds seventy-five ($75) per month".

The legislature itself has thus determined that $75 (presently $80) per month is the minimum amount of income which will properly meet the needs of an aged person entitled to the old age pension.

Section 2160, Welfare and Institutions Code provides expressly and in mandatory language: "Aid shall be granted under this chapter to any person who comes within all of the following descriptions". The respondent admits in its brief: "Appellants all had the basic age and residence qualifications for payments under the Old Age Security Law." That meets subdivisions (a), (b), (c) and (d) of section 2160. Subd. (e) excludes the inmates of certain institutions. It is not claimed that appellants fall within this class. Subd. (f) excludes those adequately supported by certain close relatives and does not apply to appellants. Subd. (g) excludes those who have made "any voluntary assignment or transfer of property for the purpose of qualifying for such aid." It is not claimed that appellants have done this.

There is no finding of the income that the community as a whole realizes. If the evidence showed that the community income was great enough to permit the payment by the community to each member of the full amount per month as fixed by the statute it may be that appellants under sections 2020 and 2020.001 would not be entitled to any pension, and that the amount of the pension should be reduced by whatever lesser amount the income of the community would enable it to pay. On that question I express no opinion since it is not presented on this record. Certainly in the absence of such a finding appellants meet the tests laid down by the legislature and under its plain mandate: "Aid shall be granted under this chapter" to them, whether or not they belong to "a tribe of Indians" or what we might consider its equivalent, or prefer to live in a religious community rather than a boarding home.

The constitutional question of the claimed gift of public money is answered by Los Angeles County v. La Fuente, 20 Cal.2d 870, 875, 129 P.2d 378, 381, where the Supreme Court held that "the 'need' of the applicant necessary to qualify for the benefits of the law is defined by the Legislature * * *." Appellants meet this definition and in my opinion are entitled to the benefits which the statute clearly gives them.

It cannot be claimed that $75 (or $80) per month is an unreasonable amount to be allowed to all applicants who qualify for the pension and hence the legislative determination meets the constitutional test. The individual recipients of the pension are allowed a freedom in its expenditure compatible with basic human dignity and the respondent itself has recognized in its Manual of Policies and Procedures, sec. A 140: "No provision of the O. A. S. Law requires or purports to require that income received by any person, whether a recipient of aid or one who has been a recipient of aid, shall be expended by that person for particular purposes or in particular amounts."

Once the authorities begin to police the manner in which the recipients of Old Age Pension shall spend their income, and that is what they are attempting here, there is no limit to their possible inquiries: Shall A be allowed to give $10 a month to Korean relief or should his pension be reduced $10 per month because he persists in doing so? Shall B be allowed to keep a dog which eats $5 worth of meat per month or C permitted to contribute $1 per week when the collection box is passed during church services on Sunday? Better restore the poor house, with all of its indignities, than to add to the new system some of the indignities of the police state.

In re CALHOUN'S ESTATE.*

OREB v. PETTIT.

Civ. 20018.

District Court of Appeal, Second District, Division 1, California.

June 30, 1954.

Rehearing Denied July 26, 1954.

Hearing Granted Aug. 26, 1954.

Proceeding upon application for letters of administration. The Superior Court, Los Angeles County, Stanley Mosk, J., entered order revoking letters of administration issued to natural daughter of adoptive mother of decedent and ordered that letters be issued to blood brother of decedent, and natural daughter appealed. The District Court of Appeal, White, P. J., held, inter alia, that even though adopted child, who died intestate, left blood brothers and sisters, natural daughter of adoptive mother was intestate's sister and sole surviving heir within statute directing line of succession, and, therefore, was entitled to letters of administration.

Order reversed.

1. Evidence 🔑14

Court would take judicial notice of the prevalence of broken homes from which whole families of children are released to agencies for adoption and that the children in most instances are too young to remember their natural parents or brothers or sisters or any other natural relative and that the natural parents often never see the adoptive parents and that the adoptive parents in many instances know nothing about the natural family of the child adopted.

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* Opinion vacated 282 P.2d 880.

2. Evidence ⚷14

Court would take judicial notice of fact that thousands of adopted children, with their corrected birth certificates, may never know that they are not the children of their adoptive parents.

3. Adoption ⚷21

The words "brothers and sisters" in statute directing line of succession to estate of an intestate includes intestate's brothers and sisters by adoption. Probate Code, § 225.

See publication Words and Phrases, for other judicial constructions and definitions of "Brothers and Sisters".

4. Adoption ⚷20

At the time of an adoption, the natural father and mother, in a legal sense, cease to be parents of adopted child. Civ.Code, § 228.

5. Adoption ⚷23

Children of an adopted child would inherit from the adoptive mother. Civ.Code, § 228.

6. Adoption ⚷22

Even adopted child who died intestate, left brothers and sisters, natural daughter of adoptive mother was intestate's sister and sole surviving heir within statute directing line of succession, and, therefore, was entitled to letters of administration. Probate Code, §§ 223, 225, 227, 257, 422; Civ.Code, § 228.

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Charles C. Morrison, West Los Angeles, for appellant.

Richard McLeod, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from an order revoking letters of administration theretofore issued to appellant and granting letters of administration to respondent. The matter was submitted to the probate court upon a written stipulation of facts.

While it appears from the affidavit of appellant that she knows nothing concerning the facts so stipulated, except what is shown by the certificates of birth, death and adoption filed as exhibits and made a part of the record, and the said exhibits are not entirely convincing as to the relationship between decedent and respondent and others, we shall assume the facts to be as stipulated by the parties to this appeal.

The pertinent facts so stipulated are:

George A. Calhoun, the decedent, was born January 8, 1913, in the California State Hospital, at Patton, California, to William Fortuna and Anna Mulvey Fortuna. He was adopted under the laws of California, by Ezra J. Calhoun and his wife, Victoria Calhoun, on April 3, 1917, with the consent of his only living parent, William Fortuna. He was the youngest of four children born to his natural parents. According to the stipulation, the others were:

Leona Mary Fortna, born October 10, 1906, for whom neither birth nor death certificate is in the record, but who is stipulated to have been adopted by persons unknown to the parties hereto before the birth of decedent, and to have died in August, 1936, "leaving surviving her as issue of her body four children whose true names and whereabouts are as yet unknown to the parties hereto".

Ruth Fortney, born April 26, 1908, in Florence, California, to William Fortney and his wife, Annie A. Mulvey Fortney, adopted prior to decedent's birth by persons unknown to the parties hereto, and now known as Ruth Rice, residing in Oakland, California.

James William Fortney, born November 15, 1911, at Florence, California, to William Fortney and his wife, Annie Mulvey Fortney, adopted July 30, 1913, by Walter W. Pettit and Cora M. Pettit. He is Walter William Pettit, the respondent herein.

Decedent's adoptive mother, Victoria Calhoun, died intestate on or about October 26, 1948, leaving as her only heirs at law, Daisy Oreb, her natural daughter, who is appellant herein, and George A. Calhoun, her adopted son. Decedent's other parents, adoptive and natural, had predeceased said Victoria Calhoun.

George A. Calhoun died intestate on or about July 15, 1952, in Ventura County, California. He left neither spouse, child, issue of a deceased child, father (either natural or adoptive), or mother (either natural or adoptive). He left estate in California consisting of cash distributed to him from the estate of his adoptive mother and a distributable interest in said estate, then in probate in Los Angeles County, appraised at $51,644.81.

From these facts, the court below concluded that respondent, Walter William Pettit, "is the brother of said decedent, and by reason of such relationship has a right to letters of administration prior to that of the said Daisy Oreb, the administratrix aforesaid", and accordingly revoked the letters of administration issued to appellant and ordered that letters of administration be issued to respondent. From that order, this appeal is taken.

Relatives of a decedent have a prior right to letters of administration only when they are entitled to succeed to the estate, or some portion thereof. Probate Code, section 422. Appellant and respondent agree that, under the stipulated facts, decedent's estate goes "in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation". Probate Code, section 225. They further agree that, if either respondent or appellant is entitled to letters of administration, it is by reason of the fact that he or she is a "brother" or "sister" referred to in said section 225 of the Probate Code.

Appellant urges that she is the only "brother or sister" of decedent and that she is entitled to succeed to his entire estate, by reason of the fact that she is the natural child of his adoptive parents, grew up in the same home, was supported by, and inherited from, the same parents as decedent.

Respondent contends that only "blood brothers and sisters" are entitled to succeed to decedent's estate; that appellant is entitled to nothing; and that respondent and his natural sisters are the decedent's "brothers and sisters" referred to in said Section 225, despite the fact that no two of the four children ever knew each other, and that each of them had different adoptive parents.

Our function, therefore, is to give expression to the intent of the legislature as reflected in the statutes governing the question presented to us.

Who are the "brothers and sisters" entitled to succeed to the estate of the adopted person under the provisions of said section 225? The true meaning of section 225 cannot be ascertained by reading it alone. It must be considered as a part of our law of succession, as affected by the statutes concerning adoption. From a consideration of various legislative enactments on these subjects, including the provisions respecting safeguards placed around adopted children to the ends that they are placed only in good homes, that consent and release by natural parents is duly given, that hearings and records regarding adoption are private, that new birth certificates are issued showing as parents the adoptive parents (with no mention of adoption), and that all other records concerning birth, release and adoption of the child are sealed, it would seem to have been the intent of the legislature that all ties by blood be replaced so far as possible by the adoption, and that each adopted child be given a new home and family to take the place of the broken home and family from which he has been released.

[1, 2] This court is not unmindful of the dicta in the early decisions to the effect that the relationship of the adopted child is changed in no way except by placing the adopting parent in the place of the natural parent and "the door to inheritance is shut, and its bolt shot, at that precise point", Hockaday v. Lynn, 200 Mo. 456, 98 S.W. 585, 8 L.R.A.,N.S., 117, quoted in many decisions including, In re Estate of Jones, 3 Cal.App.2d 395, 39 P.2d 847. However, both the social sciences and the laws relating to adoptions have progressed considerably in recent years. The court must take

judicial notice of the prevalence of broken homes, from which whole families of children are released to some agency or agencies for adoption, the children in most instances being too young to remember their natural parents or brothers or sisters, or any other natural relative, the natural parents never seeing the adoptive parents, and the adoptive parents, in many instances never knowing anything about the natural family of the child adopted. The court takes notice of the fact that thousands of adopted children, with their corrected birth certificates, may never know that they are not the natural children of their adoptive parents. The trend, both legislative and social, is toward the substitution of the adoptive family for the natural in every respect. Indeed, from the facts herein stipulated, a family of four children was adopted into four different homes between 1906 and 1917 and none ever saw another until after decedent, while in the State Hospital at Camarillo, inherited from his adoptive parent; and even now respondent is unable to name or identify the issue of one of the four, who is said to have died in August, 1936.

With the evident intention to encourage adoptive parents to leave their properties to their adoptive children equally with their natural children, the legislature of California has provided that:

(a) Had the decedent been survived by his adoptive mother she would have succeeded to the whole estate, the natural mother in no event inheriting anything from him. Probate Code, section 257.

(b) Had the decedent been survived by a spouse but no issue, his estate would have been distributed one-half to his spouse and one-half to his parents (by adoption), or if both are dead to their issue. Probate Code, section 223.

(c) Had decedent died under age and unmarried all the estate that came to the decedent by succession from a parent would go in equal shares to the other children of the same parent. Probate Code, section 227.

[3] The whole scheme of the legislature seems to be to keep the line of succession within the family by adoption. By the words "brothers and sisters", as used in section 225 of the Probate Code, it appears to us that the legislature meant the "brothers and sisters" known to decedent, his brothers and sisters by adoption. If the legislature had intended otherwise, the protective wall of privacy around adoptions would serve no useful purpose, and indeed would bar members of families like the one involved in the present controversy from access to the only records which would disclose to them the existence and identity of their "brothers and sisters" entitled to take their estates. If blood brothers and sisters inherited under said section 225, settlement of the estates of adopted persons would be subject to endless delays and uncertainties. If it should be so held, these persons who know they have been adopted and do not know well all their relatives would not dare remain intestate; and it would be necessary for every person to examine carefully all circumstances surrounding his family from the time of his birth until he was old enough to know and remember whether or not he was adopted. We do not believe the legislature so intended.

[4] Respondent relies upon the "accepted meaning" of the term "brother" as given in certain dictionaries. However, each of the definitions quoted by him defines a "brother" as a "son of the same parents or parent", or words to that effect. The blood relationship is mentioned specifically only in distinguishing between whole and half brothers. From the definitions of "brothers" and "sisters", it is apparent that, to determine who are "brothers and sisters", we must define "parent". The legislature has done this for us in section 228 of the Civil Code, which provides:

> "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation".

The natural father and mother, in a legal sense, ceased to be parents at the time of adoption. In re Estate of Jobson, 164 Cal.

312, 128 P. 938, 43 L.R.A.,N.S., 1062. In Re Estate of Pillsbury, 175 Cal. 454, 459, 166 P. 11, 14, 3 A.L.R. 1396, where children of decedent were adopted by their uncle after their father's death and before filing their claim for support and exemption of property of their father's estate, it was held:

> "Whatever rights as heirs had descended to them upon the death of their ancestor they still retained. But, upon the other hand, by virtue of their adoption the minors not only became members of the family of the adopting parents, but ceased to be of the family of the deceased * * *".

The court, in Re Estate of Mercer, 205 Cal. 506, 510, 271 P. 1067, 1069, affirmed an order granting letters of administration to the nominee of the adopted daughter of decedent's predeceased husband, based upon her right of succession under subdivision 8 of section 1386 of the Civil Code, and said:

> "* * * The statute directing succession need not follow the ties of blood.
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> "The weakness of appellant's position is simply that the adopted daughter cannot have the full benefit of her right as a daughter of the deceased husband in her relation to said husband unless the word 'children' in this statute of succession is held to include her. The predeceased spouse had an interest in, if not full ownership of, the property in question. Natural justice suggests that his daughter have an interest therein. In making his will he may have had the very contingency in mind that has arisen, and decedent, too, may, with knowledge of this statute, have declined to make a will.
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> "The legislative intent is that such common property go to the child or children of the predeceased spouse, and, in the absence of such children, to divide same equally between the families of the respective spouses. [In re] Estate of Brady, 171 Cal. 1, 4, 151 P. 275. *There is nothing in section 228 that in any way contemplates termination of the status of an adopted child when once it is lawfully fixed.* [In re] Estate of Jobson, 164 Cal. 312, 128 P. 938, 43 L.R.A.,N.S., 1062; [In re] Estate of Hunsicker, 65 Cal.App. 114, 118, 223 P. 411. *Neither the death of the adopter nor of the adopted child would have any such effect.*" (Emphasis added.)

We are here confronted with a situation wherein decedent, born George Fortna, was taken into the home of Ezra and Victoria Calhoun by adoption as their own child when he was four years of age. The only brother or sister he had ever known was his adopted sister, Daisy Oreb, appellant herein. For more than 35 years and until the day of his death, decedent knew no other sister than appellant. George A. Calhoun was a member of his adoptive family as completely as though born to the parents of appellant, Daisy Oreb.

[5] We cannot reconcile ourselves to the contention that it was the legislative intent to declare that this family relationship that had endured for more than 35 years was terminated with the death of George A. Calhoun, and that the inheritance taken by him from appellant's mother at the time of her death should be given to respondent (a natural brother of decedent, but legally adopted into another family, and since birth a stranger to decedent). As the children of the adopted child would inherit from the adoptive mother, In re Estate of Hebert, 42 Cal.App.2d 664, 109 P.2d 729; In re Estate of Smith, 73 Cal.App.2d 291, 166 P.2d 74; and In re Estate of Grace, 88 Cal.App.2d 956, 200 P.2d 189, so, in our opinion, should the natural children of the adoptive mother inherit from the adoptive child.

[6] From a review of our laws and the decisions of the courts, heretofore set forth, we are satisfied that appellant, Daisy Oreb, is the sister and only surviving heir of the decedent, George A. Calhoun.

For the foregoing reasons, the order from which this appeal was taken is reversed.

DORAN and DRAPEAU, JJ., concur.

126 Cal.App.2d 496

FOWLER v. FOWLER.

Civ. 20055.

District Court of Appeal, Second District,
Division 1, California.
July 13, 1954.

Divorce action by husband against wife wherein wife filed cross-complaint. The Superior Court, Los Angeles County, Paul Nourse, J., entered interlocutory decree of divorce for wife providing, inter alia, for division of community property. Wife appealed from portions of decree. The District Court of Appeal, White, P. J., held that where trial judge and attorneys for both parties examined papers concerning husband's civil service retirement fund and then stipulated as to division of community property, reviewing court would have to accept on appeal trial judge's statement that wife was given more than one-half of community property.

Judgment affirmed.

1. Appeal and Error ⚷125

An order or judgment entered upon consent of parties will not be disturbed on appeal.

2. Divorce ⚷278

Where wife contended on appeal from interlocutory divorce decree that she had not stipulated to certain provisions of decree relating to division of property, but had made no claim that such provisions were entered without her consent, appeal from such provisions of decree was dismissed.

3. Divorce ⚷286

Where record on appeal from interlocutory divorce decree indicated that discussions had been had among trial judge and attorneys for both parties concerning husband's civil service retirement funds, and that stipulation had been thereupon reached as to division of community property, reviewing court accepted as correct trial court's statement that wife received more than one-half of community property under such division.

4. Appeal and Error ⚷846(5)

Where findings of fact had been waived, it was presumed on appeal that trial court had found all facts in issue necessary to support judgment.

5. Appeal and Error ⚷846(5)

Where findings of fact had been waived but record was presented to the reviewing court on appeal, there was no presumption as to sufficiency of evidence to support implied findings, and that question was determined from examination of evidence itself.

6. Divorce ⚷286

Where husband had no income except from his own work, and where trial court had seen both parties in court and must have had some knowledge of their respective ages, needs, health conditions, intelligences, and adaptabilities, it was presumed on appeal that all such circumstances had been considered by trial court in determining whether husband should have been required to support wife after divorce. Civ. Code. § 139.

7. Divorce ⚷286

Decision of the trial court on whether husband should be required to support wife after divorce should not be reversed on appeal unless it plainly appears that decision was result of abuse of discretion and that it was unjust, and burden is on appellant to establish abuse of discretion. Civ.Code, § 139.

8. Divorce ⚷235

Where trial court impliedly found that wife would be able to support herself, and record on appeal revealed no evidence to the contrary, trial court's failure to award alimony to wife in addition to property awarded her would not be held to constitute abuse of discretion. Civ.Code, § 139.

9. Appeal and Error ⚷1078(5)

Where portion of judgment appealed from was not mentioned in appellant's briefs, appeal therefrom was assumed to have been abandoned and was dismissed.

Dever & Dorfman, Stuart S. Hillman, Los Angeles, for appellant.

Bruce Mason, Long Beach, for respondent.

WHITE, Presiding Justice.

Alice Evelyn Fowler, the defendant and cross-complainant, has appealed from the interlocutory decree of divorce, except those portions thereof by which she was adjudged entitled to a divorce, awarded the custody of the minor daughter, and awarded from the community property the household furniture and furnishings and two insurance policies. In the interlocutory decree there remains subject to this appeal provisions for payment by respondent to appellant of $50 monthly for child support, payment by respondent to appellant's attorneys of $350 additional fees, an award to respondent from the community property of the 1950 Oldsmobile automobile, and the following:

"Pursuant to stipulation of the parties regarding disposition of the United States Civil Service Retirement Funds comprising part of the parties' community property, it is hereby ordered that plaintiff and cross-defendant shall name defendant and cross-complainant as beneficiary of one-sixth of any and all death benefits or annuity or retirement benefits that he, or such beneficiary, might be entitled to receive under said civil service retirement plan.

"Further by way of property settlement, pending his retirement, plaintiff and cross-defendant shall pay to defendant and cross-complainant, until her death or remarriage, the sum of $200.00 per month, payable $100.00 on the 8th and $100.00 on the 23rd days of each month, beginning April 8, 1953. In the event of violation of this order, such payments shall continue after plaintiff and cross-defendant becomes entitled to retirement; otherwise, the receipt by defendant and cross-complainant of the portion of the retirement benefits as aforesaid shall be in full satisfaction of her claims after his retirement. However, if plaintiff and cross-defendant shall retire between the ages of 55 and 60, at which time there will be a reduction in the amount of his retirement pay, and enters private employment, he shall further pay to defendant and cross-complainant one-sixth of his taxable income, as determined for federal income tax purposes, payable one-half on the 8th and one-half on the 23rd days of each month during the continuance of such private employment."

[1] As urged by respondent, it is well-settled law in California that an order or judgment entered upon consent of the parties will not be disturbed on appeal. Kentera v. Kentera, 66 Cal.App.2d 373, 375, 152 P.2d 238; Meerholz v. Sessions, 9 Cal. 277, 278; La Societe Francaise D'Epargnes et de Prevoyance Mutuelle v. Beardslee, 63 Cal. 160, 161; and In re Estate of Lingg, 71 Cal.App.2d 403, 407, 162 P.2d 707.

[2] Appellant states that the record clearly shows that she "did not stipulate that the automobile be transferred to the respondent or that appellant be denied alimony in addition to the property awarded her". She makes no claim that the portions of the interlocutory judgment hereinabove quoted at length were entered without her consent, and, under the general rule above stated, her appeal from those portions of the decree cannot be entertained and must be dismissed.

As to the portion of the interlocutory decree to the effect that respondent's part of the community property shall include the automobile, we have examined the Reporter's Transcript and find nothing therein to indicate that the award of the automobile to the respondent was not in accordance with the same stipulation under the terms of which appellant received the household furniture and furnishings, the insurance policies, $200 a month by way of property settlement, and a one-sixth interest in respondent's civil service retirement fund.

However, even if it had not been stipulated to so divide the community property, the record on this appeal is devoid of any evidence proving, or tending to prove, that appellant received less than one-half thereof. Indeed, the only evidences of values in the record are appellant's testimony that the automobile could be sold for $1,000, and that one more payment of $53.40 was required to pay for it, that the household furniture and furnishings were worth "maybe $250.00", stipulation of counsel that the real property in Atlanta, Georgia, deeded to appellant, produces about $30 a month rental and that the annual taxes thereon are approximately $52, statement of counsel for respondent that the cash values of the insurance policies were peculiarly shifting and at the moment were $354.05 and $112, respectively, and respondent's testimony that he will receive nothing out of his civil service fund except under retirement, that he is 44 years of age and even if he leaves government employment the fund will remain with the government until he reaches the age of 62 years, that if he works for the government until he is 62, he will then receive an annuity of approximately $300 a month and upon his death the balance of the fund, if any, will be paid to his beneficiary.

[3] Under this record, which also indicates that discussions were had in the chambers of the judge, where the judge and the attorneys for both parties examined papers and correspondence (not in the transcript before us) concerning the respondent's civil service retirement fund, and there reached a stipulation as to the division of the community property, this court must accept as correct the trial court's statement that "the wife has been given more" and affirm the portion of the interlocutory judgment dividing the community property between appellant and respondent. Nelson v. Nelson, 7 Cal.App. 76, 78, 93 P. 399; Gorman v. Gorman, 134 Cal. 378, 380, 66 P. 313; and Crouch v. Crouch, 63 Cal.App.2d 747, 756, 147 P.2d 678.

Alimony or support for appellant is not mentioned either in the interlocutory judgment from which this appeal is taken, or in the notice of appeal. However, appellant contends that the trial court's failure to award her alimony "in addition to the property awarded her" was an abuse of discretion.

Respondent urges that, under the decision in the case of Louknitsky v. Louknitsky, 123 Cal.App.2d 406, 266 P.2d 910, appellant, by her stipulation as to the division of the community property and her waiver of findings at the close of the trial, waived her right to be heard on appeal. This is not the law.

[4, 5] Where, as in the instant action, findings of fact were waived, it is presumed that the trial court found all the facts in issue necessary to support the judgment. Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421; Gray v. Gray, 185 Cal. 598, 599, 197 P. 945; Childers v. Childers, 74 Cal.App.2d 56, 59, 168 P.2d 218. But, where, as here, the record is presented to the appellate court, there is no presumption of the sufficiency of the evidence to support the implied findings, and that question can and will be determined from an examination of the evidence itself. Childers v. Childers, 74 Cal.App.2d 56, 59, 168 P.2d 218. The implied finding of the trial court was that appellant would be able to support herself, and a careful reading of the record before us reveals no evidence to the contrary.

"Where a divorce is granted for an offense of the husband the court *may* compel him * * * to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, *having regard to the circumstances of the parties respectively;* * * *." (Emphasis added.) Civil Code, § 139. Appellant relies upon the decisions in Webber v. Webber, 33 Cal.2d 153, 199 P.2d 934; Fine v. Fine, 76 Cal.App.2d 490, 173 P.2d 355, and Farrar v. Farrar, 41 Cal.App. 452, 182 P. 989. The record before us on this appeal, however, fails to establish facts or circumstances analogous to those cases, in each of which there was evidence of the need of the wife and of the husband's ability to pay.

[6–8] The decision as to whether or not husband shall support wife, and, if so, the amount of that support must be made by the trial court. Where, as in the instant action, husband has no income except from his own work, and where, as here, the trial court saw both parties in court and must have some knowledge of their respective ages, needs, health conditions, intelligences, and adaptabilities, and perhaps other circumstances which do not appear in the record before us on appeal, we must presume that all these circumstances were considered by the trial court in determining that husband should not be required to support wife out of his earnings. Lamborn v. Lamborn, 80 Cal.App. 494, 500, 251 P. 943;

Bowman v. Bowman, 29 Cal.2d 808, 811, 178 P.2d 751, 170 A.L.R. 246. The decision of the trial court should not be reversed on appeal unless it plainly appears that such decision was the result of an abuse of discretion and that it was unjust. The burden is on appellant to establish an abuse of discretion, Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; and upon this appeal that burden has not been met.

Likewise, we fail to find in the record any evidence that the trial court abused its discretion in ordering that respondent pay to appellant the sum of $50 monthly for the support of their minor daughter.

[9] Inasmuch as the portion of said judgment requiring respondent to pay additional fees to appellant's attorneys is not mentioned in appellant's briefs, we assume the latter has abandoned her appeal therefrom, and the appeal from that portion of the judgment is dismissed.

The other portions of the judgment, from which this appeal was taken, are affirmed.

DORAN and DRAPEAU, JJ., concur.

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126 Cal.App.2d 651

SULLY et al.
v.
KERN DRILLING CORP. et al.

Civ. 20094.

District Court of Appeal, Second District, Division 1, California.

July 22, 1954.

Hearing Denied Sept. 16, 1954.

Action for specific performance of an oral agreement under which plaintiffs claimed a joint venture with defendants, and, alternatively, to establish a constructive or a resulting trust. In another cause of action, one plaintiff claimed reasonable value of services rendered by him as a geologist in evaluating property. The Superior Court, Los Angeles County, Percy Hight, J., entered judgment for $500 in favor of the geologist on the quantum meruit cause of action, but decided the other issues in defendants' favor, and defendants appealed. The geologist appealed by reason of amount of judgment rendered. The District Court of Appeal, Doran, J., held that evidence sustained findings that no contract such as plaintiffs alleged was ever made, and that no joint venture existed, and that the geologist was entitled to $500 for services rendered.

Judgment affirmed.

1. Appeal and Error 🔑931(1)

On appeal by defendants, evidence was required to be viewed in light most favorable to plaintiffs.

2. Joint Adventures 🔑1.15

Specific Performance 🔑121(4)

In action for specific performance of an oral agreement under which plaintiffs claimed a joint venture with defendants, evidence sustained finding that no contract such as plaintiffs alleged was ever made, and that no joint venture existed.

3. Trusts 🔑89(1), 110

In action to establish a constructive trust resulting from a breach of a confidential relationship, or a resulting trust, evidence sustained finding that circumstances did not require imposition of trust.

4. Work and Labor 🔑29(1)

In action by geologist for reasonable value of services rendered by him in evaluating property, evidence sustained finding that the geologist was, as a matter of quantum meruit, entitled to $500 for services rendered.

5. Specific Performance 🔑119

In action for specific performance of an oral agreement, burden of proof in respect to alleged oral contract rested upon plaintiffs.

6. Mines and Minerals 🔑79(1)

Trusts 🔑63¾, 99

Expressions of desire on plaintiffs' part to acquire interest in royalty did not amount to a contract, nor could they be considered as basis for imposition of either constructive or resulting trust in favor of plaintiffs.

7. Contracts ⚷143

Courts, whether trial or appellate, possess no authority to make contracts for parties litigant.

8. Appeal and Error
⚷994(3), 1008(1), 1012(1)

Matters of fact, weight of evidence and credibility of testimony given were matters to be determined by trial court.

Chenoweth, Robertson, Harney & Behr, David M. Harney, Los Angeles, Ruth Michaelson, Beverly Hills, for appellants.

Cree & Brooks and Joseph A. Ball, Long Beach, for respondents.

DORAN, Justice.

The complaint herein contains three causes of action: (1) specific performance of an oral agreement under which plaintiffs claimed a joint venture with defendants, by reason of which the latter were required to convey to each plaintiff a one-tenth interest in a certain 1% royalty interest purchased by the Kern Drilling Corporation from one Heller. Alternatively, and as respondents allege, "to avoid the defense of the Statute of Frauds", the complaint alleged a constructive trust resulting from a breach of a confidential relationship, or a resulting trust. A second cause of action was in favor of plaintiff Rodman K. Cross for a debt due, with a third cause of action for Cross claiming the reasonable value of services rendered in evaluating the property involved herein.

The trial court decided the various issues in defendants' favor except that plaintiff Cross was awarded judgment for $500 on the quantum meruit cause of action. The appeal is by all defendants, Cross appealing by reason of the amount of the judgment rendered.

It is appellants' contention that, "A. The findings are insufficient, uncertain, indefinite and ambiguous and not supported by the evidence because: 1. There is no finding of fact or conclusion of law on the issue of whether a joint venture existed, although definitely raised by the pleadings and evidence. 2. Yet there must have been some finding of a contractual relationship as evidenced by the award of $500.00. 3. There is no decision as to whether Donald Ford's memorandum admitted in evidence would take the case out of the Statute of Frauds if no joint venture was found to exist. B. Errors occurred in the admission and exclusion of evidence."

[1] Viewing the evidence in the light most favorable to respondents, as required by law, it appears that appellant Cross, a geologist, in 1947 occupied an office in a Long Beach building owned by respondent Kern Drilling Corporation, and there became acquainted with respondent Edmund F. Richards. Cross testified that in May, 1951, Richards was informed by Cross that one A. H. Heller had for sale a 1% overriding royalty interest in South Cuyama Field and that appellant Sully had telephoned Cross that this interest could be bought for $85,000. As stated in respondents' brief, "Cross said that he told Richards that Sully wanted to buy one-tenth of the 1% royalty, and that he, Cross would like one-tenth of it if he could afford it (R.T. 41)." Cross further testified that Richards wanted to know if the royalty was worth $85,000, and Cross told him that he would determine its value, but that he wanted to be compensated. At that time Cross "told him (Richards) that I did not think that I could afford to buy any of the percent at that time for the reason that I had other obligations".

Cross stated that prior to the date Richards went to escrow "there was only one conversation at which he, Cross, Richards and Sully were present (R.T. 209/12–14). On that date Cross did not tell either Richards or Sully that he wanted to buy one-tenth of 1%. * * * he first told Richards that he would buy * * * on June 6, 1951". Prior to that time Cross' work as geologist had been completed and Richards had been given a memo of evaluation of the royalty interest.

Cross' version of the oral contract alleged to have been made during this conversation is that Richards asked if Cross would pay $8,500 for a 1/10th interest to which Cross answered, "Yes, that amount, less the compensation for the evaluation". Richards did not reply to that statement. Nor was the amount of Cross' compensation fixed. This conversation is denied by Richards.

Appellant Sully testified to a somewhat different version of the alleged oral arrangement, and did not remember Richards' exact words but stated that "There is no doubt as to the impression that he gave me during that conversation", that the interest could be split up after Richards purchased it. The testimony of each plaintiff was flatly contradicted by respondent Richards who was president and owner of the Kern Drilling Corporation. Richards also stated that Cross had said "he couldn't afford to buy any part of the royalty because he was building a house". Three or four days after the escrow had been opened for purchase in the respondent Kern's name, appellant Sully offered to pay for part of the royalty and "Richards told Sully that he, Richards, had nothing to sell". Richards had told Cross before the escrow was opened that "they would not permit the splitting of the percent".

[2, 3] Without going into further detail concerning the testimony, it is apparent that the trial court was presented with a serious conflict of evidence concerning the making of the alleged oral contract. The record discloses substantial evidence in support of the finding that no such contract to convey tenth interests to either Sully or Cross was ever made; that no representations or promises to do so were made by the respondents, that no credit was pledged by appellants in reference thereto, that no joint venture existed, and that there were no circumstances requiring the imposition of a trust in appellants' favor. Such being the case, under the usual rule of appellate procedure, no further review of the evidence is required.

Appellants' contention that there was no finding on the issue of joint venture, is contradicted by the record in Finding No. IV where the trial court directly found that no such joint venture existed. Other findings specifically state that the defendants did not enter into any agreement whatever with the appellants.

[4] The fact that the trial court found that appellant Cross was, as a matter of quantum meruit, entitled to $500 for services rendered obviously has no bearing upon the other issues in which the court decided against the appellants' contentions. There was evidence that Cross' services as geologist for the evaluation work were reasonably worth $100.00 per day, and that the actual time spent did not exceed two days. Appellant Cross has no valid complaint in reference thereto.

Nor is there merit in any of the appellants' contentions. A survey of the record fails to disclose any prejudicial error either in the admission or exclusion of evidence, or otherwise. All parties were permitted to go into the merits of the case with considerable liberality, and the trial court had before it what appears to have been an unabridged version of all the facts and circumstances connected with the controversy.

[5, 6] As pointed out by respondents, the burden of proof in respect to the alleged oral contract rested upon appellants' shoulders. Even those isolated items of evidence presented in appellants' brief are largely expressions of desire on appellants' part to acquire an interest in the royalty, or of offers to purchase, with, in Cross' case, the regret that due to other obligations Cross felt unable to invest at that time. Such expressions of desire, obviously, do not amount to a contract, nor can they be considered as a basis for the imposition of either a constructive or resulting trust in favor of appellants. As hereinbefore indicated, the record discloses various statements by the respondent Richards to the effect that The Kern Drilling Corporation never entertained any intention of splitting up the interest purchase. In this state of the record, the findings of the trial court are abundantly supported.

[7] A discussion of the Statute of Frauds becomes unnecessary in view of the fact that the trial court was justified in finding that no contractual relation of any kind existed. It is fundamental that courts, whether trial or appellate, possess no authority to make contracts for the parties litigant.

[8] Cases cited by appellants relate largely to fundamental matters of law in respect to joint venture, the Statute of Frauds, etc. None of them relate to a factual situation comparable to that here involved. The issues here were largely concerned with matters of fact, weight of evidence and credibility of the testimony given. These were matters to be determined by the trial court which from the conflicting evidence reached a decision contrary to appellants' contentions. The findings are adequate and, as hereinbefore indicated, are supported by the evidence.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

126 Cal.App.2d 505

BAUMGARTNER v. MEEK et al.

Civ. 8380.

District Court of Appeal, Third District, California.

July 13, 1954.

Action to recover upon a real estate brokerage listing. The Superior Court, Napa County, Raymond J. Sherwin, J., entered judgment on verdict for plaintiff, and defendants appealed. The District Court of Appeal, Paulsen, J. pro tem., held that a brokerage listing, though basically an offer of a unilateral contract, attains a binding force upon the performance of services pursuant thereto by the broker, with the consideration being the performance of services by the broker in seeking a purchaser.

Judgment affirmed.

1. Brokers 🔑49(1)

A brokerage listing, though basically an offer of a unilateral contract, attains a binding force upon the performance of services pursuant thereto by the broker, with the consideration being the performance of services by the broker in seeking a purchaser.

2. Brokers 🔑44

Where owners who had given broker exclusive listing for sale of the property wrongfully attempted to withdraw the property from sale, broker was not required to continue efforts to procure a purchaser as a prerequisite to recovery of commission, since the avowed withdrawal placed it out of power of broker to complete a sale.

3. Brokers 🔑44

Provision in brokerage contract obligating owner to pay commission if property is withdrawn from sale is not invalid as a penalty or liquidated damage provision.

Francis H. Frisch and Laura O. Coffield, Napa, for appellants.

Riggins, Rossi, King & Kongsgaard, Napa, for respondent.

PAULSEN, Justice pro tem.

This is an appeal from a judgment of $15,000 and interest upon the verdict of a jury in an action to recover upon a real estate brokerage listing. The document signed by the parties conformed to the California Real Estate Association standard form and so far as material to this appeal reads as follows:

> "In consideration of the services of W. B. Griffiths Company, hereinafter called broker, I hereby list with said broker, exclusively and irrevocably, for the period of time beginning January 8, 1951 and ending March 1, 1951, the property situated in the Berryessa Valley, County of Napa, California, described as follows, to-wit: [Description] and I hereby grant said broker the exclusive and irrevocable right to sell said property within said time for Three Hundred Thousand .... 00/100 ($300,000.00) Dollars * * *
>
> "I hereby agree to pay said broker as commission five (5%) per centum of the selling price should, during the time set forth herein, said property be

sold by said broker or by me or by another broker or through some other source or whether said property be withdrawn from sale, transferred, conveyed or leased without approval of said broker.

* * * * * *

"Dated January 8, 1951
"(Signed) N. T. Meek
Flora E. Meek

"Contract extended to
Dec. 1/51
(Signed) N. T. Meek
Flora E. Meek"

"In consideration of the foregoing listing and authorization the undersigned broker agrees to use diligence in procuring a purchaser.

"W. B. Griffiths Company
"(Signed) By Edith R. Baumgartner
"Broker."

It will be noted that the contract was originally made in January, 1951, and ran to March 1, 1951. There was evidence to the effect that after March 1st, at appellants' request, respondent continued her attempts to find a buyer, and that in September of that year she obtained an offer of $200,000 which was refused by appellants. They asked her to try to find a buyer who would pay more, and respondent then insisted upon again having an exclusive authorization. A new contract was executed, but this was later superseded by the extension of the original agreement as shown above.

On November 8, 1951, respondent called appellant N. T. Meek in San Jose and advised him she had a prospective purchaser for $250,000 and discussed the possibility of a sale at that price. The following morning N. T. Meek called respondent and told her he would have to take the ranch off the market. There is a dispute regarding the rest of the conversation at that time. Respondent testified that when N. T. Meek told her he was taking the property off the market, she said, "But, Tom, how about my authorization; I still have until the 1st of December and you know I have done a great deal of work on this and I have spent a great deal of money and I have interested people; I am going to be in a most embarrassing position with my people." Appellant N. T. Meek testified that "Edith said that she thought she ought to be recompensed for what she was out for advertising. I asked her how much it was; she said 'About $480.00', and I told her I would pay her. It was okay with her to take it off the market."

Appellant N. T. Meek then wrote respondent, under date of November 9, 1951, advising her that he was taking his ranch off the market.

In December, 1951, respondent filed an action to recover from appellants the sum of $15,000. Her first cause of action alleged she was entitled to that sum because of the withdrawal of the property from sale and the second cause of action alleged that she was entitled to that sum because defendants, without her approval, had sold the property to other purchasers. This second cause of action was subsequently dismissed and the cause proceeded to trial upon the first count alone.

There can be no doubt but that respondent, in accordance with her written statement that she would in consideration of the listing use diligence in procuring a purchaser, did expend considerable sums of money advertising the property, taking photographs of it, gathering data for use in promoting the sale and listing it with other brokers. Supportive of this is the testimony of appellant N. T. Meek concerning the phone conversation in which he offered to pay her $480 to recompense her for her expenditures in efforts to sell the property. It cannot be doubted either that respondent actively continued her efforts to obtain a satisfactory sale up to the time when she was advised by appellants through the letter of N. T. Meek that they had taken the property off of the market. This happened within the term stipulated by the writings executed by the parties.

Appellants first contend that respondent could not recover a commission without pleading and proving that she had procured a purchaser ready, able and willing to pay the price at which appellants had authorized her to sell. In support of this they cite Merkeley v. Fisk, 179 Cal. 748, 178 P.

945. The case is not in point. In that case the plaintiff's claim was based upon allegations of performance by the broker who claimed that he had made a sale. A demurrer to his complaint was sustained and it was held on appeal that the pleading was insufficient because it did not contain allegations that the purchaser procured by the broker was one that was able, ready and willing to buy.

Appellants next argue that the contract was unilateral and without consideration. Basically, a brokerage listing is an offer of a unilateral contract, the act requested being the procuring by the broker of a purchaser ready, able and willing to buy upon the terms stated in the offer. Conformable to the settled rules governing offers of unilateral contracts such a listing, which we might term a general listing, is held to be revocable at the will of the owner in good faith at any time before performance, regardless of the efforts expended by the broker. Furthermore, such a listing leaves the owner free to list with other brokers, to sell the property through his own efforts, to withdraw the property from the market, or otherwise to revoke his offer. Latterly, however, and particularly in California, there has developed a concept of irrevocability which brokers have generally sought to implement by written provisions placing restrictions upon the freedom of the owner under a general listing. These stipulations take the form of a stated term within which the broker might accept the offer of unilateral contract by performing the required act, or of a so-called exclusive agency, doing away with the right of the owner to deal through other brokers, or of an exclusive right to sell, precluding the owner himself from selling and the like. In view of the nature of the basic transaction between the owner and the broker, that is, a listing which is no more than an offer of a unilateral contract to be accepted only by a performance of the requested act, these additional stipulations were challenged in many courts as not resulting in any contract in fact between the parties, e. g. see Bartlett v. Keith, 325 Mass. 265, 90 N.E.2d 308; 37 Iowa L.Rev. 350, 354. But in many states, and in this state, courts have accepted such written listings as resulting in contractual relations. Though the basic offer to pay a commission for the procuring of a purchaser ready, able and willing to buy can still be accepted only by performance, nevertheless it has been held that these restrictive stipulations bind the owner and subject him to liability if he refuses to abide by them. These holdings are sometimes based on the idea that the restrictive clauses constitute subsidiary promises resting upon the consideration that the broker agrees to and does expend time and effort to bring about a sale. Thus we find in Restatement of Contracts, Section 45:

> "If an offer for a unilateral contract is made and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, * *."

It is unnecessary to attempt to follow the reasoning given in the many opinions of courts dealing with this subject. We think that in California the rule has been too long declared and too often enforced to leave the matter open. This position of our courts is well set out in Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067. In that case the written listing was substantially the same as in the case before us. It read:

> "'For and in consideration of the services to be performed by Messrs. Hooker & Lent, I hereby employ them as my sole and exclusive agents to sell for me that certain real property [indicated] * * *. This employment and authority shall continue for the full period of thirty days from the date hereof, and thereafter until withdrawn by me in writing; and I agree to pay to said Hooker & Lent, in the event of the sale of said real property by them or by anyone else, including myself, while this contract is in force, twenty-two hundred and fifty dollars as and for their compensation hereunder.'"

Within the time stipulated the owner sold the property and action was brought to recover the amount which the written listing stipulated would be paid in that event. It was conceded that the brokers had found no purchaser, but the evidence and findings were that they had spent time and money in attempting to do so. The court had no hesitancy in treating the written listing as a contract and said:

> "* * * the contract was in full force and effect at that time [when the owner sold]. * * * If the brokers had found a purchaser at any time prior to the sale made by defendant, then clearly they would have been entitled to their commission; and this circumstance shows that the contract was in full force and effect when the sale was made.
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> * * * * * *
>
> "It is claimed that the brokers' contract was one to find a purchaser, and, no purchaser having been found, no commissions were earned, and that for this reason the complaint does not state a cause of action. The contract in this case is not the ordinary broker's contract. It is more. By its terms the brokers were entitled to $2,250 if during the life of the instrument, they found a purchaser; or if, during its life, defendant sold the property, they were likewise entitled to the same amount. Defendant having sold the property during the life of the contract, this last provision is relied upon to support a recovery, and justly so. The defendant made a contract, and had the power to make it; and there is no reason why she should be allowed to escape from its binding force unless equitable grounds exist which excuse her. The parties to a broker's contract are at liberty to make the compensation of the broker depend upon any lawful conditions they see fit to place therein. The single question is, what does the contract provide?"

[1] As to the contention there was no consideration to support the contract the court stated it was to be found in the consideration of the services to be performed by the broker. The court said that the owner had agreed that if these services produced a buyer the stipulated commission would be paid, but that: "She also further agreed to pay them the same amount in consideration of their services if she herself sold the property. The consideration for her promise to pay the money if the sale was made by her, was the performance of services by the brokers in seeking a purchaser." In declaring the contract enforceable the court relied on Crane v. McCormick, 92 Cal. 176, 28 P. 222; Maze v. Gordon, 96 Cal. 61, 30 P. 962, and Rucker v. Hall, 105 Cal. 425, 38 P. 962, and these cases squarely support the opinion. Although the matter is not mentioned in the opinion it is noteworthy that in the Kimmell case the appellants in their opening brief challenged the provision for payment in event the sale was made by the owner as providing for a penalty and as therefore void. This contention was countered by respondent who argued that the action was not one for damages, either liquidated or unliquidated, or for a breach, citing Maze v. Gordon, supra, but was one to recover a sum of money that was to be paid on the happening of contingencies which had occurred. Said respondent in his brief in that case: "No breach is claimed and the idea of liquidated damages and penalty originated with counsel for the plaintiff. * * * By no construction of the complaint or contract can this action be converted into a claim for penalty or liquidated damages." In Maze v. Gordon, where the agreement was to pay a commission if the owner withdrew the property from sale within the term the court said [96 Cal. 61, 30 P. 963]: "By the terms of the employment, commissions became due 'in the event of withdrawing the sale of said property during the time.' The claim to compensation under this provision of the contract is not, as respondent suggests, as damages for a breach of the contract *in withdrawing the land from sale.* This Hamilton had a right to do, and in such event he became indebted to plaintiff for his commissions." The contention of appellant that the contract here was unilateral and without consideration cannot be sustained in view of the authorities we have referred to.

Appellants next insist that the "attempted withdrawal of the land from sale was ineffectual since the authorization to sell was exclusive and irrevocable." To this effect they cite Sill v. Ceschi, 167 Cal. 698, 140 P. 949, where it is held that where the brokerage contract is for a definite term it cannot be revoked within the term if the broker has expended money and effort in seeking a purchaser.

[2] It appears to be appellants' view that because they had no legal right to withdraw the property from sale, respondent therefore had the legal right to continue her efforts to find a purchaser and was required to do so before she could recover. As stated in Rucker v. Hall, supra [105 Cal. 425, 38 P. 963], the withdrawal "placed it out of her power to complete" a sale. If appellants' contentions in this respect are correct the respondent would have been required to spend additional money and time trying to find a buyer who could not have viewed the property without permission of the owner. Respondent would also have been required, in order to interest such a buyer at all, to misrepresent her position in the matter, or, what is equally as bad, to persuade a prospective buyer to enter into an agreement which she knew would not be honored by the seller, and all this for the sole purpose of placing herself in a position to collect a commission and not with the hope of making a sale. The law does not demand such absurdities or sanction such questionable practices.

[3] Finally, it is contended that the promise to pay if the owner withdrew the property from sale during the term must be considered either as a penalty or as a liquidated damage provision and in either view void as a matter of law. As we have noted, provisions in brokerage contracts similar to those contained in this contract have been approved and enforced by our courts in such cases as Kimmell v. Skelly and cases therein cited. See also Walter v. Libby, 72 Cal.App.2d 138, 164 P.2d 21; Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 78 A.L.R. 585, and Mills v. Hunter, 103 Cal.App.2d 352, 229 P.2d 456. We think this contention cannot be sustained in view of the contrary holdings in the cases referred to. The distinction between an action for breach of the promise by the owner not to revoke or deal through others or sell himself during the stipulated term, wherein damages are sought for such breach, and a contractual provision whereby, in consideration of the services of the broker to be and being rendered, the owner directly promises that if he sells through others or by himself or revokes he will pay a sum certain, is made clear in the cited cases, particularly in the quotations we have taken from the opinion in Kimmell v. Skelly. The action is for money owed, an action in debt, Maze v. Gordon, supra, and the only breach involved is the failure to pay the promised sum. Plaintiff in such cases seeks to recover actual damages, not liquidated damages. The code provisions, therefore, concerning penalties and concerning stipulated damages are not applicable. It is not for this Court at this stage to defend or attack the rationale of these decisions upon this subject. Brokerage contracts have been formulated for many years in reliance upon them. These contracts in their language are so plain that the intent of the parties to bind themselves, just as these decisions have declared they are bound in such instances, cannot be disregarded. As we have indicated, the whole question of the relationships between owner and broker in respect of this type of transaction is one wherein there has been much conflict in decisions. Our courts have ruled in the way indicated by us and we think the rule of the cases in which they have done so ought not now to be disturbed. Although these decisions have not specifically discussed the challenge here made to the contractual provisions upon which respondent relies, it can hardly be said that they have been rendered without consideration of such attacks, for as we have seen, the contentions were advanced in the brief in at least one, and that the principal one, of the cases cited.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

126 Cal.App.2d 426

MAINIERI v. MAGNUSON.

Civ. 15814.

District Court of Appeal, First District,
Division 2, California.

July 7, 1954.

Action by customer to recover payments, made under agreement by manufacturer to produce fruit basket assembling machine and machine for folding metal frames for such baskets from straight strips produced by customer's existing machine, based on failure to produce latter machine. Manufacturer cross-complained for balance due under agreement to produce assembling machines. The Superior Court, Santa Clara County, Andrew R. Schottky, J., entered judgment for manufacturer on cross-complaint. Customer appealed. The District Court of Appeal, Dooling, J., held that failure of customer's existing machine to produce straight strips constituted failure of condition precedent which excused manufacturer from performance of agreement to produce machine for folding frames from such strips.

Judgment affirmed.

1. Contracts ⚷350(1)

In action against machine manufacturer to recover payments made under agreements by manufacturer to produce machines for assembling fruit baskets and one for folding metal frames for such baskets from straight metal strips produced by customer's existing machine, evidence sustained findings that customer's machine was represented as producing straight strips, that it did not do so and that manufacturer was unable to produce machine to fold frames because strips were not straight

2. Contracts ⚷278(1)

Where machine manufacturer agreed to make machine for folding metal frames for fruit baskets from straight metal strips produced by customer's existing machine, representation that customer's machine produced straight strips was condition precedent, failure of which excused manufacturer's performance which was dependent on it. Civ.Code, § 1439.

3. Appeal and Error ⚷1071(1)

On appeal from judgment in action for breach of contract, alleged delay of trial judge in deciding case afforded no ground for reversal.

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C. Leonard Rosenberg, Oakland, Edward M. Fellows and Emery J. Delmas, San Jose, for appellant.

L. D. Bohnett, Bohnett, Hill, Cottrell & Bohnett, San Jose, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment denying him any relief on his complaint and awarding defendant $1,900 on his cross-complaint.

Appellant is in the business of manufacturing fruit baskets. In August 1946 appellant employed respondent to determine whether a machine could be designed which would assemble fruit baskets with tin protected edges. As a result of the report made by respondent the parties entered into two written agreements on March 8, 1947. One agreement (hereinafter called Agreement A) bound respondent to manufacture successively three similar machines for assembling tin-edged fruit baskets. The other agreement (hereinafter called Agreement B) was for the manufacture of a machine for folding V-shaped strips of tin into half squares, to be used as edging for the boxes. The machine to be manufactured under Agreement B was thus described in that agreement: "a machine for folding half square metal frames for Tin Top Fruit Baskets from cut lengths of straight 'V' groove metal strip. This machine will be an attachment to be added to and driven from an existing machine, now Mr. Mainieri's property, which produces three straight 'V' groove metal strips simultaneously in each operation."

Respondent produced under Agreement A a machine which the court found met all the terms and provisions of that agreement. It is not disputed that the evidence supports this finding. Respondent was unable, however, to manufacture a satisfactory machine under Agreement B, because the machine furnished by appellant, to which the one to be manufactured by respondent under Agreement B was to be attached, did not in fact produce *straight* V-groove metal strips. It is undenied in the evidence that respondent made every reasonable effort to readjust appellant's machine so that it would produce straight metal strips, and that no adjustment of it could be made which would bring about this result. It is also established by the evidence that without a machine which would fold V-groove metal strips into half squares, the basket assembling machine manufactured under Agreement A would not be commercially useful to appellant. For this reason appellant refused to accept the completed machine or to pay the balance due thereon, and sued to recover back the payments already made under both agreements. Respondent cross-complained for the balance due him under Agreement A and was given judgment therefor.

The parties devote much time to the discussion of whether the two agreements should be construed as a single contract. Civil Code, § 1642. The trial judge in a memorandum filed at the time that he ordered judgment, said: "Whether the two writings are considered as one contract or as two contracts they are interrelated, and as the Court views the evidence the result would be the same whether they are considered as one contract or as two contracts." We agree with this statement.

The whole case hinges on the proper construction of the language above quoted from Agreement B. By the first sentence above quoted respondent agreed to manufacture "a machine for folding half square metal frames * * * from cut lengths of *straight* 'V' groove metal strip." By the second sentence it was provided that this machine was to be an attachment to an existing machine belonging to appellant "which produces * * * *straight* * * strips * * *".

Appellant's position is that the parties agreed upon the fact that appellant's machine does produce *straight* strips. For this reason he objected in the court below to the evidence which showed that the machine in fact did not produce *straight* strips and could not be made to produce them.

[1] It is respondent's position that appellant bound himself to supply a machine which produces *straight* strips and that his failure to do so excused respondent's performance of his agreement to produce the machine called for by Agreement B.

The contract itself makes it perfectly clear that respondent only bound himself under Agreement B to manufacture a machine for folding half squares "from cut lengths of straight * * * strip." The first sentence of the agreement quoted is explicit on that. By the second quoted sentence this machine which was to fold half squares from *straight* strips was to be an attachment to appellant's existing machine "which produces * * * straight * * strips." It is clear that the machine called for by the contract, i. e. one which folds half squares from straight strips, could only be successfully attached to appellant's machine if appellant's machine does produce straight strips. The court, we think, correctly found that the machine to which the one to be manufactured was to be attached "was represented as producing straight * * * strips", that it did not do so and that respondent could not produce a machine to fold into half squares the metal strips produced by appellant's machine because they were not straight.

[2] This brings into play the rule of the Restatement of Contracts, sec. 262: "Where a promise cannot be performed in accordance with its proper interpretation without some precedent or concurrent act or forbearance by the promisee, the act or forbearance is a condition." Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 30, 134 P. 989; Mansfield v. New York Cent. & H. R. R. Co., 102 N.Y. 205, 6 N.E. 386, 388; Mill Dam Foundery v. Hovey, 21 Pick., Mass., 417, 439; 3 Corbin on Contracts, sec. 640, pp. 546–548; 3 Williston on Contracts, Rev.Ed.1936, sec. 887A, pp. 2494–2497. The failure of appellant to perform this condition precedent excused respondent's performance which was dependent on it. Civil Code, § 1439 and cases cited supra.

It thus becomes immaterial whether the two agreements are regarded as one contract or not. In either case respondent's failure to perform the particular obligation was excused.

[3] Appellant's complaint of the delay of the trial judge in deciding the case affords no ground for reversal. The other points made have to do with the claim that the two agreements were one contract, a question which we have concluded is immaterial under the facts found.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

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126 Cal.App.2d 529

KRIENKE v. FOUNDERS' INS. CO.

Civ. 4816.

District Court of Appeal, Fourth District, California.

July 14, 1954.

Action on insurance policy for theft of property from fishing boat. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment on verdict for insured and insurer appealed. The District Court of Appeal, Barnard, P. J., held that evidence supported finding that damage was done by one not rightfully in possession of boat.

Judgment affirmed.

Insurance ⇨665(4)

In action on insurance policy for theft of property from fishing boat, wherein insurance carrier sought to deny coverage on grounds boat had been sold to one who allegedly committed theft, evidence supported finding that damage was done by one not rightfully in possession of boat.

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Higgs, Fletcher & Mack, San Diego, for appellant.

J. Perry Langford, Los Angeles, for respondent.

BARNARD, Presiding Justice.

In this action on an insurance policy, the jury returned a verdict for the plaintiff and the defendant has appealed from the judgment.

The plaintiff was the owner of the fishing boat "Little Albert", which was moored near the civic center in San Diego. On January 18, he entered into an agreement with one Al Koritz which was entitled "Option to purchase boat—Little Albert". It was then stated that "this option" was made on that day between these parties; that Koritz agrees to purchase the boat for $5,250, payable $200 "upon the signing of this option", $1,200 on February 15, 1951, at which time Koritz was to receive a bill of sale and give back a preferred mortgage for $3,850, payable in monthly payments; that Koritz agreed to insure the boat on February 15, 1951, in the amount of the unpaid balance, with the insurance payable to the plaintiff to the extent of the balance due; that Koritz is to have possession of the boat "upon the signing of this Option, in order to make repairs, replacements and to remodel said Boat"; and that Koritz is not to take or permit the boat to be taken from San Diego harbor "before this Option is perfected on February 15, 1951." The agreement refers to an "option" in six places.

On January 19, 1951, the defendant placed a "30-day binder" on the boat reinstating a previous policy covering described perils, including a loss from "Thieves" and "Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c, or any part thereof". The original policy contained a warranty that the boat should be "Laid up and out of Commission" within the harbor; and a clause providing that the insurance should terminate if the boat started to leave that port.

A door to a cabin on the boat, giving the only access to the engine room and other equipment on the boat, was kept locked and the plaintiff retained the key. On January 21, 1951, a Mr. Nash was hired by one Collins to tow the boat to another location in San Diego Harbor, some four miles away.

Nash testified that when he arrived at the location of the Little Albert he was introduced by Collins to a man who was there "as Koritz, the new owner of the boat"; that he had no conversation with that man and no conversation with Collins which that man could hear; that when he arrived there the boat door of the Little Albert was open, and he did not notice whether or not it had been forced open; that Collins told him where he wanted the boat taken and he took it to that place; that when they arrived the same man was waiting there; that Collins then gave him an army radio, an anchor and a compass as compensation for moving the boat; that this man, who had been introduced as Koritz, was watching the procedure but did not go on board the boat; that he had never met this man before; that in March, 1952, he saw that same man again in an office in a bank building in San Diego; and that he saw the name "Koritz" on the directory at the entrance to this building.

On January 23, 1951, the boat was found at the place where Nash had taken it, in a stripped condition. The engine and several thousand dollars worth of equipment were gone, the door to the boat had been broken open, and part of the roof of the cabin had been removed. The plaintiff reported the loss to the defendant, resulting in an investigation. The missing property was not recovered except for the small items given to Nash by Collins as compensation for the towing job. An adjuster for the defendant testified that he met Koritz in March, 1951, at the office of the district attorney; and again met him on March 17, 1952, in the office of "O'Neils and Koritz" in the bank building, at which time Nash was present. It was conceded at the trial that this 30-day binder issued by the defendant was on a "Port Risk Form", but we find no evidence in the record as to the exact terms and conditions stated therein.

Appellant's main contention is that it appears, as a matter of law, that the evidence is not sufficient to establish a loss covered by the policy since it affirmatively appears that the damage was done by one rightfully in possession of the boat, and that such a person could not be a thief under the terms of a marine insurance policy. It is argued that a contract of marine insurance is governed entirely by Admiralty Law; that the term "Thieves" in a contract of marine insurance means assailing thieves from without, and probably simple larceny by third persons, but never includes larceny or embezzlement by the Master or those lawfully in possession; that Al Koritz, being lawfully in possession, could not be guilty of theft or embezzlement; and that, at most, he was guilty of a mere breach of contract. In support of this contention the appellant relies on Atlantic Insurance Co. v. Storrow & Boyd, 1835, 5 Paige, N.Y., 285; Marshall and Hartshorn v. Nashville Marine and Fire Ins. Co., 1839, 20 Tenn. 99; and American Ins. Co. v. Bryan, 26 Wend., N.Y., 563, 37 Am.Dec. 278. While some of the language used in these decisions lends support to some of these contentions, these cases are not controlling under the facts which here appear.

Assuming that the rule thus contended for, as applicable to a policy of marine insurance covering ships engaged in commerce on the high seas, is still effective, its applicability to the situation here in question would still be doubtful. This was a special contract, applicable only in one harbor, and issued to cover and protect the insured under certain known conditions for a short time, until he was in a position to receive other protection. It appears, without conflict, that the respondent showed his contract with Koritz to appellant's agent and that the policy was issued after the agent read that agreement. A further doubt exists with respect to Koritz' ownership and right of possession under the terms of the contract. It does not conclusively appear that he was the owner, and in possession, within the meaning of the ancient law relied on by the appellant. The meaning of the contract is somewhat ambiguous with respect to whether it was intended to be a mere option or a conditional sales contract, effective immediately. It clearly appears that it was not the usual conditional sales contract giving an immediate right to full possession, the usual indication of present equitable ownership. The only right of possession given was strictly limited both as to purpose and as to where it might be exercised. In view of the language used, the court's interpretation of the contract, as in effect an option, cannot be said to be unreasonable, in the light of the contract and the evidence.

Regardless of the meaning of the contract, there is ample evidence that possession of the boat was not actually given to Koritz. The boat was locked so that it could not be operated, and the respondent kept the key. After the agreement was signed it was orally agreed by the parties that the respondent would keep the key and that Koritz would ask for it when he was ready to repair or remodel the boat; in other words, when he was ready to take the limited possession authorized by the contract.

Even if Al Koritz were to be considered as the owner of this boat under the old law, or any law, further questions of fact appear with respect to the theft itself. The respondent was the legal owner and entitled to possession of the boat until he surrendered the key. There is ample evidence that some one broke into the boat, enabling it to be towed away, and that some one took practically all of its equipment from it without the respondent's knowledge or consent, which justified an inference that a theft occurred. Under the evidence it could reasonably be inferred that Collins was the person who committed the theft. The appellant attempted to show that Al Koritz was the thief, but the most that can be said is that conflicting inferences in that regard could be drawn. Even if a man named Koritz was present when the boat was moved to the other location it was not shown that this was the same Koritz who signed the contract. There was no direct evidence that the man who was seen at the piers just before and just after the boat was moved, and who was later seen by two witnesses and thought to be a Mr. Koritz, was the one who had signed the contract. The evidence may well justify, but does not compel, such an inference. Moreover, if it be assumed that Al Koritz was there when the boat was moved, the boat was stripped at some later time and there is no evidence that he was then present or had anything to do with that event. Many questions of fact existed and the evidence, with the inferences which might reasonably be drawn therefrom, supports the verdict and judgment.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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126 Cal.App.2d 540

BOND v. DE WITT et al.

Civ. 4902.

District Court of Appeal, Fourth District, California.

July 14, 1954.

Employee's action in which complaint alleged that employers had fraudulently concealed and misrepresented profits of which the employee was to have a share as part compensation. From judgment of Superior Court, Fresno County, Strother P. Walton, J., on a verdict for $7,500 in favor of the employee, the employers appealed. The District Court of Appeals, Griffin, J., held that the jury's special finding that there was no fraud, was inconsistent with its verdict, which was for a larger sum than the employee's counsel had claimed to be warranted by the proof, aside from punitive damages, and that the special finding was controlling.

Judgment reversed.

1. Fraud 🔑66

Where action in which employee's complaint labeled "complaint for fraud" alleged that employers had fraudulently concealed and misrepresented profits of which employee was to have a share as part compensation, was tried on theory of fraud, jury's special finding that there was no fraud was inconsistent with general verdict awarding damages to employee. Code Civ.Proc. § 625.

2. Limitation of Actions ⇨195(5)

Though statute of limitations ordinarily is affirmative defense and the burden rests on defendant to prove such defense, in an action for fraud which is commenced more than three years after fraud occurred, burden is not on defendant to show that knowledge of facts was brought home to plaintiff but on plaintiff to prove he did not discover facts constituting fraud within three years prior to commencement of action and he must further show time and circumstances under which facts were brought to his knowledge.

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Miles & Sears, William M. Miles, Fresno, for appellants.

Matt Goldstein, Fresno, for respondent.

GRIFFIN, Justice.

There is some confusion whether the complaint states a cause of action for breach of an oral agreement or whether it states a cause of action for damages for fraud. Plaintiff labels it "Complaint for Fraud" and alleges that defendants A. H. DeWitt and Katherine DeWitt, doing business as Creamers Dairy and Central Valley Creamery, entered into an oral agreement whereby defendants agreed to pay plaintiff a monthly salary equal to the union salary scale prevailing in Fresno County for butter pasteurizers so long as plaintiff would be employed by defendants, and in addition defendants agreed to pay plaintiff 25 per cent of the annual profit earned by the dairy and creamery managed by plaintiff during each of the years he was so employed; that it was agreed in computing the profits, the salary paid by defendants to plaintiff and all reasonable operating expense would first be deducted from the gross income and that said 25 per cent of the net profits would be paid to plaintiff at the end of each calendar year after the accountants for defendants had computed the net profits.

It then alleged that up to June 28, 1951, plaintiff reposed great confidence in defendants and permitted them to manage all of the financial affairs of the creamery and dairy; that plaintiff did not have any familiarity with bookkeeping but trusted the defendants to give to the plaintiff a fair and just account of all profits earned in connection with the oral agreement; that on July 15, 1945, plaintiff entered the employ of the defendants and continued such employment to December 31, 1950, at which time it was terminated; that beginning on January 1, 1946, and each year thereafter, plaintiff requested defendants to render him a written statement of the net profits, but that at no time prior to April 20, 1950, was any written financial statement prepared by defendants' accountants and presented to him; that in January, 1946, A. H. DeWitt informed plaintiff that the profits earned for the period commencing July 15, 1945, and ending December 31, 1945, were approximately $1,000, and paid plaintiff $250, representing 25 per cent of the profits; that each year thereafter, defendants informed plaintiff that no profits were made during that year but they continued to pay plaintiff a sum of money each year (totaling $3,000 for the entire period) in addition to plaintiff's salary, and informed plaintiff that they were paying these sums on account of future profits which might be earned from the dairy and creamery, and in recognition of the loyal service which he rendered defendants; that on April 20, 1950, defendants delivered to plaintiff a statement purporting to show the operations of the dairy and creamery for the years 1945 to 1949, inclusive; that up to June 28, 1951, plaintiff relied upon and believed each and all of these statements and representations and accepted as true the explanations made by defendants to the plaintiff as to the reasons why the defendants were paying the additional sums over and above plaintiff's salary; that said statements and representations were false and untrue and were known by defendant A. H. DeWitt to be false and untrue; that in truth and in fact the said dairy and creamery managed by the plaintiff earned a total net profit of approximately $100,000 during said period after deducting the salary paid to the plaintiff and all operating expenses; that plaintiff was entitled to receive 25 per cent thereof, namely $25,000, less a credit in the sum of $3,000, for monies theretofore paid, leaving a balance due of $22,000.

Then follows an allegation that plaintiff did not discover the falsity and untrue character of the false and fraudulent statements until June 28, 1951, at which time he caused a partial audit to be made of the books and records at plaintiff's expense; that until said audit was made plaintiff was not aware of the untruth and falsity of said statements showing the methods employed by defendants in concealing from the plaintiff the true and correct net profits earned by the business and in perpetrating the fraud upon the plaintiff.

Then follows the allegation that in connection with the false and fraudulent representations made by defendants and as a part of the scheme to defraud plaintiff out of his just share of the profits pursuant to their agreement, defendants did certain described false, fraudulent, malicious and illegal acts.

It is then alleged that on December 31, 1950, plaintiff demanded from defendants the profits to which he was entitled but that defendants refused to pay plaintiff said sum. Plaintiff then alleges that the acts of defendants were willful, wanton and malicious and that by reason thereof plaintiff is entitled to recover punitive damages in the sum of $5,000.

Then follows the allegation that plaintiff expended $500 for the partial audit and that it would be necessary to have an additional examination and correction made of defendants' books and records, and that such additional auditing expense will be $5,000, making in all, damages in the sum of $5,500 for this item.

The prayer of the complaint is for "*damages* against the defendants" for said amounts.

Defendants answered and denied the allegations of the complaint generally, and specifically denied that Katherine DeWitt was a copartner. They admitted that the plaintiff and defendant A. H. DeWitt entered into an oral agreement and that plaintiff was to receive a salary equal to the union scale and that he was also to receive 25 per cent of the annual net profits for each of the years he was employed, but claim it was agreed that the net profits were to be computed by taking the annual gross receipts and deducting therefrom all deductions allowable for U. S. Income tax purposes, plus a salary for A. H. DeWitt equal to the salary allowed plaintiff, and that said profits were to be computed within a reasonable time after the close of each of said years, and it was then when plaintiff was to be paid his bonus, if any. They admitted that at no time prior to April 20, 1950, was any written financial statement prepared by their accountants and presented to plaintiff. They admitted that such payments made to plaintiff, over and above his salary, were made to him from time to time as he needed more money, and were given to him on account of any past or future bonuses due.

The answer then sets up Section 339 of the Code of Civil Procedure and Section 1624 of the Civil Code as a bar to plaintiff's recovery. On a motion for nonsuit the action against defendant Katherine DeWitt was dismissed. Plaintiff demanded a jury trial, which resulted in a verdict of $7,500 for plaintiff.

Accompanying the verdict was a special interrogatory submitted to the jury in the following form: "Do you find that A. H. DeWitt fraudulently concealed any income, or fraudulently included any items of expense or charges?" To this the jury answered "No".

On appeal from the judgment defendants claim (1) that the answer of the jury to the special interrogatory was fatally inconsistent with the general verdict of the jury; (2) that the jury was prejudicially misdirected by the giving of an erroneous and contradictory instruction upon the statute of limitations applicable to the case; (3) that the offer and reception of evidence of accounting expenses as an item of special damage was prejudicial error; (4) that the damages awarded were excessive; and (5) that the jury was erroneously instructed that exemplary damages might be awarded upon a finding of fraud on the part of the defendant.

[1] If the label plaintiff attaches to his cause of action is correct, i. e., "com-

plaint for fraud", and the recovery claimed is for *damages* for such fraud, as alleged, then it is apparent that the special finding returned by the jury that DeWitt did not fraudulently conceal any income or fraudulently include any items of expense or charges is inconsistent with the general verdict awarding "damages" to plaintiff for $7,500. Haas v. Whittier, 97 Cal. 411, 32 P. 449; Martin v. Sutter, 60 Cal.App. 8, 212 P. 60; Williams v. San Francisco & N. W. Ry. Co., 6 Cal.App. 715, 93 P. 122. Section 625 of the Code of Civil Procedure provides that the court may direct the jury to find a special verdict in writing, upon all, or any of the issues; and that where a special finding of fact is inconsistent with the general verdict the former controls the latter.

It is plaintiff's position that the special verdict is not inconsistent with the general verdict because there was sufficient evidence to support the judgment on the theory of money had and received (which cause of action was not specifically pleaded), or upon the general theory that the judgment would be supported as an action upon contract and accordingly the question of fraud was immaterial, citing Portland Cracker Co. v. Murphy, 130 Cal. 649, 63 P. 70. In that case the action was for the return of money claimed to have been fraudulently appropriated by defendant, and the prayer of the complaint was for judgment for the sum of money had and received, or for conversion. There it was held that the finding that there was no fraud was not inconsistent with the last-named causes of action upon which the judgment was predicated.

In determining the nature of plaintiff's cause of action and the theory upon which it was tried, we should consider additional facts. The jury was instructed (at plaintiff's request) on the question of fraud in the language of sections 1571, 1572 and 1573 of the Civil Code, and that any concealment of facts constituted fraud where a confidential relationship existed. The jury was specifically instructed that "plaintiff claims and alleges that he suffered and sustained certain damages and losses by virtue of the alleged fraud of the defendant"; and that the "measure of damages for the breach of an obligation arising from fraud, is the amount which will compensate the person injured thereby for all detriment proximately caused thereby"; that "for breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, * * * a plaintiff, in addition to actual damages, may recover damages by way of example and by way of punishing the defendant". This was followed by an instruction that the "Statute of Limitations has been raised as a defense in this action by the defendant. The burden of proving that the Statute of Limitations bars any of the claims alleged in the plaintiff's complaint rests with the defendant"; and that (quoting section 338, subd. 4, Code Civ.Proc.) "An action for relief on the ground of fraud or mistake [must be commenced within three years of the accrual of the cause of action]. The cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake". The court then gave defendants' proffered instruction that the law "prevents this plaintiff from recovering damages for any breach of his agreement prior to November 9, 1949, unless he can prove by a preponderance of the evidence * * * 1. That any such prior breach of the agreement was fraudulently concealed from him, and 2. That he did not discover such breach prior to November 9, 1949."

As an element of special damage the court allowed plaintiff to testify that he expended $1,300 accountant's fees in auditing and ascertaining the facts in reference to defendant's operating costs and net profits for the five-year period beginning June 15, 1945, to December 31, 1950. In no instance did the trial court indicate that a judgment could be returned for plaintiff on any other basis than damages for fraud. There was no indication that such a verdict could be returned on the theory of money had and received or conversion or upon an oral contract notwithstanding the failure of proof of fraud, and no such instruction was offered. It is apparent that the case was tried upon the theory of a recovery for damages for plaintiff upon the ground of fraud. Accordingly, the special finding of the jury that the defendant did not fraudulently conceal any income, or fraudulently include any items of expense or charges was inconsistent with a recovery upon the theory upon which plaintiff proceeded. Haas v. Whittier, supra.

It is apparent that plaintiff was relying upon fraudulent concealment of the facts to bar the operation of the statute of limitations. The action was not commenced until November 9, 1951, and to avoid the operation of the three-year statute of limitations, Section 338 of the Code of Civil Procedure, subdivision 4, plaintiff alleged that the fraud was not discovered until June 28, 1951. The court gave an instruction in the language of that section and subdivision, even though defendant did not plead that section or subdivision as a defense but did plead section 339 of the Code of Civil Procedure without naming the subdivision. It also gave an instruction that no recovery could be had for breach of the agreement prior to November 9, 1949, unless plaintiff could prove that any prior breach was concealed from plaintiff, and that he did not discover such breach prior to November 9, 1949. The action was filed on November 9, 1951. Apparently the court has also attempted to apply the two-year statute of limitations, namely, section 339, subdivision 1, of the Code of Civil Procedure. Under the pleadings as they exist and the theory upon which the case was tried these two instructions are in hopeless conflict and cannot be reconciled.

If plaintiff is relying upon the theory of money had and received or a conversion without fraudulent intent, or upon breach of contract to sustain the judgment, then any evidence of *special damage* in payment of accounting fees was inadmissible, and if admissible at all, it was only admissible under the theory that the action was for damage for a tort arising from the fraud as alleged. Haigler v. Donnelly, 18 Cal.2d 674, 117 P.2d 331. In determining the amount of the judgment returned, the jury may have taken into consideration the item of $1,300 accountant's fees. If so, it could not be supported in face of the special finding that no fraud was committed by defendant. A similar conclusion might well be reached in regard to the instruction pertaining to exemplary damages, even though the verdict returned recited that it was for "*compensatory damages*". This conclusion is fortified by the fact that a judgment on the verdict was entered for $7,500, after plaintiff's attorney, in his argument to the jury, told it that plaintiff had not been successful in proving damages in excess of $6,206.97 (which included the $1,300 accounting item); and that the jury was to be the judge whether punitive damages should be awarded in addition to that amount. On the motion for a new trial, counsel for plaintiff, in answer to the contention that the judgment was excessive, offered, in writing, to stipulate to a reduction of the judgment to $6,206.97. The court refused the stipulation and denied the motion for a new trial. From the facts presented it appears that the motion should have been granted.

[2] Counsel for plaintiff concedes that in an action based upon fraud, it is the duty of the plaintiff and the burden is cast upon him to prove that the fraud was not discovered more than three years prior to the commencement of the action, but contends that the instruction placing the burden of proof of the statute of limitations on the defendant was proper when considered with the court's instruction that the burden rests upon the plaintiff "to prove by a preponderance of the evidence all elements of his case". Shapiro v. Equitable Life Assurance Society, 76 Cal. App.2d 75, 172 P.2d 725, correctly states the rule, and no doubt on a new trial a more adequate instruction on this subject will be given.

We conclude that the errors pointed out were sufficiently erroneous and prejudicial to the defendant to require the granting of a new trial.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

126 Cal.App.2d 597

SCHINDLER v. SCHINDLER.

Civ. 20186.

District Court of Appeal, Second District,
Division 1, California.
July 19, 1954.

Divorce action involving question as to whether certain realty was community property or joint tenancy property. The Superior Court, Los Angeles County, H. S. Farrell, J., entered judgment holding the property to be community property, and both parties appealed. The District Court of Appeal, Mosk, J. protem., held, inter alia, that where wife signed papers involved in purchase of realty under joint tenancy deed, in absence of fraud or misrepresentation, she participated in the transaction and thereby consented in writing to transfer of community funds to joint tenancy property, though the property was purchased primarily from community funds, even if wife's unrevealed intention were that the property belonged to the community.

Reversed in part and affirmed in part.

1. Evidence 🔑5(2)

It is common knowledge that innumerable husbands and wives with little or no information about estates in real property acquiesce without reflection in suggestion that they place purchased property in joint tenancy.

2. Husband and Wife 🔑249

A community estate and joint tenancy estate cannot exist at same time in same property.

3. Husband and Wife 🔑264

The statutory presumption that property acquired after marriage except by gift, bequest, devise, or descent is community property, is successfully rebutted by evidence that property was taken in joint tenancy. Civ.Code, §§ 162–164.

4. Joint Tenancy 🔑3

The fact that deed was taken in joint tenancy establishes prima facie case that property is in fact held in joint tenancy.

5. Deeds 🔑192

There is a presumption that property is as described in deed, and burden is on party who seeks to rebut the presumption.

6. Joint Tenancy 🔑3

Even with evidence that parties did not intend to take property as joint tenants, deed, creating joint tenancy, in itself creates a conflict of fact.

7. Husband and Wife 🔑262(1)

The form of joint tenancy conveyance is itself some evidence of intent to change character of community property, and creates a rebuttable presumption to that effect.

8. Husband and Wife 🔑249

A conveyance of property to husband and wife as joint tenants does not necessarily, and under all circumstances, preclude idea of their holding the property as community property.

9. Husband and Wife 🔑266

A husband and wife may convert community property into separate property, and vice versa, by agreement between themselves.

10. Husband and Wife 🔑264

Persuasive evidence of understanding between husband and wife converting community property into separate property, or vice versa, will rebut presumption created by form of deed.

11. Evidence 🔑426

Parol evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property.

12. Husband and Wife 🔑254

The purchase of property with community funds is insufficient, standing alone, to establish that property is community property.

13. Husband and Wife 🔑264

The presumption arising from form of joint tenancy deed may not be rebutted, in attempt to show that property is community property, solely by evidence as to source of funds used to purchase the property, but such presumption may be controverted by testimony indicating the intention, understanding or agreement of the parties.

14. Husband and Wife ⚷264

The unrevealed intention of husband or wife that property conveyed by joint tenancy deed remain part of the community is not effective to rebut presumption arising from form of the deed.

15. Husband and Wife ⚷265

The statutory restrictions upon husband's control of community property are solely for benefit of the wife. Civ.Code, § 172.

16. Husband and Wife ⚷254

A husband, in transferring community funds into joint tenancy property, is subject to limitations imposed by statute upon his control of community property. Civ. Code, §§ 172, 172a.

17. Husband and Wife ⚷266, 267

Division of community property can take place only after dissolution of community by death or divorce or by transfer by husband with wife's consent. Civ.Code, §§ 172, 172a.

18. Husband and Wife ⚷267

If husband exceeds his authority of management of community property by transferring it into joint tenancy property without wife's written consent or participation, she may reclaim the property for the community by showing her own intent, even though undisclosed, that it retain its community character. Civ.Code, §§ 172, 172a.

19. Husband and Wife ⚷270(3)

The statutory period for institution of independent action to avoid deeds affecting community property is for protection of third parties who might rely on recorded instruments. Civ.Code, § 172a.

20. Husband and Wife ⚷264, 267(9)

If wife consents to or participates in transfer of community property to joint tenancy property by any act in writing, she may no longer avail herself of protection of statutes restricting husband's control of community property, and presumption that property is held as deed recites it to be held may be rebutted only by convincing testimony of mutual understanding of husband and wife. Civ.Code, §§ 172, 172a.

21. Husband and Wife ⚷254

Where wife signed papers involved in purchase of realty under joint tenancy deed, in absence of fraud or misrepresentation, she participated in the transaction and thereby consented in writing to transfer of community funds to joint tenancy property, though property was purchased primarily from community funds, even if wife's unrevealed intention were that property belonged to the community.

22. Divorce ⚷249(3)

Unless realty held in joint tenancy is in fact a community asset, court in divorce action is without power to make disposition of such property.

Clarke & Gleis, Stanley N. Gleis, Beverly Hills, for appellant and cross-respondent.

Hahn, Ross & Saunders, Los Angeles, for respondent and cross-appellant.

MOSK, Judge pro tem.

Declaring that it was impossible to continue to live together as husband and wife, respondent commenced an action against appellant for divorce on October 1, 1952. In her complaint she alleged that certain real property known as 14041 Roblar Road, Sherman Oaks, California, was community property.

Her specific averment in that regard was "that the title to said property stands of record in the names of the parties hereto as joint tenants for the purpose of convenience only and for no other reason, and said property was intended between the parties hereto to be at all times and now is their bona fide community property". Appellant answered that "it was at all times since the acquisition of the said property and is now the intention of the parties that the said property be held by them as joint tenants".

After trial held on June 23, 1953, the court found "That it is true that the real property hereinabove described stands of record in the names of plaintiff/cross-defendant and defendant/cross-complainant as joint tenants, but that in truth and in fact, said property is the bona fide community property of the parties hereto". Pursuant to the foregoing finding that it was community, the trial court awarded the property to respondent, to whom it granted an interlocutory decree of divorce on the ground of extreme and habitual cruelty. From that portion of the decree relating to the real property, appellant has appealed, maintaining the realty is in fact joint tenancy.

Testimony at the trial revealed that the parties were married in Connecticut and during their marriage acquired a home in Pennsylvania, that residence having been sold when they moved to California in about 1949, at which time the Sherman Oaks residence was purchased. In connection with the acquisition appellant borrowed $3,000 from his father to apply on the purchase price and that sum has not been repaid. Testimony of the respondent was in essence that she did not understand the meaning of joint tenancy, that no one explained its nature or effect to her, that she signed the papers in connection with the transaction, that she thought the property "belonged to both of us" and that it was community property, and that all payments made on the property came from appellant's earnings. She further stated on cross-examination that there had been no discussion between her and appellant as to how title should be taken. She also admitted that she did not know anything about community property at that time.

The sole question presented on this appeal is whether the trial court properly determined that the real property was in fact community property and therefore subject to disposition in the divorce proceedings.

[1] It is common knowledge that innumerable husbands and wives with little or no information about estates in real property acquiesce without reflection in the suggestion that they place purchased property in joint tenancy. This estate, of course, has certain advantages. Usually not until marital discord reaches the critical stage of dividing community assets does one of the spouses—generally the one found to be innocent of wrong-doing and therefore entitled to more than half of the community property—first learn of the disadvantages of joint tenancy. At that point the issue of lack of comprehension, or absence of consent to the creation of the joint tenancy estate inevitably arises. Rare indeed is the contested divorce case today in which the trial court is not concerned with this issue.

The basic law applicable to this problem is reasonably well settled. It is in some of the refinements that we find what appears at first blush to be a conflict in the cases.

[2] From the very nature of the estate, as between husband and wife, a community estate and a joint tenancy estate cannot exist at the same time in the same property. Tomaier v. Tomaier, 23 Cal.2d 754, 758, 146 P.2d 905. This was established in Siberell v. Siberell, 214 Cal. 767, at page 773, 7 P.2d 1003, at page 1005, the court there further holding that "use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate."

[3–7] The statutory presumption that property acquired after marriage except by gift, bequest, devise, or descent is community property, Civil Code, §§ 162, 163, 164, is successfully rebutted by evidence that the property was taken in joint tenancy. Edwards v. Deitrich, 118 Cal.App.2d 254, 260, 257 P.2d 750. The fact that a deed was taken in joint tenancy establishes a prima facie case that the property is in fact held in joint tenancy. King v. King, 107 Cal.App.2d 257, 259, 236 P.2d 912. There is actually a presumption that the property is as described in the deed and the burden is on the party who seeks to rebut the presumption. Edwards v. Deitrich, supra. The form of the deed cannot be lightly disregarded. Even with evidence of contrary intent, the deed alone creates a conflict of fact. Cox v. Cox, 82 Cal.App.2d 867, 870–871, 187 P.2d 23. As stated in Re Rauer's Collection Co., 87 Cal.App.2d 248, 257, 196 P.2d 803, 809, "The form of the conveyance is itself some evidence of the intent to change it from community property, and creates a rebuttable presumption to that effect."

[8–11] On the other hand, a conveyance of property to a husband and wife as joint tenants does not necessarily, and under all circumstances, preclude the idea of their holding the same as community property. Cummins v. Cummins, 7 Cal.App.2d 294, 304, 46 P.2d 284. It is clear that a husband and wife may convert community into separate property, and vice versa, by agreement between themselves, and that persuasive evidence of such an understanding will rebut the presumption created by the form of the deed. Edwards v. Deitrich, supra. Parol evidence is admissible to show that a husband and wife who took property as joint tenants actually intended it to be community property, the purpose being to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intention of the parties. Tomaier v. Tomaier, supra, 23 Cal.2d at page 757, 146 P.2d at pages 906, 907. In Thomasset v. Thomasset, 122 Cal.App.2d 116, 133, 264 P.2d 626, 637, the court indicated "Property may be found to be other than that indicated by the deed when there is an oral or written agreement as to the ownership of the property, or where such understanding may be inferred from the conduct and declarations of the spouses."

[12–14] The purchase of property with community funds is insufficient standing alone to establish that property is community property. In re Rauer's Collection Co., supra, 87 Cal.App.2d at page 257, 196 P.2d at pages 808, 809. The presumption arising from the form of the deed may not be rebutted solely by evidence as to the source of the funds used to purchase the property. Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656. However, it may be contraverted by testimony indicating the "intention, understanding or agreement of the parties". Socol v. King, 36 Cal.2d 342, 345, 223 P.2d 627, 629. Respondent has emphasized the disjunctive character of the foregoing phrase, and maintains her intention alone will suffice to establish the property held in joint tenancy to be actually community. Neither the facts nor the outcome of Socol, however, lend her much comfort. For the unanimous court there determined that the unrevealed intention of one party alone for the property to remain a part of the community is not effective.

At this point we reach two cases upon which respondent heavily relies. Superficially they appear to conflict with the foregoing rules, but we believe they can be reconciled.

In Palazuelos v. Palazuelos, 103 Cal.App.2d 826, 230 P.2d 431, the court affirmed a holding that property was community although the only evidence mentioned indicated the wife did not intend the property to be purchased in joint tenancy. Apparently there was no finding as to the husband's or their mutual intention. In Turknette v. Turknette, 100 Cal.App.2d 271, at page 279, 223 P.2d 495, at page 501, although the court said: "The trial court is required to ascertain the intention of the parties, and that intent may be found not only in direct but also in circumstantial evidence", it found as the principal circumstance 100 Cal.App.2d at page 280, 223 P.2d at page 501 that "she had no intent of creating separate interests in the property". Here again, what the husband or the parties jointly intended or understood was not discussed.

[15–17] The husband has the management and control of the community property, but he cannot make a gift of it without the written consent of the wife. Civil Code, § 172. The restrictions upon the husband's control are solely for the benefit of the wife, or as stated in Re Estate of McNutt, 36 Cal.App.2d 542, 552, 98 P.2d 253, 258, for her protection "from the prodigality of a reckless or faithless husband". It is not necessary to determine whether transferring community funds into joint tenancy property is a gift or other disposition, for it has been held that in so acting a husband, despite his powers of management of the community, is subject to the limitations of Sections 172 and 172a of the Civil Code. As stated in Britton v. Hammell, 4 Cal.2d 690, 692, 52 P.2d 221, 222, "Our law does not contemplate this means of dividing the community property. It provides only for division after dissolution of the community by death or divorce or by transfer by the husband with the wife's consent * * *."

In Socol, Edwards, Tomaier, Cox and other cases herein discussed, the wife joined in the transaction by which the property was converted into joint tenancy. This amounted to the consent required by Civil Code sections 172 and 172a. In Palazuelos, however, she did not consent and that element apparently influenced the result. For the court, while not revealing all pertinent facts in the abbreviated opinion, discussed the wife's participation in Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906, and then stated, 103 Cal.App.2d at page 827, 230 P.2d at page 432: "Such circumstances did not exist in the instant case". Turknette presented a somewhat more complicated problem, since a putative marriage was involved.

[18] It would seem, therefore, that if the husband exceeded his authority of management by transferring community property into joint tenancy property without the wife's written consent or participation, she should be able to reclaim the property for the community by showing her own intent, even though undisclosed, that it retain its community character.

[19] Although there is a statutory period for the institution of an independent action to avoid deeds of that character, Civil Code, § 172a, it would appear this is for the protection of third parties who might rely on the recorded instruments. As cautioned in Siberell, 214 Cal. at page 772, 7 P.2d at page 1005, it should be noted that we are dealing here strictly with the controversy between the parties to the marriage and are not determining standards by which the characteristics of the property are ascertained when the claims of judgment creditors or the rights of third persons are involved.

[20] But if the wife consented to or participated in the transfer to joint tenancy by any act in writing, then she may no longer avail herself of the protection of Civil Code sections 172 and 172a, and the presumption that the property is held as the deed recites it to be held may be rebutted only by convincing testimony of the mutual understanding of the husband and wife. For a discussion on this entire subject see Brown and Sherman *Joint Tenancy or Community Property: Evidence,* Vol. XXVIII Journal of the State Bar of California, p. 163 ff. For discussions of consent by acts constituting subsequent ratification, see 7 A.L.R.2d 299, 309, 333, 342.

[21, 22] In the instant case, the wife signed the papers involved in the purchase of the property. In so doing, and in the absence of fraud or misrepresentation, she clearly participated in the transaction and thereby consented in writing to the transfer of community funds to joint tenancy property. Respondent further testified in response to interrogation that she "just thought it belonged to both of us" and believed that it was community property. There is no testimony in the record that she revealed those evanescent thoughts to appellant or to anyone else. On cross-examination she conceded she had not discussed the manner of taking title with appellant.

This, then, is a precise duplicate of the unilateral and uncommunicated intention that existed in Walker v. Walker, 108 Cal.App.2d 605, 239 P.2d 106, the court there holding it utterly insufficient to meet the burden of establishing the property to be community. The wife having consented in writing to "the execution of the joint tenancy deed, she cannot defeat her act by testimony of a hidden intention not disclosed to the other party at the time of the execution of the document", said the court in Watson v. Peyton, supra, 10 Cal.2d at page 158, 73 P.2d at page 907, adding that "* * * all the restrictions of sections 172 and 172a of the Civil Code were met * * *."

It is of no significance that the respondent stated she was unaware of or mistaken about the legal effect of the deed. Nor is it material that the home was purchased primarily from community funds. Those facts, taken together, provide no basis for an inference of a mutual understanding or agreement between the husband and wife that the community nature of the property was to be preserved regardless of the form of the deed. Gudelj v. Gudelj, supra. The evidence falls far short of supporting the allegation of the complaint that "said property was intended between the parties hereto to be at all times and now is their bona fide community property." In fact, there was no evidence of an agreement, nor any evidence from which it can be inferred that the parties, as distinguished from one party alone, intended the parcel to be community property. Walker v. Walker, supra, 108 Cal.App.2d at page 609, 239 P.2d at page 108. Therefore, the trial court was in error in attempting to dispose of the property in the divorce action. It is well settled that unless real property held in joint tenancy is in fact a community asset, the court in an action for divorce is without power to make disposition of such property. Walker v. Walker, supra.

Therefore that part of the interlocutory decree of divorce purporting to award the real property to respondent is reversed; cross-appellant having abandoned her cross-appeal, it is dismissed, and the decree in all other respects is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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126 Cal.App.2d Supp. 845

PEOPLE v. McSHANE.

C.R.A. 3127.

No. 19789.

Appellate Department, Superior Court,
Los Angeles County, California.

March 17, 1954.

Defendant was found guilty and summarily granted probation by the Municipal Court, Los Angeles Judicial District, Byron J. Walters, J., and he filed notice of appeal. The People obtained order to show cause why appeal should not be dismissed. The Superior Court, Appellate Department, Bishop, J., held that there was no judgment from which to appeal, but that notice would be construed as notice of appeal from order granting probation.

Order to show cause discharged.

1. Criminal Law 🔑1023(10)

Where trial court found defendant guilty and summarily granted probation, among the terms of which were a fine and requirement that defendant serve first ten days of probationary period in jail, there was no sentence imposed upon verdict and no judgment from which to appeal.

2. Criminal Law 🔑1081

Where notice of appeal stated that it was taken from judgment entered on certain date, and only action taken by trial court on that date was to find defendant guilty and summarily grant probation, notice was construed as notice of appeal from order granting probation. Pen. Code, §§ 1237, 1466.

Lowell Lyons, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

BISHOP, Judge.

[1] The only notice of appeal in this case states that it is taken "from the judgment entered in above entitled matter on January 13, 1954." The action taken by the trial court on that date was to find the defendant guilty and summarily grant probation. Among other terms of the probation, the trial court imposed a fine of $500 and required that the defendant serve the first 10 days of his three-year probationary period in jail. In a very similar situation the court observed in People v. Hartshorn, 1943, 59 Cal.App.2d 285, 286, 138 P.2d 782, 783: "As no sentence was imposed upon the verdict there is no judgment to appeal from * * *." Plainly, this is so. People v. Guerrero, 1943, 22 Cal.2d 183, 184, 137 P.2d 21, 22; Peo-

ple v. Jones, 1950, 36 Cal.2d 373, 375, 224 P.2d 353, 354.

[2] In spite of the fact that in each of the cases just cited the appeal from the nonexistent judgment was dismissed, we have concluded that that should not be our action in this case, but that we should proceed as though the appeal were from the order granting probation. (The problem is before us on an order to show cause why the appeal should not be dismissed.) We may follow the course indicated, without being disrespectful to the courts whose opinions we have cited, because of a change in the statutory law that became effective in 1951. At the time the cited cases were decided, no appeal was authorized from an order granting probation, with the consequence that no appeal would lie from such an order either as the judgment it was not or as the order it was. Sections 1237 and 1466 of the Penal Code were amended in 1951 so that now appeals may be taken from orders granting probation. If, then, our notice of appeal may properly be interpreted as referring to the order granting probation, although it uses the term "judgment," we have an appeal.

We have concluded that the notice may and should be construed as an appeal from the order. As stated in Adams v. Talbott, 1942, 20 Cal.2d 415, 417, 126 P.2d 347, 349: "The fact that the plaintiff's notice of appeal stated that it was taken 'from the judgment' does not compel a conclusion that it was intended as an appeal from the judgment of June 19, 1939, rather than from the order of October 23, 1939. Notices of appeal are liberally construed to effect a hearing on the merits, and the words 'judgment' and 'order' have been treated as interchangeable." Again, we read in Holden v. California Employment, etc., Comm., 1950, 101 Cal.App.2d 427, 430, 225 P.2d 634, 636: "Notices of appeal, of course, are to be liberally construed to permit, if possible, a hearing on the merits. It has been held that a misdescription of an 'order' as a 'judgment,' or vice versa, will not invalidate a notice of appeal." In People v. Saad, 1951, 105 Cal.App.2d Supp. 851, 853, 234 P.2d 785, 786, quoting from one of our earlier cases, we declared what to us is an obvious truth: " 'Notices on appeal should not be construed more strictly in criminal cases than they are in civil cases * * *.' "

The converse of our situation faced the court in Meadows v. Clark, 1939, 33 Cal.App.2d 24, 29, 90 P.2d 851, 853; the notice of appeal referred to " 'that order' entered on the 15th day of August, 1938", whereas the only "order" entered that day was a "judgment." It was held that an appeal was taken from the judgment, in spite of the notice's reference to an "order." It is equally clear that the appeal in this case from the "judgment" entered on January 13, must have been intended to be taken from the order made that day, and we are not dismissing the appeal.

Under circumstances closely akin to those of this case, we recently dismissed appeals from non-existent judgments in People v. Chapman, CR A 2888; People v. Rotman, CR A 2897; People v. Timmons, CR A 2935; People v. Wood, CR A 3117; and People v. Buyny, CR A 3102, when we should have interpreted them as appeals from orders granting probation. Those cases are overruled.

The order to show cause in this case is discharged.

SHAW, P. J., and STEVENS, J., concur.

DUNN v. PACIFIC GAS & ELEC. CO.

S. F. 18975.

Supreme Court of California.
In Bank.
July 20, 1954.

Rehearing Denied Aug. 19, 1954.

Action was brought against electric power company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with electric power line, which company had easement to maintain over district's park property where district was preparing for construction of golf driving range. The Superior Court of Contra Costa County, Hugh H. Donovan, J., entered judgment of nonsuit against special administratrix of estate of deceased employee and an order granting motions for judgment of nonsuit, and she appealed. The Supreme Court, Schauer, J., held that questions of negligence, proximate cause, and contributory negligence were for jury.

Judgment reversed and purported appeal from order dismissed.

Prior opinion 262 P.2d 65.

1. Appeal and Error ⟹133

Where order granting motion for judgment of nonsuit was not entered in court's permanent minutes until after entry of written judgment of nonsuit, the order was wholly ineffective, and purported appeal from the order would be dismissed.

2. Trial ⟹165

A nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference, which may be drawn from that evidence favorable to plaintiff's case, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

3. Electricity ⟹14(2)

Where one rule of Public Utilities Commission provided that in rural districts minimum clearance of power lines might be reduced to 22 feet above ground where lines cross portions of public or private roads or driveways, and another rule provided that in rural areas, clearance might be reduced to 18 feet for lines across areas capable of being traversed by agricultural equipment, second rule was applicable in action against electric power company to recover for death of one who was electrocuted in rural district and not on road, though power line in question at some points crossed roads.

4. Electricity ⟹14(2)

Where park district raised the level of its park property preliminary to construction of golf driving range, so that electric power line maintained by electric power company over the park property pursuant to easement did not have minimum clearance required by rule of Public Utilities Commission, company, after receiving notice of the hazard, was required to raise the electric power line so that it complied with safety order of the Public Utilities Commission.

5. Electricity ⟹17

Where park district raised the level of its park property preliminary to construction of golf driving range, so that electric power line maintained by electric power company over the park property pursuant to easement did not have minimum clearance required by rule of Public Utilities Commission, alleged fact that park district was guilty of negligence proximately contributing to fatal injuries sustained by one who was electrocuted would not relieve company from liability for his death, if the company was guilty of unreasonable delay in raising the power line after receiving notice of the hazard.

6. Death ⟹58(1)

Where there were no eyewitnesses to fatal accident in which deceased was electrocuted, and there was no evidence as to why or how deceased came in contact with electricity, plaintiff, in action for wrongful death of deceased, was entitled to rely on statutory presumption that deceased was exercising due care, and was entitled to have jury so instructed. Code Civ.Proc. § 1963, subd. 4.

7. Electricity ⟹19(6)

In action against electric power company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with the electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, question whether company was negligent in failing to raise electric power line within 27 hours after company received notice of hazardous condition was for jury.

8. Electricity ⚷19(6)

In action against electric power company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with the electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, question whether proximate cause of death was alleged negligence of company or negligence of truck driver was for jury.

9. Electricity ⚷19(12)

In action against electric power company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with the electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, question whether deceased employee was contributorily negligent was for jury.

◆

William B. Mead, Oakland, and Cyril Viadro, San Francisco, for appellant.

Robert H. Gerdes, San Francisco, Carlson, Collins, Gordon & Bold, John Ormasa and Robert Collins, Richmond, for respondent.

SCHAUER, Justice.

In this wrongful death action, plaintiff administratrix appeals from an order and judgment of nonsuit. The decedent met his death by electrocution when the elevated bed of a dump truck came into contact with one of defendant's high tension wires. For the reasons hereinafter elucidated we have concluded that the issues involved should have gone to the jury, and, hence, that the judgment should be reversed.

[1] Preliminarily, it is noted that plaintiff has filed two separate notices of appeal, one from the written "Judgment of Non-Suit" entered November 28, 1951, and the other from an order granting "motions for a judgment of non-suit" which was not entered in the court's permanent minutes until April 15, 1952. Since such order was not entered until subsequent to the entry of the written judgment the order is wholly ineffective and the purported appeal therefrom will be dismissed.

[2] With respect to the merits of the appeal, it is to be recalled that a nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence favorable to plaintiff's case, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. (Raber v. Tumin (1951), 36 Cal.2d 654, 656, 226 P.2d 574; see also Sokolow v. City of Hope (1953), 41 Cal.2d 668, 670, 262 P.2d 841.)

From the evidence, viewed in the light most favorable to plaintiff, it appears that the decedent, Austin Dunn, was employed as a bulldozer operator by the East Bay Regional Park District. During the work week beginning Monday, June 20, 1949, the district commenced to fill and level a portion of its Tilden Park property in Contra Costa County as a preliminary in construction of a golf driving range and parking area. The fill material, consisting of dirt and rocks, was hauled to the area by employes and trucks of defendant Freethy,[1] a contractor who was doing other construction work nearby and who needed a place to dump such materials. Since, as stated by plaintiff, the district "apparently needed what he had to dump, it had previously authorized him to do so." Dunn's job was to spread the dirt and rocks with a bulldozer. The district's golf course superintendent, Collins, was in charge of the construction, but when he was busy elsewhere Dunn would tell the truck drivers where to dump.

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[1] Freethy is not a party to this appeal, and the record does not disclose what, if any, disposition was had of the action as against him.

Defendant, pursuant to an easement granted to it by the park district, owned and maintained three uninsulated high tension (12,500 volts of electricity) wires, which extended in a north-south direction over a portion of the contemplated improvement. By Wednesday morning, June 22, the filling, leveling and grading of the area underneath the wires had been completed, with a resultant raising of the ground level and reducing of the clearance at that point by approximately 6 feet, leaving the distance between the wires and the ground at 12 feet 6 inches. Collins instructed the truck drivers not to dump anything more in that particular area and told Dunn not to push anything there. Thereafter "all the work was being done to the west or to the east of the wires." Up to this time defendant had neither notice nor knowledge that the clearance of its wires had been impaired. On Thursday morning, June 23, a crew of defendant's workmen went to the area to install a transformer. The foreman of the crew saw loaded trucks proceeding under the high voltage wires and that the reduced clearance caused by the fill created a dangerous situation. He spoke with Collins concerning the danger of the impaired clearance and the high voltage, and Collins immediately started stopping the truck drivers and telling them that the wires were hot and to stay out from under them. Hickman was one of the truck drivers he warned. Plaintiff's decedent, Dunn, was present and Collins warned him at the same time, as well as "several" other times, "every time I was around him" both on Thursday and Friday. Both Hickman and Dunn stated that they would avoid the wires. Upon inquiry from Collins, defendant's foreman stated his company would have to put in a higher pole.

That afternoon (Thursday) Rucker, a supervisor of defendant's pole and transmission line department, who had received a report of the dangerous condition, went to the area. He saw trucks passing under the wires. He spoke with Dunn, and "cautioned him about the proximity of the wires and warned him that they were twelve thousand volts and that there should be no more dumping there," and that neither trucks nor Dunn's bulldozer should go under the wires. Dunn said he had already been warned by another of defendant's men "previously that day." Rucker then located Tom Flood, chief aide to the district manager of the park district, who "seemed to be very pleased that I had showed up, because he said that morning he had noticed the fill was getting close to the line and intended to call us, but he hadn't done so." Rucker and Flood looked the area over together and Rucker told Flood "there shouldn't be any more dumping within ten feet of the line, and he agreed that that would be the case, and called Mr. Dunn [decedent] over, and in my presence instructed him not to permit any more dumping within ten feet of the line. At that time I again cautioned Mr. Dunn as to the voltage of the line * * *." Dunn and Flood both stated "no more dumping would be permitted in the area where there was impaired clearance * * * and no closer than ten feet on either side of these wires." Rucker also told Flood "I would have an estimator out to see him the next morning about installing a pole at the edge of the fill." Flood testified that he had realized, prior to the discussion with Rucker, that the wires were low, of high voltage, and a danger to life, and had "cautioned the trucks to stay out from under it. * * * Mr. Dunn and I had discussed it, because we knew that the pole had to be put in there before the job was complete * * * [W]e discussed the fact that we wouldn't—shouldn't put any more fill in there; the wire was too low." On Wednesday Flood had told Dunn not to operate tractors under the wires and not to permit the trucks to go under them. Flood had intended to notify defendant of the dangerous condition but had not done so. He testified that he told Rucker that no trucks would go under the wires. Rucker returned to his office, reported the condition to his supervisor, and asked him to arrange to have an estimator meet Flood on Friday morning. Friday morning Collins again told both Dunn and the truck drivers to stay out from under the wires and not to dump or push anything in there.

About one o'clock Friday afternoon Adams, an employe of the district, drove Dunn in a trash truck from the park clubhouse toward the parking area. Dunn got off the truck on the road leading into that area, and when last seen by Adams, Dunn was some 700 to 800 feet from the wires and walking in their general direction. As Adams continued on to the driving range shack he saw a dump truck coming into the area. Adams went into the shack and talked a couple of minutes with the carpenter. The two men then walked outside and saw both Dunn and Hickman lying on the ground near the dump truck, which was under the high tension wires. The bed of the truck was elevated and touched one of the wires. Dunn moved his arms, hitting a wheel of the truck, and "there was a big flash." Hickman, who was lying face down under and parallel to the truck's fender, was also moving, and there was a flash every time his back and shoulders touched the running board. As Hickman moved he touched Dunn, and both men were electrocuted. The same afternoon, "shortly after" the accident, defendant's crew arrived and commenced installation of a pole to raise the wires. There were no other eyewitnesses to the occurrence.

In support of the nonsuit, defendant urges, first, that the evidence shows as a matter of law that it breached no duty of care owing to the decedent, Dunn, and therefore was guilty of no negligence toward him. It also contends that as a matter of law the evidence establishes both contributory negligence by Dunn, and that the sole proximate cause of Dunn's death was the intervening act of Hickman in raising the truck bed so that it touched one of the wires.

Plaintiff, contending that the case should have gone to the jury on each of these points, argues that under rules set forth in General Order 95 of the Public Utilities Commission defendant was required to maintain the wires at a minimum clearance of 22 feet, that such rules established a standard of care which defendant had violated by maintaining a clearance of only 18 feet 6 inches even before the filling work here involved, and that plaintiff was entitled to have a jury determine whether such violation constituted negligence towards the decedent, Dunn. Rule 37 of General Order 95 establishes a basic minimum clearance of 25 feet above the ground along thoroughfares in rural districts or across other areas capable of being traversed by vehicles or agricultural equipment. Subparagraph (a) of Rule 54.4–A(2) permits reduction of the clearance to 22 feet in rural districts, "for conductors crossing or overhanging traversable portions of public or private roads or driveways." Subparagraph (b) of the same rule states that in rural districts the clearance may be reduced to 18 feet "for lines across areas capable of being traversed by agricultural equipment and along roads where no part of the line overhangs any traversable portion of a public or private roadway."

[3] In 1948 the district had granted defendant the easement for the lines here involved. Both prior to such grant, and also at the time of the accident, a road existed which crossed under the lines at a point where they were less than 22 feet above ground before the filling operations. The accident to Dunn occurred "near" the road, but the evidence does not show that it occurred on the road area nor how near to it. It thus appears that subparagraph (b) of rule 54.4–A(2) applies, since the area was in a rural district and capable of being traversed by agricultural equipment. Subparagraph (a) of that rule, requiring a 22-foot clearance, when read in the light of subparagraph (b), clearly applies only to lines crossing or overhanging traversable portions of public or private roads and does not mean that if the lines cross a roadway in a rural district the 22-foot clearance must be maintained for the entire district. Prior to the filling done by the district, the lines were some 6 inches above the 18-foot height required by subparagraph (b). In any event it was not the height at which defendant had maintained its wires before the fill but, rather, the greatly reduced clearance which existed after the fill, which contributed to the tragedy.

With respect to the impaired clearance existing after the filling operations, plaintiff states in her brief that she does not seek to hold defendant "liable for having created the dangerous condition. It makes no difference who created it. The important point is that, after the level of the parking area was raised, a dangerous condition existed. We seek to hold defendant liable for having allowed it to remain for an unreasonable length of time." The time charged as being unreasonable is approximately 27 hours.

In Polk v. City of Los Angeles (1945), 26 Cal.2d 519, 525, 159 P.2d 931, this court stated that "On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. [Citations.] Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom. [Citations.] Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein. [Citations.] And, in the places where there is a probability of injury, they must not only make the wires safe by proper insulation, but as stated in Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 186, 106 P. 587, 'keep them so by vigilant oversight and repair.'" In the Polk case defendant city's power line extended along the line of a city street right of way, and passed through the branches and foliage of trees growing on private property but spreading over the street. The wires, located some 42 to 45 feet above ground, were insulated. Plaintiff, a workman engaged by the property owner to trim the trees, was injured when his pruning hook touched a section of the wires from which the insulation had been worn off by friction with one of the tree limbs; judgment in his favor was affirmed.

In Lozano v. Pacific Gas & Elec. Co. (1945), 70 Cal.App.2d 415, 420, 422, 161 P.2d 74, in which two workmen were killed when a light tower they were pushing came in contact with an uninsulated wire 43 feet above ground and running over their employer's land, it is declared that the defendant company's duty "to use care so as to avoid injury to persons or property was established by a clear showing that the company owned, maintained and operated the power line in question. [Citations.] Such duty extended to every person rightfully on the premises and was obviated only as to trespassers and individuals unlawfully there at the time of injury. [Citations.] * * * The right of way granted to the company to construct, maintain and service its lines on or over the customer's private property was not exclusive of the ordinary use of the property by said owner and its agents or servants. [Citations.]" After referring to the principles quoted hereinabove from the Polk case, the court continues, "The duty of due care with which the company was charged consists not only in the proper installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. Even if at the outset of the installation of equipment the company may have been entirely free from fault, yet, if, under changing circumstances, a hazardous condition arose, nonaction or the failure to remedy such condition would constitute culpable negligence. [Citations, including the Polk case, supra.]" In the Lozano case one of defendant power company's agents had learned, some two to four months before the accident, that the light towers being used in the employer's operations on his land were higher than the agent had assumed them to be. Judgment against the company on jury verdicts, was affirmed.

Despite the holdings of the Polk and Lozano cases defendant urges that the park district and its employes in making the fill were trespassing upon defendant's right of way. It is true that the making of the fill with resulting impaired clearance below the wires was not "the ordinary use of the property by * * * [the] owner and its agents or servants," but this fact alone is not an adequate answer to the problem. Defendant relies on Pacific Gas & Electric Co. v. Minnette (1953), 115 Cal.App.2d 698, 701, 252 P.2d 642, but that case determines nothing which is controlling here. There, the grantors of the easement had covenanted with the company not to "erect or maintain any building or other structure on the right of way";[2] subsequently a building was erected directly beneath the company's wires, with its roof only four feet below them. The company sued to quiet title to its easement and for a mandatory injunction requiring removal of the building. No question was before the court relative to the duty or liability of the company in respect to a continuing dangerous condition which the company had not created but which involved its property and of which it had notice.

[4, 5] Youngstown Steel etc. Co. v. City of Los Angeles (1952), 38 Cal.2d 407, 240 P.2d 977, holds that the owner of property over which defendant city held a right of way to erect and maintain power poles and wires was obliged to pay the cost of raising the wires where such raising was desired by it in order to permit it to safely operate a new and higher type of crane, but does not suggest that a power company whose wires became a hazard under the circumstances present in the instant case could refrain from moving them to a safe height despite the fact that the property owner whose operations created the hazard may be liable for the cost of the change. We are persuaded that in view of the extremely dangerous character of wires carrying high voltage electricity the better and more humane rule is that stated in Bickham v. Southern Cal. Edison Co. (1953), 120 Cal. App.2d 815, 820, 263 P.2d 32: that after such a hazard comes to the knowledge of the power company it is required to so raise the wires as to make them comply with the safety order (General Order 95) and that "it is inconceivable" that the power company would refuse to make such a change. The fact that the property owner in creating the hazard caused by an impaired clearance is guilty of negligence proximately contributing to personal injuries thereafter resulting should not, and we believe does not, operate to relieve the power company from liability for an unreasonable delay (if there was such) in raising the wires. Indeed, in oral argument before this court, defendant conceded its duty to raise the wires as "to certain people," although arguing that the duty did not extend to Dunn by reason of the latter's alleged contributory negligence.

On this point defendant contends that as to it Dunn was a trespasser to whom its only duty was to abstain from wilful or wanton injury, but that even if he be considered an invitee defendant had fulfilled its duty by warning him of the danger. (See Raber v. Tumin (1951), supra, 36 Cal. 2d 654, 658, 226 P.2d 574; Popejoy v. Hannon (1951), 37 Cal.2d 159, 170, 231 P.2d 484.) In Hall v. Southern Cal. Edison Co., Ltd. (1934), 137 Cal.App. 449, 30 P.2d 1013, plaintiff, an employe of an electrical contractor, was sent to disconnect the electrical power from a pump-house which the owner wished to dismantle so the pump could be moved. Plaintiff climbed defendant's power pole and cut the wires at a point where live wires would not be left lying on the ground. With the support of the wires thus removed, the pole, later discovered to have been partially decayed, broke and fell to the ground, injuring plaintiff. Plaintiff was held to have been a trespasser as to defendant, and judgment of nonsuit was affirmed. In Strother v. Pacific Gas & Elec. Co. (1949), 94 Cal.App.2d 525, 529, 211 P.2d 624, it was held that plaintiffs had failed to state a cause of action for deaths resulting when an airplane, while approaching an air field and attempting to land, collided with wires maintained by defendant over its own land and some 26 feet above the ground; the court declared that "Being trespassers, the owner of the land owed plaintiffs no duty to warn them of the hazard of the wires." And in Leslie v. City of Monterey (1934), 139 Cal.App. 715, 720, 34 P.2d 837, defendant city, which owned and operated a baseball park, awarded a contract for the erection of a fence and backstop around the park. Plaintiff was an employe of the contractor. The fence had been moved five feet into the street from the property line, and plaintiff was injured when a steel pole which he was helping to raise into place at one point along the fence came into contact with an overhead 22,000-volt line. A nonsuit was granted in favor of the city, and on appeal plaintiff's judgment against defendant power company, who owned and maintained the wires, was reversed upon the authority of the Hall case, supra, with the declaration that plaintiff was a trespasser. However, since the evidence in the present case does not show that Dunn himself contacted or caused a contact with defendant's wires, we are convinced that in accord with the principles enunciated in the Polk and Lozano cases a finding is not compelled as a matter of law that Dunn, who was lawfully upon the park property, was a trespasser as to defendant power company. (See also Jackson v. Utica Light & Power Co. (1944), 64 Cal.App.2d 885, 889, 149 P.2d 748; Langazo v. San Joaquin L. & P. Corp. (1939), 32 Cal.App.2d 678, 685–690, 90 P.2d 825.) And this is true even if we assume that defendant's easement carried with it a right to have the established clearance of its wires remain unimpaired until it had notice and a reasonable opportunity to raise the wires (presumably at the expense of the park district) to legally accommodate the proposed fill, and even if we assume (we do not so decide) that the park district was a trespasser when it impaired the clearance without notice.

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[2] In the present case the grant of defendant's easement reads as follows: "East Bay Regional Park District, a California park district, hereinafter called first party, does hereby grant to Pacific Gas and Electric Company, a California corporation, hereinafter called second party, its successors and assigns, the right to erect, maintain, replace, remove and use a line of poles with all necessary and proper crossarms, braces, anchors, guys and other appliances and fixtures for use in connection therewith, and to suspend therefrom, maintain and use such wires as second party shall from time to time deem necessary for the transmission and distribution of electric energy, together with a right of way along said line of poles, over and across those certain premises, situate in the County of Contra Costa, State of California, which are described as follows: [Description.] Said right includes the trimming by second party of any trees along said poles and wires whenever considered necessary for the complete enjoyment thereof."

In view of the rules noted hereinabove, it thus appears that unless the evidence is as a matter of law insufficient to sustain a finding that defendant was negligent in having allowed the danger to remain for an unreasonable length of time before raising the wires, the question of defendant's negligence should have gone to the jury. Plaintiff offered no evidence as to what would constitute a reasonable time within which defendant should have installed the new poles to raise the wires, but rested upon the showing that the installation was commenced "shortly after" the accident and some 27 hours after the hazardous condition came to the attention of defendant's foreman on Thursday morning.[3] This proof is slight but regardless of what we, or some of us, might think we should find if the question were before us as triers of fact, we are persuaded as a court of review that the matter of whether or not the delay was reasonable should not be determined as a matter of law upon defendant's motion for a nonsuit, but instead should go to the jury after, of course, defendant is first afforded opportunity to produce evidence that it acted promptly and with due care under the circumstances.

Cases relied upon by defendant in support of its further contention that the sole proximate cause of Dunn's fatal accident was Hickman's act of driving his dump truck under the wires where the elevated bed could touch them, rather than any negligence by defendant, appear to involve situations where defendant had no reason to anticipate danger, or else no duty to make changes in the location or elevation of its wires in order to accommodate the convenience of others in their operations carried on in close proximity to the wires. (See Pascoe v. Southern Cal. Edison Co. (1951), 102 Cal.App.2d 254, 258–259, 227 P.2d 555; Hayden v. Paramount Productions, Inc. (1939), 33 Cal.App.2d 287, 291–292, 91 P.2d 231; Stasulat v. Pacific Gas and Elec. Co. (1937), 8 Cal.2d 631, 637–638, 67 P.2d 678; Stackpole v. Pacific Gas & Elec. Co. (1919), 181 Cal. 700, 705, 186 P. 354; Sweatman v. Los Angeles Gas & Elec. Corp. (1929), 101 Cal.App. 318, 326, 281 P. 677.) In Benard v. Vorlander (1948), 87 Cal.App.2d 436, 440–441, 197 P.2d 42, the pole line and wires involved were owned and maintained by the government rather than by the power company, which only energized them. By contrast, defendant in the present case was obliged after learning of the generally dangerous condition existing after the filling operations, to place its wires in a safe condition under the changed circumstances, and the questions of whether it acted with reasonable promptness and of proximate cause should, as stated hereinabove, have been submitted to the jury. The danger which existed here was of the very nature admittedly realized by defendant's agents when they discovered the impaired clearance, and against which they warned Dunn and others concerned. (See Jackson v. Utica Light & Power Co. (1944), supra, 64 Cal.App.2d 885, 891–894, 149 P.2d 748.)

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[3] There was also evidence that after defendant's superintendent, Rucker, inspected the area on Thursday afternoon he asked his supervisor to have an "estimator" meet the park district official Flood; but whether this relates to discussions with the district as to bearing the cost of changing the wires or, if it did so, whether it contributed to any delay in action by defendant, is not shown.

[6] Finally, defendant contends that in view of the repeated warnings given Dunn, his participation in the filling operations, and his specific knowledge of the danger, contributory negligence on his part was shown as a matter of law. In the first place, however, there were no eyewitnesses to the accident and no evidence as to why or how Dunn came in contact with the electricity and plaintiff suggests that he may have been attempting to save Hickman. (See Petersen v. Lang Transp. Co. (1939), 32 Cal.App.2d 462, 467–468, 90 P.2d 94.) In any event plaintiff was entitled to rely upon the statutory presumption that Dunn was exercising due care (see Code Civ.Proc. § 1963, subd. 4) and to have the jury so instructed. (Scott v. Burke (1952), 39 Cal.2d 388, 394–395, 247 P.2d 313; Jackson v. Utica Light & Power Co. (1944), supra, 64 Cal.App.2d 885, 894, 896, 149 P.2d 748.) Further, in Polk v. City of Los Angeles (1945), supra, 26 Cal.2d 519, 524, 529–532, 159 P.2d 931, in which plaintiff tree trimmer knew of the dangerous character of the wires, saw a sign stating that those in question carried a high voltage, and knew that insulation was likely to be worn where rubbed by a tree limb, it was held that the question of contributory negligence depends upon the circumstances in each case, and had properly been submitted to the jury. (See also Monroe v. San Joaquin L. & P. Corp. (1941), 42 Cal.App.2d 641, 650, 109 P.2d 720.) In Rojas v. Southern Cal. Edison Co. (1951), 105 Cal.App.2d 258, 259, 233 P.2d 141, plaintiff himself testified that he unintentionally brought his aluminum walnut shaker, over 33 feet in length, in contact with the wires overhead, although he understood the danger and had meant to avoid the wires; the court's declaration that one who "voluntarily contacts the wire" after a warning is guilty of contributory negligence as a matter of law is not controlling here, where, as stated above, the exact circumstances surrounding the accident are not completely shown and plaintiff is entitled to rely on the presumption of due care.

[7–9] It appears that each of the cases involving injuries from contact with high tension wires has largely turned on the particular facts involved, and we conclude that upon the evidence in the record now before us the questions of negligence, proximate cause, and contributory negligence should have been submitted to the jury.

The judgment appealed from is reversed, and the purported appeal from the order granting "motions for a judgment of nonsuit" is dismissed.

SHENK, Acting C. J., and EDMONDS, CARTER and SPENCE, JJ., and SCHOTTKY, J., pro tem., concur.

TRAYNOR, Justice (concurring).

I concur in the judgment and in the opinion, except for the reference to the presumption of due care. Since the burden of proof on the issue of contributory negligence was on defendant, no proper purpose is served by invoking the presumption. See dissenting opinion in Speck v. Sarver, 20 Cal.2d 585, 590, 128 P.2d 16.

43 Cal.2d 280

ABLETT et al.

v.

CLAUSON et al. (two cases).

CLAUSON et al.

v.

GLENDALE ESCROW CO.

CLAUSON et al.

v.

SPOT DRIVE IN, Inc., et al.

CLAUSON et al. v. ABLETT et al.

L. A. 22756, 22757.

Supreme Court of California.
In Bank.
July 23, 1954.

Action in unlawful detainer brought by owners and lessors of premises used for restaurant, consolidated with action for declaratory relief. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., rendered a judgment adverse to the lessors and the lessors appealed. The Supreme Court, Edmonds, J., held that under lease giving lessees "first right and prior option" to lease premises for another term before premises were offered to others, lessees had first refusal or right to lease, conditioned upon lessors' leasing of premises again upon termination of original term, and did not have absolute right at termination to lease for additional term.

Reversed.

Prior opinion, 263 P.2d 333.

1. Landlord and Tenant 🔑86(1)

Under lease giving lessees "first right and prior option" to lease premises for another term before premises were offered to others, lessees had first refusal or right to lease, conditioned upon lessors' leasing again upon termination of original term, and did not have absolute right at termination to lease for additional term.

2. Contracts 🔑39

Generally, although promise may be sufficiently definite when it contains option given to promisor or promisee, if essential element is reserved for parties' future agreement promise can give rise to no legal obligation until such future agreement.

3. Landlord and Tenant 🔑86(1)

Where lease giving lessees first right and prior option to lease premises for another term before premises were offered to others, left all provisions of new lease to future agreement except duration, option terms were too uncertain to make option enforceable as contract right.

Hiram T. Kellogg, Los Angeles, for appellants.

Freston & Files, Los Angeles, amici curiæ on behalf of appellants.

Fizzolio & Fizzolio, Los Angeles, Carl B. Sturzenacker, Hollywood, and Walter Monarch, Los Angeles, for respondents.

EDMONDS, Justice.

Ernest L. Clauson and his wife, who are the owners and lessors of certain real property, have appealed from a judgment which declares their rights under a lease. The appeal is also from a judgment in an action for unlawful detainer brought by them against Cyril and Kathleen Ablett, who claim as assignees of the interests of the original lessees. The principal question concerns the Abletts' right, if any, to a renewal of the lease.

Much of the evidence is sharply conflicting, but the following facts appear without substantial dispute:

The Clausons by a written agreement leased a building used for a restaurant to a group of persons whom the parties have designated the "Rite Spot People". The lease was for a term of five years, ending on August 31, 1951. It was agreed that the lessees "shall have the first right and a prior option to secure a lease upon said premises before the same are offered to any other person, firm or corporation for lease or rental and that said option shall contemplate a lease for a period of five (5) years upon terms to be then agreed upon."

Shortly after the Rite Spot lessees took possession, the building and an adjacent parking lot were modified for use as a drive-in restaurant. Thereafter the premises were used in that way. The lessees then formed a corporation and transferred to it the assets of the business. The record does not show either a transfer of the lease to the corporation or the Clausons' consent to make such a transfer.

In the latter part of 1948, the Abletts began negotiating with the Rite Spot lessees to purchase the business. The negotiations resulted in a sale of the business to the Abletts, and the execution by the lessees of an instrument by which they "assigned" all their "right, title and interest" in the lease to the Abletts. The Abletts took possession of the premises and continued the business, as found by the trial court, with the knowledge and acquiescence of the Clausons.

Some time later, a dispute arose between the Clausons and the Abletts concerning the performance of certain grading operations on the parking area adjacent to the restaurant building. There was also another controversy relating to the Abletts' refusal to permit Clauson to remodel the restaurant building. In January, 1951, Mr. Clauson informed the Abletts that he would not renew the lease upon its expiration and since that time he has continually refused to do so.

The Abletts then commenced an action for "declaratory relief, trespass, injunction." Named as defendants were the Clausons, each of the original lessees and the corporation formed by them, and several other persons. The principal relief sought was a declaration that they have a valid option to renew their lease "at the same terms" and for an additional five years, and that the Clausons "by their acts and conduct are estopped from denying the existence of such option." As an alternative the Abletts asked for judgment that the defendants are liable to them for fraud and misrepresentation. The Clausons then sued the Abletts for unlawful detainer. The actions were consolidated for trial and appeal.

In the action commenced by the Abletts, judgment was rendered in favor of all of the defendants, except the Clausons, and against the Abletts. Their rights against the Clausons were declared to be as follows: The Abletts are assignees of all of the rights of the original lessees in the lease with the consent of the Clausons. As assignees of the lease, the Abletts "are entitled to a renewal thereof for an additional five-year term * * * pursuant to the terms and provisions of Clause 17 of the lease."

The judgment in the unlawful detainer action was in favor of the Abletts. The court held that they are entitled to a renewal of the lease for an additional five-year term, "pursuant to the terms of the lease."

The Clausons challenge the portions of the declaratory judgment relating to the purported assignment of the lease, the right of the Abletts to obtain a renewal of it, and the extent and nature of the lessees' rights in the leasehold under a renewal. They also contend that the provision concerning an option does not prevent the lessors from taking possession of the premises upon the termination of the original lease.

The decisive question here presented concerns the provision of the lease which the Abletts contend granted to the original lessees an option for an additional term of five years. According to the Clausons, the evidence indisputably shows that the Abletts obtained only a sublease of the premises. If that is the legal effect of the transaction between the parties, the Abletts have no right to any option given by the lease. Only if they are assignees may they enforce an obligation of the lessors to a further term.

[1] But if it be assumed that the Abletts are assignees of the lease, the provision here in controversy does not meet the requirements of an option which may be enforced. It does not purport to grant an absolute right to an additional term of five years or any other period. As the Clausons correctly state, it gives the lessees only "the first right and a prior option to secure a lease upon said premises before the same are offered to any other person, firm or corporation for lease or rental. * * *" It does not specify the terms for such a lease but provides that it shall be for five years "upon terms to be then agreed upon."

The Abletts contend that the provision, "first right and prior option", does not in any way qualify the right of renewal. They rely upon the statement in Butt v. Maier & Zobelein Brewery, 6 Cal.App. 581, 92 P. 652, that "[t]he word 'prior,' * * * does not qualify the right of renewal. The right given the lessee to lease for a further term of five years must necessarily be prior to the right of other parties to lease the property." 6 Cal.App. at page 585, 92 P. at page 653. In that case, the lease included an option to the lessor to terminate the lease at the end of the original term by purchasing the improvements made by the lessee. In another clause of the lease, the lessee was given a "prior right" to lease the premises for an additional term, subject to the lessor's right to claim the improvements at the end of the term without payment of their reasonable value. It was the latter clause to which the court referred.

In Falkenstein v. Popper, 81 Cal.App.2d 131, 183 P.2d 707, the lease gave the lessee " 'the first opportunity' " to purchase the property. The court reviewed extensively the decisions which discuss the meaning of such terms as "first privilege", and "first right", and concluded that the weight of authority holds that such provisions do not give the lessee an absolute right to a renewal, but one conditioned upon the lessor's leasing the property, in which case the lessee may have first refusal. Quoting from a leading New York case, R. I. Realty Co. v. Terrell, 254 N.Y. 121, 172 N.E. 262, the court said: " 'In construing the clause in question, the court is required to give some meaning to all the words used. To construe the clause in accordance with the contention of the respondent (lessee) would require that the word "first" be eliminated. With that word elimiated, the privilege to buy would be absolute and enforceable. (Citations.) Therefore, it must have been used to prevent the agreement from constituting an absolute option to sell. The phrase "first privilege to buy" and the words "privilege to buy" have an entirely different meaning; one is conditional and the other absolute.' " 81 Cal. App.2d at p. 135–136, 183 P.2d at page 709. The Butt case was distinguished, the court pointing out that the options given the lessor and the lessee in that case were conflicting, both apparently giving an absolute right at the termination of the orginal lease. Use of the word "prior" might have been explained as indicating the supremacy of the lessee's option over that of the lessor.

In the present case, the option is a "first right and prior option" to lease the premises "*before the same are offered to any other person, firm or corporation for lease or rental.*" The clear meaning of the provision is to give the lessee a first refusal or right to lease, conditioned upon the lessor's leasing of the property again. This construction is in accordance with the Falkenstein case, and the clear weight of authority. See annotation 6 A.L.R.2d 820.

The Clausons further contend that the option provision does not give even a conditional right to a renewal, but is too uncertain to be enforced. Their position is that the judgment declares that a renewal should be "pursuant to the terms and provisions of Clause 17 of the lease", and that clause specifies a new lease "upon terms to be then agreed upon." In effect, they say, this provision is an agreement to contract in the future, for a breach of which neither law nor equity provides a remedy. Autry v. Republic Productions, 30 Cal.2d 144, 151, 180 P.2d 888. The Abletts rely upon Chaney v. Schneider, 92 Cal.App.2d

88, 206 P.2d 669, which affirmed a judgment declaring enforceable an option provision very similar to the one in the present case.

[2] The general rule regarding contracts to agree in the future is stated to be as follows: "Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." 1 Williston, On Contracts, (Rev.Ed.1936) 131, § 45. The rule is well established in this state, Autry v. Republic Productions, supra, 30 Cal.2d 151, 180 P.2d 888; Vangel v. Vangel, 116 Cal.App.2d 615, 631, 254 P.2d 919; Howard v. Burrow, 77 Cal.App. 4, 8, 245 P. 808, and, in conformity with the weight of authority in other states, see annotation 172 A.L.R. 421 et seq., it has been held that an option agreement which leaves an essential term to future agreement is not enforceable. Morrison v. Rossignol, 5 Cal. 64, 65–66; cf. Los Angeles Soda Works v. Southern California Aquazone Co., 103 Cal.App. 105, 106, 284 P. 253; Autry v. Republic Productions, supra, 30 Cal.2d at page 155, 180 P.2d 888.

Where the only term of a new lease requiring the agreement of the parties is the fixing of rent, some courts have adopted an exception to the general rule. One example is where the rent is to be fixed by arbitration. It has been held that submission to arbitration is ancillary to the main purposes of the option provision, and upon failure of the arbitrators to agree, a court of equity may fix the amount of rent. See cases cited in Glenn v. Bacon, 86 Cal.App. 58, 71–72, 260 P. 559. In another group of cases, the courts, "recognizing the practical business utility of such clauses in a lease", treat option agreements which leave the amount of rent to be fixed by subsequent agreement as sufficiently definite "by interpreting them as meaning a reasonable rental under the circumstances in case the parties cannot agree." Williston, op. cit. supra, pp. 132–133; see annotations 68 A.L.R. 157; 166 A.L.R. 1237.

In Streicher v. Heimburge, 205 Cal. 675, 272 P. 290, 291, the renewal lease was to be for an additional term of five years "'upon the same covenants and conditions'" as the original lease, except that the parties were to agree upon a new rental. If they were unable to agree within 30 days from the acceptance of the option, the controversy as to the amount of rent was to be submitted to arbitration. Attempts to arbitrate the matter failed, and the lessor sued for unlawful detainer. The trial court concluded that the successful arbitration of rent was a condition precedent to the creation of a new lease, and the condition having failed, no right to renew accrued to the lessee. On appeal, this court reversed the judgment, holding that, construed most strongly in favor of the lessee, the option provision insofar as it related to the fixing of rent was a covenant, rather than a condition. It was concluded that "[w]hether the rental * * * shall be the amount provided for in the original lease, the amount fixed by the appraisers appointed *ex parte*, or whether in the absence of an agreement of the parties a court of equity shall fix it, are questions not germane to this appeal." 205 Cal. at page 685, 272 P. at page 295.

In Chaney v. Schneider, supra, the option provision in controversy provided that "'Lessor agrees to give Lessee first refusal for an additional term of lease, at rentals and terms to be mutually agreed upon at that time * * *.'" The trial court adjudged that the option entitled the lessee to an additional term of five years, upon the same terms and conditions as the original lease, but at an increased rental. Upon appeal, the judgment was affirmed, the court ruling that the renewal of the lease was the "essence of the contract" with the other terms and conditions merely incidental details.

Although there is an intimation in other decisions that a court of equity is empowered to fix a reasonable rental under an option provision reserving that matter to the future agreement of the parties, cf. Penilla v. Gerstenkorn, 86 Cal.App. 668, 670–671, 261 P. 488; Kaliterna v. Wright, 94 Cal.App.2d 926, 939–940, 212 P.2d 32, the extensions of the rule suggested by the Chaney decision seem seriously questionable. The basis for upholding option provisions which leave the amount of rent to future agreement is that the implied agreement of a reasonable rent if the parties are unable to agree, provides a sufficient standard for enforcing the option without requiring the court to write a new contract for them. But certainly the Streicher case is not authority for the proposition, relied upon in the Chaney decision, that the court may fix all of the provisions of a new lease without ascertainable standards in the option agreement. Cf. Autry v. Republic Productions, supra, 30 Cal.2d 154–155, 180 P.2d 888.

[3] In the present case, the original lease is nine typewritten pages in length and contains seventeen separate numbered clauses in addition to the paragraph which includes the provision for securing a new lease. The only term fixed by the option provision as contemplated by a new lease is its duration. All of the other provisions are left to future agreement. In these circumstances, the terms of the option are too uncertain to make it enforceable as a contract right.

This conclusion does not mean, however, that the rights claimed by the Abletts in the leasehold may not be enforced under a different theory. The Abletts assert that the Clausons are estopped to deny that the lease includes an absolute option to renew upon the same terms and conditions as provided by the original lease. Although the pleadings were framed upon that theory and facts were found from which an estoppel might be inferred, there was no finding that the Clausons are estopped to deny the Abletts' right to an option, and the record does not compel that conclusion. From those facts, the trial court reasonably might have determined the issue of estoppel contrary to the claims of the Abletts in that regard.

The judgments are reversed.

SHENK, Acting C. J., CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., and BRAY, J. pro tem., concur.

43 Cal.2d 190

TEVIS et al.

v.

CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 18624.

Supreme Court of California.
In Bank.
July 2, 1954.

Mandamus action to compel city officials to allow discharged employees vacation pay for services rendered prior to their discharge. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for plaintiffs, and defendants appealed. The Supreme Court, Edmonds, J., held, inter alia, that fact that San Francisco charter amendment, retroactively granting vacation rights to city and county employees, provided that such rights should be given pursuant to Municipal Code provision allowing vacation so long as employee remained in City or County service, did not make continued service a condition precedent to receiving payment of vacation pay as reward for services previously performed.

Reversed in part and affirmed in part.

Prior opinion, 257 P.2d 100.

1. Municipal Corporations 🔑46

A city charter amendment may specify time at which it shall become effective as municipal law, but such an enactment may also fix operative date from which rights and duties arising under new provision are to be measured.

2. Statutes 🔑263

Statutes and other enactments should not be given retrospective operation unless legislative intent to do so is clearly apparent.

3. Counties 🔑93(1)
Municipal Corporations 🔑220(5)

Fact that San Francisco charter amendment, retroactively granting vacation rights to city and county employees, provided that such rights should be given pursuant to Municipal Code provision allowing vacation so long as employee remained in City or County service, did not make continued service a condition precedent to receiving payment of vacation pay as reward for services previously performed, and employees, who were discharged prior to effective date of charter amendment, were entitled to vacation pay for services rendered during the retroactive period. Laws 1950, 3rd Ex.Sess., p. 102.

4. Municipal Corporations 🔑871
Officers 🔑100(2)

The retroactive grant of vacation rights to employees of municipality governed by freeholder's charter was a municipal affair and not subject to constitutional prohibitions against gift of public funds and against granting of extra compensation to public servants for past services. Const. art. 4, §§ 31, 32.

5. Municipal Corporations 🔑8

If two sections of municipal charter are inconsistent, the one later in time controls.

6. Mandamus 🔑3(2)

Generally, the extraordinary remedy of mandate is not available when other remedies at law are adequate.

7. Mandamus 🔑3(6)

In proceedings involving claims for wages by municipal employees or by parties to contract with municipality, generally, ordinary action at law for damages is adequate, and writ of mandate will be denied.

8. Mandamus 🔑107

Mandamus will not lie when there is no cause of action for reinstatement of municipal employee to his position, but merely a claim for damages for breach of employment contract.

9. Mandamus 🔑107

Mandamus was available to compel city officials to allow discharged municipal employees vacation pay for services rendered prior to discharge.

10. Municipal Corporations 🔑220(5)

Right of municipal employee to receive pay for vacation rights accrued prior to separation from service does not arise until time of his separation from service, but when compensation is paid, it is estimated on basis of projection of his services for period beyond his date of separation equal to his accrued claims.

11. Municipal Corporations 🔑220(5)

Where municipal employees were discharged prior to effective date of 1951 charter amendment, retroactively granting vacation rights, no right to receive accumulated vacation pay accrued until amendment became effective, and legal liability of municipality thus created should have been treated as an obligation of fiscal year 1950–1951.

12. Municipal Corporations 🔑220(1)

The San Francisco charter authorizes payment of back pay accruing prior to current fiscal year.

13. Mandamus 🔑107

Where municipality's charter made existence of fund for payment of claims an essential prerequisite to payment of such claims, and such fund did not exist for payment of claims of discharged employees for compensation for accrued vacation rights, which were granted retroactively by charter amendment after discharge of employees, mandamus would not lie to compel city officials to pay such claims, but such relief was available to compel officials to certify and approve payrolls showing that the employees were entitled to receive vacation pay for the periods enumerated. Laws 1950, 3rd Ex.Sess., p. 102.

◆

Dion R. Holm, City Atty., Bernard J. Ward and Jack G. McBride, Dep. City Attys., A. Dal Thomson and Thomas M. O'Connor, Public Utilities Counsel, San Francisco, for appellants.

Delany, Fishgold & Minudri and Molly H. Minudri, San Francisco, for respondents.

EDMONDS, Justice.

Twenty-three former employees of the municipal railway of the City and County of San Francisco seek a writ of mandate to compel certain city officials to allow them vacation pay for two calendar weeks. Their petition, on behalf of themselves and all other employees similarly situated, names as defendants the city and county, the members of the public utilities commission and its manager, the secretary of the civil service commission, the controller, and the treasurer of the city and county.

Prior to 1950, it was the practice of the city and county to grant to each municipal employee an annual vacation of two weeks, with pay, in accordance with section 151 of its charter and sections 375 to 380 of Part I of its municipal code. In Adams v. City and County of San Francisco, 1949, 94 Cal. App.2d 586, 211 P.2d 368, 371, 212 P.2d 272, it was held that when wages of municipal employees were fixed under section 151.3 of the charter at the rate of pay "generally prevailing for [similar] groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements," vacation rights also should be governed by the provisions of such collective bargaining agreements.

The petitioners were members of a group of employees whose wages were fixed by collective bargaining agreements which made no provision for paid vacations. After the Adams case was decided, vacations for those employees were discontinued. They received no paid vacation for the fiscal year of 1949–1950.

Section 151.4[1] of the charter, concerning vacation rights, was enacted while the Adams case was pending and became effective January 1, 1951. At an election held on June 6, 1950, the voters of the city and county approved a proposed charter amendment which, after legislative approval, became effective on September 26, 1950, as section 151.5[2] of the charter. An argument accompanying the measure and urging its approval stated that it was submitted on behalf of a small group of city employees who, because of a "legal technicality via court action", were deprived of the vacation rights previously given to them. Its purpose was "to clarify existing vacation rights granted all other City Employees and thereby have restored the same vacation privileges enjoyed by all other departments within the City Government".

A short time after the election but before section 151.5 became effective, the petitioners lost their positions because of a reduction in force. In accordance with the amendment, all employees in the municipal service, whose right to paid vacations during 1948, 1949, and 1950 had been disallowed because of conflicting collective bargaining agreement provisions, were given payment or compensating time off equal to two weeks of paid vacation in each of those years. However, no payment was made to the petitioners or to others whose employment was terminated before the effective date of section 151.5.

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[1] Reading in part: "Every person employed in the city and county service shall, after one year's service, be allowed a vacation with pay of two calendar weeks, annually, as long as he continues in his employment. * * *"

[2] Section 151.5 reads: "(a) Every employee of the City and County of San Francisco whose rate of compensation is fixed pursuant to the provisions of section 151.3 of this charter shall be entititled to receive an annual vacation at the time, with the pay and of the duration specified in section 151.4, and no section of the charter nor any provision of any collective bargaining agreement nor any street railway or bus wage schedule shall be construed in any manner or for any purpose to increase, reduce or otherwise affect the time or duration of, or pay for, vacations provided by section 151.4, nor shall any employee be deemed to have any vacation rights other than or in excess of the vacation rights specified in section 151.4.

"(b) The vacation rights granted by section 151.4 or by this section, or contained in any collective bargaining agreements, or in any street railway or bus wage schedules, as any of said terms are referred to in section 151.3 of this charter, shall in no way increase, reduce or otherwise affect or be deemed to affect the wage or pay rate or schedule determinations made pursuant to the provisions of said section 151.3.

"(c) All vacation payments heretofore made to employees of the City and County of San Francisco in the manner and to the extent prescribed by sections 375 to 380, inclusive of Part I of the San Francisco Municipal Code, are hereby deemed to have been earned and the payments therefor are hereby ratified and validated, and for all services rendered by employees during the calendar years 1948, 1949 and 1950 vacations shall be granted and paid pursuant to the terms of said sections of the Municipal Code.

"(d) This section shall become effective upon approval by the State Legislature." Laws 1950, 3rd Ex.Sess., p. 102.

The trial court made findings in accordance with the foregoing statement of facts and concluded that each of the petitioners is entitled to receive wages for two weeks as vacation pay. By peremptory writ of mandate, the city officials, and in particular the members of the public utilities commission, the secretary of the civil service commission, and the controller, were directed to certify and approve payrolls and timerolls setting forth the petitioners' right to receive the amounts to which each is entitled and to pay those amounts. The appeal is from that judgment.

The city officials contend that section 151.5 should be construed as conferring vacation rights upon only those persons who were employees when it became effective and performed services after that time. Another argument is that, even if the petitioners properly may claim the right to receive vacation pay, mandate is not a proper remedy.

By its express terms, the amendment did not become effective until approved by the Legislature, at which time the petitioners' employment had been terminated. The city officials rely upon that provision as stating the intention of the framers of the amendment to give the enactment only prospective application. The petitioners take the position that the only purpose of stating the effective date of the new section is to fix a time from which payments for vacations should be calculated.

[1] A charter amendment may specify the time at which it shall become effective as municipal law, but such an enactment may also fix an operative date from which the rights and duties arising under the new provision are to be measured. Williams v. City of Vallejo, 36 Cal.App. 133, 171 P. 834, and Callahan v. City & County of San Francisco, 68 Cal.App.2d 286, 156 P.2d 479, construed charter amendments which clearly indicated that the rights created were to be measured at a time differing from the amendment's adoption. Accordingly, the principal issue under the amendment here in controversy is whether it demonstrates an intent to allow the employees pay for vacation in connection with services performed prior to its effective date.

[2] It is well established that statutes and other enactments should not be given a retrospective operation unless the legislative intent to do so is clearly apparent. Aetna Cas. & Surety Co. v. Industrial Acc. Comm., 30 Cal.2d 388, 393, 182 P.2d 159. However, by its express terms, section 151.5 provides that it shall have some retrospective application. Subsection (c) states: "All vacation payments heretofore made to employees * * * are hereby deemed to have been earned and the payments therefor are hereby ratified and validated, and for all services rendered by employees during the calendar years 1948, 1949 and 1950 vacations shall be granted and paid pursuant to the terms of [sections 375 to 380, inclusive of Part I] the Municipal Code." The clear purpose of this provision is to validate payments made for vacations to which employees were not entitled under collective bargaining agreements. It also authorized the city to pay for vacation time in employment where, because of such agreements, no vacation pay was allowed.

In fixing the method in which vacations are to be computed, section 151.5 makes reference to sections 375 to 380 of Part I of the Municipal Code.[3] Because section 375

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[3] Section 375 provides: "Every employee in the City and County service * * * shall be allowed an annual vacation as provided herein as long as he remains in the City and County service."

Section 376 states in part: "Employees shall be allowed a vacation of allows an annual vacation to an employee "as long as he remains in the City and County service", the city officials argue, the reference to that section in the charter amendment indicates an intent to make continued service a condition precedent to payment of vacation pay.

Section 375 does not concern the length of, or payment of compensation for, annual vacations, but merely defines the employee's right to receive them. The limitation as to the time of employment serves two purposes. It insures to an employee that his right to an annual vacation will continue throughout his service with the city and county; it also prevents him from claiming the right to such a vacation for any year after the termination of his service. But separation from service should in no way affect his right to receive pay for accrued vacation rights. In an analogous situation, it has been held that, in the absence of a clear indication of a contrary statutory intent, an employee's separation from governmental service should not prevent him from receiving the cash equivalent of vacation rights accrued to him for services rendered prior to his separation. Pohle v. Christian, 21 Cal.2d 83, 89–90, 130 P.2d 417.

[3] Subsection (c) of section 151.5 states that "for all services rendered by employees during the calendar years 1948, 1949 and 1950 vacations shall be granted and paid pursuant to the terms of said sections of the Municipal Code." By express terms, the statute granted vacation rights retroactively as compensation for services performed during those years. As stated in the argument accompanying the proposed measure, it was enacted to remedy the injustice which resulted when employees were deprived of vacation rights because of restrictive provisions in the controlling collective bargaining agreements. Certainly those persons whose employment was terminated before they could enforce their vacation rights should be in no different position from the employees who continued in the service of the city and county. It is more logical to conclude that the reason for the charter amendment's reference to other sections of the municipal code is to provide a method of computing the amount of vacation pay to which the employee is entitled. Section 376, the principal section dealing with the computation of vacation payments, makes no requirement of continued service to entitle an employee to receive pay for accrued vacation rights, nor does any other section dealing with such computations. In the absence of a more explicit statement to the contrary, it is unreasonable to conclude that the framers of the charter amendment, by reference to those sections, intended to make continued service a condition precedent to receiving payment of vacation pay as a reward for services previously performed.

[4] The appellants take the position, however, that a retroactive application of the charter amendment to allow payments to the petitioners would be a gift of public funds or a grant of extra compensation in violation of provisions of the State Constitution. Cal.Const., art. IV, §§ 31, 32. The petitioners point out that the city and county is governed by a freeholder's charter, Cal.Const. art. XI, § 8, and argue that extra compensation of municipal employees is a municipal affair and not subject to the prohibitions of sections 31 and 32 of article IV.

In Los Angeles G. & E. Corp. v. Los Angeles, 188 Cal. 307, 205 P. 125, it was contended that a contract between the city and a private utility for the distribution of electrical energy violated the prohibition of section 31 of article IV against the lending of credit. The court rejected the contention, saying: "This provision of the Constitution is in the article regulating the powers of the legislative department of the state government, and is a limitation upon the power of the state Legislature. The powers of the city of Los Angeles are not

two calendar weeks, and the compensation paid to employees during the vacation period shall be the amount the employee would earn during his vacation period if working at his current rate of pay and work schedules without inclusion of overtime earnings. * * *"

derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. That is to say, the people of the state, through the Constitution authorize the people of the city to regulate its affairs by a charter to be framed by a board of freeholders and voted upon by the people of the city, and approved by a resolution of the Legislature. Section 31 of article IV has no application to a city charter. It is expressly provided by the Constitution, article 11, § 6, that the city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. The sale and distribution of electrical energy manufactured by a city is a municipal affair, and one over which the Legislature of the state has no control." 188 Cal. at pages 317–318, 205 P. at page 129.

That conclusion has been followed in other decisions involving charter provisions assertedly in violation of the constitutional prohibition against gifts of public funds. Mullins v. Henderson, 75 Cal.App.2d 117, 132–133, 170 P.2d 118; Smith v. City of Glendale, 1 Cal.App.2d 463, 465–466, 36 P.2d 1083; see Bank v. Bell, 62 Cal.App. 320, 328–329, 217 P. 538. The Mullins case is similar to the present situation in that it concerned payment of wages to public employees, beyond doubt a municipal affair. Cf. Dept. of Water and Power v. Inyo Chemical Co., 16 Cal.2d 744, 753, 108 P.2d 410.

[5] Section 150 does not bar the petitioners' right to vacation pay. If it be assumed that payment to an employee for an annual vacation is compensation for "a greater time than that covered by his actual service", the intent to make such payment is clear from section 151.5, and the latter provision, being later in time, would control the earlier provision. Cf. Adams v. City and County of San Francisco, 94 Cal.App.2d 586, 593, 211 P.2d 368, 212 P.2d 272.

Even if the right of petitioners to receive vacation pay be established, the city officials next contend, the present proceeding in mandate is improper to enforce such right. They assert that mandate may not be used to compel the payment of a claim for wages.

[6–8] It is a general rule that the extraordinary remedy of mandate is not available when other remedies at law are adequate. Irvine v. Gibson, 19 Cal.2d 14, 15–16, 118 P.2d 812. In proceedings involving claims for wages by municipal employees or by parties to a contract with a municipality, it is generally held that an ordinary action at law for damages is adequate, and a writ of mandate will be denied. Black v. City of Santa Monica, 13 Cal.App.2d 4, 6, 56 P.2d 256; Coombs v. Smith, 17 Cal.App.2d 454, 455, 62 P.2d 380; Northrup v. Haynes, 15 Cal.App.2d 665, 666, 59 P.2d 1056. As this court has pointed out, "[i]t is settled that mandamus does not lie when there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract." Elevator Operators, etc., Union v. Newman, 30 Cal.2d 799, 808, 186 P.2d 1, 6.

In a few situations involving claims by state or municipal employees for wages the general rule has been relaxed. For the most part, these cases concern disputes as to the proper construction of a statute or ordinance defining or giving rise to the exercise of official duty, and, although recognizing that the ultimate effect of a decision may be to adjudicate a money claim, they emphasize the necessity of official cooperation and the ministerial nature of the official acts involved. Cf. Quigg v. Evans, 121 Cal. 546, 553–554, 53 P. 1093; Scott v. Boyle, 164 Cal. 321, 323, 128 P. 941; Dupuy v. Board of Education, 106 Cal.App. 533, 539, 289 P. 689; Gantenbein v. City of Long Beach, 9 Cal.App.2d 726, 729, 51 P.2d 124; 52 P.2d 495; Scannell v. Murphy, 82 Cal.App.2d 844, 850, 187 P.2d 790. In the Scannell case, which also involved a proceeding under section 150 of the San Francisco City Charter for the payment of wages, the court pointed to the necessity for obtaining the approval by several public officials of a demand, without which no right to receive compensation could arise. A similar result was reached in the Gantenbein case.

[9] It is argued that an extension of the remedy of mandate to include an action based upon a claim for damages may deny to the municipality the procedural safeguards, such as claim statutes and the right to a jury trial, it would enjoy in the ordinary action at law. Clearly, the remedy of mandate should not be allowed indiscriminately, but, in the present case, the trial court has not extended it beyond established precedent. Accordingly, it was not error to allow the writ.

Finally, the city officials contend that the fiscal provisions of the charter of the city and county do not allow the payment of claims for vacation pay as salary or wages. To compel them by writ of mandate to approve such payments, they argue, would require the violation of the city charter provisions. Furthermore, the argument continues, the petitioners have failed to allege and prove the existence of a fund from which payment of the claims could be made, and thus have failed to establish a case for the issuance of the writ.

Under the procedure established by the charter for the payment of wages and salaries, each department head must prepare in advance of the fiscal year a budget including a detailed analysis of the estimated expenditures for compensation. (§ 69.) The budget must be approved by certain public officials and then submitted to the board of supervisors as a basis for the enactment of an appropriation ordinance. The controller must then allot the funds included in the appropriation to the payment of specific obligations. (§ 72.) The position of the city officials is that the present claims have been included in no budget estimate or allotment, and the controller is precluded from incurring liabilities in excess of any allotment. (§ 72.) They assert that the obligation to pay vacation claims did not arise until after the petitioners had been discharged, and there is no "authority retroactively to certify payrolls for time worked when they were not even employees."

[10–12] The situation is analogous to the one presented when an employee is granted compensation for unused vacation time or for accrued overtime work for which he might have been given compensating time off. His right to receive pay does not arise until the time of his separation from service, and yet when compensation is paid, it is estimated on the basis of a projection of his services for a period beyond his date of separation equal to his accrued claims. Cf. Martin v. Henderson, 40 Cal.2d 583, 593, 255 P.2d 416; Pohle v. Christian, 21 Cal.2d 83, 90, 130 P.2d 417. Here, in the case of all employees, both those who remained in the city and county service and those whose employment was terminated before the effective date of section 151.5 of the charter, no right to receive accumulated vacation pay accrued until the amendment became effective. The legal liability thus created should have been treated as an obligation of the fiscal year 1950–1951. In any event, there is ample precedent for construing the San Francisco charter as authorizing payment of back pay accruing prior to the current fiscal year. Cf. Scannell v. Murphy, supra; Francis v. Leavy, 131 Cal.App. 620, 21 P.2d 979.

The city officials assert, however, that there is no fund presently available to pay the claims. They rely upon the general rule that a public officer may not be compelled to authorize the payment of compensation or issue a warrant when funds are lacking, and the decisions which hold that, in an action for mandate to compel the drawing of a warrant by a public official, allegation and proof of available money are essential elements of the petitioner's case. Stevens v. Truman, 127 Cal. 155, 157, 59 P. 397; Cramer v. Supervisors, 18 Cal. 384, 385; State Commission in Lunacy v. Welch, 20 Cal.App. 624, 628, 129 P. 974.

[13] This contention is well taken. The petition for a writ of mandate does not allege, nor is there any proof, as to the existence of a fund from which payment of the petitioners' claims could be made at the present time, and the existence of such a fund is an essential prerequisite under the charter to making such payments. (§ 72.) However, there is no error in the judgment

insofar as it directs the city officials to certify and approve payrolls showing that the petitioners are entitled to receive vacation pay for the periods enumerated. With those legal demands established, it may be presumed that the city officials will pay the claims if funds are available, and if unavailable, that the proper steps will be taken to appropriate the amount required to meet them.

The portion of the judgment which commands the appellants to pay the claims of the petitioners is reversed; in all other respects, the judgment is affirmed. The appellants are to bear the costs of this appeal.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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43 Cal.2d 287

STANFORD

v.

RICHMOND CHASE CO. et al.

S. F. 18990.

Supreme Court of California.

July 23, 1954.

Rehearing Denied Aug. 19, 1954.

Action for injuries to driver of truck being loaded on defendant's premises by employees of defendant using two mechanized fork-lifters. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment from which defendants appealed. The Supreme Court, Peek, J., pro tem held that evidence warranted the giving of res ipsa loquitur instruction.

Judgment affirmed as to two defendants; reversed as to two defendants.

Prior opinion, 263 P.2d 108.

1. Negligence 🔑121(2)

As a general rule, doctrine of res ipsa loquitur is applicable where it appears that the accident is of such nature that it can be said, in light of past experience, that it probably was result of negligence by someone and that defendant is probably the person responsible, and the extent of control exercised by the defendant and the conduct of the plaintiff are material on such question.

2. Negligence 🔑121(2)

In order to recover on basis of doctrine of res ipsa loquitur, plaintiff must show that he did not contribute to the accident.

3. Negligence 🔑135(1)

In action for injuries to driver of truck which was being loaded by defendant's employees on defendant's premises by use of mechanized fork-lifters, wherein injuries were allegedly a result of striking driver by fork-lifter and recovery was sought on basis of doctrine of res ipsa loquitur, evidence of plaintiff was sufficient to warrant conclusion that driver did not by his conduct contribute to the accident.

4. Negligence 🔑138(3)

In action for injuries to driver of truck being loaded by defendant's employees by use of mechanized fork-lifters, wherein there was no direct evidence as to manner in which injuries were sustained, but circumstances indicated that they were result of either being struck by fork-lifter or by falling from trailer of truck, evidence warranted giving of res ipsa loquitur instructions.

5. Master and Servant 🔑301(1)

Where defendant was the employer of the drivers of two fork-lifters being used for loading of truck at time plaintiff sustained injuries when purportedly struck by fork-lifter, responsibility rested on defendant under doctrine of respondeat superior, regardless of which operator through his negligence caused injuries of plaintiff.

6. Negligence 🔑134(11)

In action for injuries to driver of truck being loaded by defendant's employees by use of mechanized fork-lifters, wherein operators of two fork-lifters and assistant night superintendent of defendant's cannery were joined as defendants, evidence as to one of the operators was insufficient to warrant conclusion that he was in position to cause the accident, or that injuries of driver were caused by such operator's negligence rather than negligence of operator of other fork-lifter.

7. Negligence ⚷134(4)

In action for injuries to driver of truck being loaded on defendant's premises by employees using two mechanized fork-lifters, wherein there was no direct evidence as to whether driver was struck by fork-lifter or suffered fall from truck, evidence was insufficient to warrant finding of negligence on part of defendant's night superintendent who was not present when the accident occurred.

8. Trial ⚷345

Although failure to object to form of verdict can constitute waiver of defect of form, it does not constitute waiver of substantial claim of insufficiency of the evidence to support the verdict against one of several defendants.

◆

Bronson, Bronson & McKinnon, San Francisco, for appellants.

James F. Boccardo, Edward J. Niland, San Jose, for respondent.

PEEK, Justice pro tem.

This action was brought to recover damages for injuries received by plaintiff while a business invitee on the premises of defendant Richmond Chase Company. The injuries were allegedly caused by the negligent operation of mechanized fork lift loaders belonging to defendant corporation. Three of its employees, Castro, Silva and Rouyet, were joined as defendants. The jury returned a verdict against all defendants, and they have appealed from the ensuing judgment contending that the trial court erred in giving any instructions upon the doctrine of res ipsa loquitur and that there is insufficient evidence to connect defendants Silva and Rouyet with the accident.

Plaintiff operated a tractor with two trailers, and the parties have referred to the combined unit as a truck. He obtained a load of grapes on behalf of his employer and drove to the cannery yard of defendant corporation, arriving about 2 a. m. He slept in the tractor until the grapes were unloaded by cannery employees about 3:30 a. m. and then drove to the box shed in another part of the cannery yard to get some empty boxes for his return trip. The record is not entirely clear as to the exact location where he parked his truck in relation to the stacks of empty boxes, but the evidence indicates that the boxes were 20 to 30 feet from the right side and at or behind the back end of the truck. The boxes were stacked nine high on individual pallets to facilitate loading, and they were placed on the trailers by means of mechanized fork lifts operated by defendants Castro and Silva, who were the only persons other than plaintiff in the area during the loading operation. Silva worked on the left or driver's side of the truck, and Castro worked on the right side which was next to the boxes. Silva loaded the left side by picking up a pallet of boxes from the pile with his fork lift, backing away until in position to go forward, and then proceeding around the rear of the truck and placing the pallet on a trailer. The record does not show in what direction Silva backed before proceeding forward. Castro loaded the right side by picking up a pallet of boxes, backing along the right side of the truck toward its front, swinging around in an arc until in position to go forward toward the truck, and then placing the pallet on a trailer. Eight pallets of boxes, four to a side, were placed on each trailer, and it took about twenty minutes to load both trailers.

Plaintiff testified that the front trailer had been loaded when he went to the rear of the second trailer to obtain some rope and that he scattered the rope along the right side of the second trailer and stopped between the front and back trailers. The last thing he remembered was standing between the two trailers in an open space "just about even with the edge of the trailer," and he replied "Yes" when asked if that was "the position you were in when you were struck." Also, he testified that he was "knocked out there" when he was standing in that location. He did not see or feel anything hit him, and the next thing he knew was when he regained consciousness about two hours later in the first aid room of the cannery. Plaintiff further testified that from the time he parked his truck "until [he] blacked out" he did not mount any part of the truck and that it was not his custom to climb on a load of empty boxes when placing cables on them because of the unstable character of the boxes. As a result of the accident plaintiff suffered a concussion of the brain and fractures of the left antrum, left jaw, and left elbow. His face, lip and eyelid were cut, two teeth were completely knocked out, and his right knee was bruised.

Castro and Silva testified that, during the early morning hours when the yard was nearly deserted, they customarily backed the fork lifts without looking, and neither of them looked while backing during the time they were loading plaintiff's truck. The forward vision was obstructed when a fork lift was carrying a pallet of boxes. Both operators said that they did not know how plaintiff was injured. Castro testified that he did not become aware that plaintiff was injured until he was placing the last pallet of boxes on the back trailer, and he saw plaintiff lying on the ground beside the cab of the truck on the side he was loading. He called to Silva, they both approached plaintiff, and upon finding him injured they took him to the first aid station of the cannery. Castro could not remember seeing plaintiff during the loading operation, and Silva recalled seeing him only once.

Defendant Rouyet, the assistant night superintendent of defendant corporation, testified that he was not near the scene when the accident occurred but that when informed of it he proceeded to the scene where he found an angle iron and blood stains on the ground near the right side of the tractor and observed a smudge on the right hand gas tank of the tractor.

At plaintiff's request the trial court gave instructions, applicable to all defendants, upon the doctrine of res ipsa loquitur. Defendants do not complain of the form of the instructions but contend that the evidence does not warrant any instructions upon the doctrine. We have concluded that the instructions were properly given as to defendants Castro and Richmond Chase Company but not as to defendants Silva and Rouyet.

[1] As a general rule, res ipsa loquitur is applicable where it appears that the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 442–443, 446, 247 P.2d 344. As aids to help the courts in determining whether such probabilities exist with regard to a particular occurrence, the courts have considered, among other things, the extent of control exercised by the defendant and the conduct of the plaintiff. Zentz v. Coca Cola Bottling Co., supra, 39 Cal.2d at pages 446, 447, 247 P.2d 344.

Plaintiff, Castro and Silva were the only persons in the area at the time of the accident, and the two fork lifts were the only pieces of equipment then in operation. Under these circumstances, and in view of the serious nature and extent of plaintiff's injuries, it is apparent that there are only two possible explanations for the cause of plaintiff's injuries: either he was struck by a fork lift or he fell from some portion of his truck. Plaintiff testified that before losing consciousness he did not climb onto any part of the truck and that he did not customarily get on empty boxes while fastening his load. The last thing he remembered was that he was standing on the ground between the two trailers about even with their outside edges, and his testimony, when construed most strongly in favor of the judgment, was to the effect that he was "struck" or "knocked out there" when standing in that location. It can be inferred that his loss of memory began as of the moment he was injured, and the jury could reasonably conclude from all the evidence that the accident was not due to a fall from the truck but, rather, that plaintiff was struck and injured by a fork lift at the point between the two trailers.

[2, 3] The requirement of the doctrine of res ipsa loquitur that the plaintiff must show that he did not contribute to the accident, see Escola v. Coca Cola Bottling

Co., 24 Cal.2d 453, 458, 150 P.2d 436, is satisfied by the evidence that plaintiff was standing between the two trailers when he was struck, since the jury could properly conclude that a reasonable man, under the same circumstances, would expect that the space would be a safe one within which to stand. Further, it obviously seems more probable than not that a person standing in plaintiff's position would not have been struck by a fork lift if due care were used in its operation, and, therefore, under the doctrine of res ipsa loquitur, it can be inferred that the operator of the fork lift which struck plaintiff was negligent. In reaching this conclusion and in considering the propriety of the res ipsa loquitur instructions, we have, of course, disregarded the direct evidence of negligence on the part of the fork lift operators in backing without looking where they were going.

[4] Defendants claim that the evidence regarding the method of operation of the fork lifts and the courses taken in loading the truck shows that the accident could not have occurred while plaintiff was standing between the two trailers. From this premise they argue that, although plaintiff may not remember it, he could have moved from that position and climbed onto the trailers to tie the load, and that, consequently, a fall is as probable an explanation for his injuries as his being struck by a fork lift. Cf. LaPorte v. Houston, 33 Cal.2d 167, 199 P.2d 665. The evidence, however, does not show that the accident could not have occurred while plaintiff was standing between the trailers. The jury was not required to believe the testimony of Castro and Silva as to the position in which they found plaintiff or as to the routes taken by them in operating their fork lifts. In this connection plaintiff stated merely that the operator on the right side of the truck would back around towards plaintiff to load the boxes onto that side and that the other operator would go forward around the rear of the truck to load the left side. It seems clear that the operator on the right side could have deviated slightly from his prior course and that his fork lift, or some portion of it, could have entered the space between the two trailers for the short distance required to strike a person in the position where plaintiff was standing, namely, "just about even with the edge of the outside of the trailer."

The cases of LaPorte v. Houston, 33 Cal.2d 167, 199 P.2d 665, and Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129, cited by defendants, are distinguishable. In the LaPorte case the plaintiff was struck when an automobile equipped with a hydra-matic transmission moved forward while a mechanic was adjusting the carburetor. In the Olson case the plaintiff, on leaving a store, held one swinging door open for another person and was struck by the rebound of a second swinging door which had been used by a third customer. In both cases the instrumentality that caused the injury was known but not the particular reason for the accident, and the problem was whether it was caused by some defect for which defendants were responsible. The court was therefore concerned only with the question of law whether it could be said that, in the light of common experience, the accident was more likely than not the result of defendants' negligence. In the present case, on the other hand, the question is one of fact as to whether the injuries were caused by a fork lift rather than by plaintiff's own conduct, and, as we have seen, if plaintiff was hit by a fork lift, it is more probable than not that the operator was negligent.

[5] Regardless of which of the two fork lifts caused the accident, it would seem clear that, under respondeat superior, defendant corporation would be responsible for any negligence in their operation since both of the fork lifts were operated by its employees. The evidence also appears sufficient to permit an inference that plaintiff was struck by the fork lift operated by defendant Castro because he was loading the side of the truck where plaintiff was injured.

[6] There is no evidence that defendant Silva operated his fork lift in the area along the right side of the truck where plaintiff was injured, and the only evidence on the issue places him either on the opposite side or to the rear of the truck.

Under the circumstances, therefore, the evidence is insufficient to support an inference that Silva's fork lift was a probable cause of plaintiff's injuries. Plaintiff claims that the judgment against Silva can be sustained under the principle of the cases in which it has been recognized that, under certain unusual circumstances, the doctrine of res ipsa loquitur may be applicable against one or more of several persons where any one of them could reasonably have been responsible for plaintiff's injuries but where plaintiff is unable to point out which of them is responsible. Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574; Cavero v. Franklin Gen. Benevolent Soc., 36 Cal.2d 301, 223 P.2d 471; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; see discussion in Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 445–446, 247 P.2d 344. These cases are distinguishable, however, because the evidence is insufficient to show that Silva was in a position to cause the accident.

[7] The evidence as to defendant Rouyet appears to be clearly insufficient to connect him with the accident. He was apparently joined as defendant in this action because he was the assistant night superintendent of the cannery, but admittedly he was not present when the accident occurred, and the evidence does not show what was the scope of his duty, whether he had notice of the negligent manner of operating the fork lifts, or whether he gave any instructions on how to operate them.

[8] There is no merit to the contention that Silva and Rouyet cannot now question the judgment against them because the record shows that they failed to ask for separate verdicts or to object to the forms of verdict submitted to the jury which provided only for verdicts as to all defendants together. Although the failure to object to the form of a verdict can constitute a waiver of a defect of form, Joerger v. Pacific Gas and Electric Co., 207 Cal. 8, 21, 276 P. 1017; Hicks v. Coleman, 25 Cal. 122, 146, it does not constitute a waiver of a substantial claim of insufficiency of the evidence to support the verdict against one of several defendants. Cf. Pisani v. Martini, 132 Cal.App. 269, 274–275, 22 P.2d 804; 3 Cal.Jur.2d 649–650; 2 Cal.Jur. 282.

As to defendants Richmond Chase Company and Castro, the judgment is affirmed. As to defendants Silva and Rouyet the judgment is reversed, but without costs in view of their waiver of costs.

SHENK, P. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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43 Cal.2d 243

In re HALLINAN.

S. F. 19053.

Supreme Court of California.
In Bank.
July 9, 1954.

Disciplinary proceeding. The Supreme Court, Traynor, J., held that conviction under federal statute for failure to collect and pay over tax or attempting to defeat or evade tax does not necessarily involve moral turpitude and does not justify summary disbarment.

Order in accordance with opinion.

1. Constitutional Law ⚷247

Attorney, against whom disciplinary proceedings were instituted on ground that he had been convicted of a violation of a federal statute, could not contend that he had been denied equal protection of the laws without showing that he had challenged the propriety of his prosecution and conviction or that others demonstrably guilty of the same violation had not been prosecuted, or that the statute was administered discriminatorily against a class to which he belonged. 26 U.S.C.A. § 145(b).

2. Attorney and Client ⚷39

"Moral turpitude" within statute providing for summary disbarment of attorneys who are convicted of an offense involving moral turpitude, includes fraud, and a crime in which an attempt to defraud is an essential element is a crime involving moral turpitude. Business and Professions Code, §§ 6101, 6102.

See publication Words and Phrases, for other judicial constructions and definitions of "Moral Turpitude".

3. Attorney and Client 🔑39

The related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude.

4. False Pretenses 🔑1

The fraudulent acquisition of another's property is but another form of theft in California. Pen.Code, § 484.

5. Attorney and Client 🔑32

An attorney's standard of conduct should be one of complete honesty.

6. Attorney and Client 🔑39

The crime of defrauding the government involves moral turpitude equally as does the crime of defrauding an individual.

7. Attorney and Client 🔑39

An attorney can be summarily disbarred only when the crime of which he was convicted involves moral turpitude, and the record of conviction is conclusive evidence of moral turpitude only when the crime itself necessarily involves moral turpitude. Business and Professions Code, §§ 6101, 6102.

8. Attorney and Client 🔑39

Provision that record of conviction of a crime involving moral turpitude is conclusive evidence of moral turpitude was enacted in order that Supreme Court could disbar an attorney convicted of such a crime, without giving him further notice or hearing. Business and Professions Code, § 6102.

9. Criminal Law 🔑1144(14, 15)

It would be assumed that every jury in a criminal trial is properly instructed to convict defendant if they find the minimum elements of the offense charged, but it would not be assumed that jury found a defendant guilty of conduct alleged in indictment, proof of which is unnecessary to conviction, merely because jury brought in verdict of guilty.

10. Courts 🔑97(5)

The interpretation given to a United States statute by the United States courts would be accepted.

11. Internal Revenue 🔑2407, 2408

Fraud is not an essential element of the federal offense of failing to collect and pay over tax or attempting to defeat or evade tax, and the measure of bad faith or evil intent which is an essential element is that which can be inferred from evidence that the defendant acted without justifiable excuse, or without ground for believing his acts were unlawful, or in careless disregard of the lawfulness of his acts, and the offense does not necessarily involve moral turpitude. 26 U.S.C.A. § 145(b).

12. Attorney and Client 🔑49

Where an attorney's conviction for violation of federal statute relating to failure to collect and pay over tax or attempt to defeat or evade tax involves moral turpitude, discipline or disbarment should be imposed by nonsummary procedure. 26 U.S.C.A. § 145(b); Business and Professions Code § 6106 et seq.

13. Attorney and Client 🔑39

Conviction under federal statute relating to failure to collect and pay over tax or attempts to defeat or evade tax does not warrant summary disbarment. 18 U.S.C.A. § 3287; 26 U.S.C.A. § 145(b); Business and Professions Code, §§ 6101, 6102.

14. Attorney and Client 🔑36(1)

The Supreme Court has inherent power over the admission, suspension, and disbarment of attorneys, and, in the exercise thereof, can initiate disciplinary proceedings on its own motion and, in so doing, may adopt any suitable process or mode of proceedings. Business and Professions Code, § 6107; Code Civ.Proc. § 187.

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Dreyfus, McTernan & Lubliner and Benjamin Dreyfus, San Francisco, for petitioner.

Gladstein, Andersen & Leonard, George R. Andersen, Norman Leonard, Charles R. Garry and James Martin MacInnis, San Francisco, amici curiae on behalf of petitioner.

Garrett H. Elmore, San Francisco, and Herman F. Selvin, Los Angeles, for respondent State Bar.

TRAYNOR, Justice.

Vincent W. Hallinan was charged by indictment with violating section 145(b) of the Internal Revenue Code, 26 U.S.C. § 145(b)[1] by "willfully and knowingly fil[ing] false and fraudulent income tax returns." The jury found him guilty as charged on five counts of the indictment. The court sentenced him to 18 months imprisonment on each count, the sentences to run concurrently, and fined him $50,000. He did not appeal, and the time for appeal has now elapsed. The State Bar filed with this court a certified copy of the indictment and judgment of conviction, contending that it calls for Hallinan's disbarment under sections 6101[2] and 6102[3] of the Business and Professions Code. These sections provide for the summary disbarment of attorneys who are convicted of "a felony or misdemeanor, involving moral turpitude * * *." Hallinan objects to the entry of an order of disbarment and moves that the proceeding be dismissed on the grounds that he is being deprived of equal protection of the laws, that the term "moral turpitude" in sections 6101 and 6102 is too vague, uncertain, and indefinite to meet the requirements of due process of law, and that in any event the crime proscribed by section 145(b) does not involve moral turpitude.

[1] Hallinan has not made the required showing of discrimination to sustain his contention that he is being denied equal protection of the laws. (See Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497.) He has not directly challenged by appeal or otherwise the propriety of his prosecution and conviction for violating section 145(b). Nor has he shown that others demonstrably guilty of violating that section have not been prosecuted, or that the section is administered discriminatorily against a class to which he belongs. See, In re Pearson, 30 Cal.2d 871, 876–878, 186 P.2d 401; Snowden v. Hughes, supra, 321 U.S. 1, 8, 64 S.Ct. 397; Southern Ry. Co. v. Watts, 260 U.S. 519, 526, 43 S.Ct. 192, 67 L.Ed. 375; Yick Wo v. Hopkins, 118 U.S. 356, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220. He claims that he is being discriminated against because the State Bar has failed to file with this court the records of conviction of other attorneys prosecuted for tax offenses. Information supplied by the State Bar shows that of the five attorneys involved, a record of conviction of violating section 145(b) was filed in one case, but

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[1] "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[2] "Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102.

"The record of conviction shall be conclusive evidence and the clerk of the court in which the conviction is had shall, within thirty days thereafter, transmit a certified copy of the record of conviction to the Supreme Court. The proceedings to disbar or suspend an attorney shall be undertaken by the court upon receipt of the certified copy of the record of conviction.

"A plea or verdict of guilty or a plea of nolo contendere is deemed to be a conviction within the meaning of this section."

[3] "Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude, the court shall * * * order the attorney disbarred when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal * * *.

"The other provisions of this article providing a procedure for the disbarment or suspension of an attorney do not apply to an attorney convicted of a crime involving moral turpitude, unless expressly made applicable."

the attorney died before action was taken by this court, and in another an appeal is still pending. The State Bar has taken no action with respect to the remaining three, who were adjudged guilty of the offenses charged on pleas of *nolo contendere.* In view of Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 490–492, 139 P.2d 681, holding that a plea of *nolo contendere* is not the equivalent of a plea of guilty and cannot be used in another proceeding as an admission against the person so pleading, the State Bar was justified in concluding that such a plea was not the equivalent of a "plea or verdict of guilty" within the meaning of section 6101 of the Business and Professions Code.[4]

[2–6] Although the problem of defining moral turpitude is not without difficulty, see, In re Hatch, 10 Cal.2d 147, 151, 73 P.2d 885; dissenting opinion of Mr. Justice Jackson in Jordan v. De George, 341 U.S. 223, 232, 71 S.Ct. 703, 95 L.Ed. 886; Schmidt v. United States, 2 Cir., 177 F.2d 450, 451, it is settled that whatever else it may mean, it includes fraud and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude. Jordan v. De George, supra, 341 U.S. 223, 227, 71 S.Ct. 703; United States ex rel. Berlandi v. Reimer, 2 Cir., 113 F.2d 429, 431; United States ex rel. Robinson v. Day, 2 Cir., 51 F.2d 1022; In re Crane, Cal.Sup., 189 P. 1072; see also, Ex Parte Wall, 107 U.S. 265, 273, 2 S.Ct. 569, 27 L.Ed. 552; People v. Wisecarver, 67 Cal.App.2d 203, 208, 153 P.2d 778. It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. In re Rothrock, 25 Cal.2d 588, 154 P.2d 392 (petty theft); Werner v. State Bar, 24 Cal.2d 611, 150 P.2d 892 (attempted bribe and grand theft); Moura v. State Bar, 18 Cal.2d 31, 112 P.2d 629 (forgery); Suspension of Hickman, 18 Cal.2d 71, 113 P.2d 1 (grand theft); In re McAllister, 14 Cal.2d 602, 95 P.2d 932 (conspiracy to violate the General Cemetery Act by misrepresenting cemetery lots offered for sale); Barton v. State Bar, 2 Cal.2d 294, 40 P.2d 502 (attempted extortion); Oster v. State Bar, 2 Cal.2d 625, 42 P.2d 627 (misappropriation of a client's funds); In re Shinn, Cal.Sup., 186 P. 772 (forgery); Matter of Coffey, 124 Cal. 522, 56 P. 448 (attempted extortion); In re Thompson, 37 Cal.App. 344, 348, 174 P. 86 (knowingly receiving property stolen from the mails); see also, In re Rothrock, 16 Cal.2d 449, 454, 106 P.2d 907, 131 A.L.R. 226. The fraudulent acquistion of another's property is but another form of theft in this state. Pen.Code, § 484. We see no moral distinction between defrauding an individual and defrauding the government, United States ex rel. Berlandi v. Reimer, supra, 113 F.2d 429, 430–431, and an attorney, whose standard of conduct should be one of complete honesty, McGregor v. State Bar, 24 Cal.2d 283, 288–289, 148 P.2d 865, who is convicted of either offense is not worthy of the trust and confidence of his clients, the courts, or the public, and must be disbarred, since his conviction of such a crime would necessarily involve moral turpitude.

[7–9] Conversely, if a conviction for any crime can be had without proof of facts showing moral turpitude, an attorney convicted of such a crime cannot be summarily disbarred under section 6101 and 6102 of the Business and Professions Code. Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under those sections. As we said in In re Rothrock, 16 Cal.2d 449, 454, 106 P.2d 907, 910, an "attorney's name will not be stricken from the rolls where the *nature of the particular crime* does not reflect a bad moral character with respect to the duties of the attorney's profession." [Italics added.] See In re McAllister, supra, 14 Cal.2d 602, 603–604, 95 P.2d 932. The language of the statute itself clearly indicates that an attorney can be summarily disbarred only when the *crime* of which he was convicted involves moral turpitude. Even if it is assumed that statements in the indictment or judgment of conviction describing conduct that goes beyond the essential elements of the crime charged are a part of the "record of conviction," as the State Bar contends, the record of conviction is "conclusive evidence" only when the crime itself necessarily involves moral turpitude. The provision that the record of conviction is conclusive evidence was inserted in the statute in order that this court could disbar an attorney, convicted of a crime involving moral turpitude, without giving him further notice or hearing. In re Collins, 188 Cal. 701, 703, 706–708, 206 P. 990, 32 A.L.R. 1062. Only when an attorney is indicted for a crime the commission of which would in every case evidence a bad moral character, is the issue of moral turpitude tendered in the criminal trial. If an attorney could be summarily disbarred after conviction for a crime, the minimum elements of which do not involve moral turpitude, he would never have an opportunity to be heard on the issue on which his disbarment depends. We must assume that every jury in a criminal trial is properly instructed to convict the defendant if they find the minimum elements of the offense charged, and it would be mere speculation to conclude in any case that a jury finds a defendant guilty of conduct alleged in the indictment, proof of which is unnecessary to his conviction, merely because the jury brought in a verdict of guilty.

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[4] That section has since been amended to include pleas of *nolo contendere.* Stats. 1953, chap. 44, § 1.

A similar rule has been established by the federal courts. In proceedings for the deportation of aliens twice convicted of "a crime involving moral turpitude", 8 U.S.C.A. § 1251 (a) (4), it has been held that the crime of which the alien was convicted must necessarily involve moral turpitude to warrant deportation. United States ex rel. Giglio v. Neelly, 7 Cir., 208 F.2d 337, 340–342; United States ex rel. Zoffarano v. Corsi, 2 Cir., 63 F.2d 757, 759; United States ex rel. Robinson v. Day, supra, 51 F.2d 1022; United States ex rel. Griffo v. McCandless, D.C., 28 F.2d 287, 288; see also United States v. Carrollo, D.C., 30 F.Supp. 3, 7; United States ex rel. Valenti v. Karmuth, D.C., 1 F.Supp. 370, 373–376. In these cases it is said that if by definition the crime "does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral. * * *" United States ex rel. Robinson v. Day, supra, 51 F.2d 1022; United States ex rel. Giglio v. Neelly, supra, 208 F.2d 337, 341. The "circumstances under which the crime was in fact committed" cannot be considered. (Ibid.) It has also been said that whether or not a crime involves moral turpitude does not depend upon unnecessary adjectives added to the indictment by a "zealous and over careful prosecutor" United States v. Carrollo, supra, 30 F.Supp. 3, 7, for such a holding would "make of law an uncertain thing." United States ex rel. Griffo v. McCandless, supra, 28 F.2d 287, 288.

In re Hatch, 10 Cal.2d 147, 73 P.2d 835, is not inconsistent with the rule that the crime of which an attorney is convicted must necessarily involve moral turpitude to warrant summary disbarment. The Hatch case was not a summary proceeding, since Hatch was given a hearing before this court and an opportunity to show that he was not guilty of moral turpitude.

[10] The crucial question in the present proceeding, therefore, is whether or not an intent to defraud the United States is an essential element of the crime proscribed by section 145(b) of the Internal Revenue Code. If an intent to defraud is not an essential element and a person may be convicted thereunder without proof of that intent or other conduct evidencing moral turpitude, an attorney convicted of that crime cannot be summarily disbarred. Since section 145(b) is a United States statute, we must accept the interpretation given it by the United States courts. Urie v. Thompson, 337 U.S. 163, 174, 69 S.Ct. 1018, 93 L.Ed. 1282; Anderson v. Atchison, T. & S. F. Ry. Co., 31 Cal.2d 117, 121–122, 187 P.2d 729; Caminetti v. Imperial Mutual Life Ins. Co., supra, 59 Cal.App.2d 476, 490, 139 P.2d 681; see also, Hayashi v. Lorenz, 42 Cal.2d 848, 271 P.2d 18; Op. Atty.Gen., No. 54/37, June 4, 1954, pp. 6–7.

These courts have definitely held that an intent to defraud is not an essential element of section 145(b) and that a conviction under that section does not necessarily involve moral turpitude. In United States v. Scharton, 285 U.S. 518, 52 S.Ct. 416, 76 L.Ed. 917, the defendant was indicted for violating section 1114(b) now § 145(b) for attempting to evade taxes by falsely understating taxable income. He contended that the general three-year period of limitations had expired and that the prosecution was therefore barred. The United States contended, however, that the special six-year statute of limitations applicable to offenses involving fraud or attempts to defraud the government was controlling. It urged, as the State Bar does in the present proceeding, that "fraud is implicit in the concept of evading or defeating; and [that] * * * [a]ny effort to defeat or evade a tax is * * * tantamount to and * * * possess[es] every element of an attempt to defraud the taxing body." 285 U.S. 518, 520–521, 52 S.Ct. 416, 417. The Supreme Court noted that many statutes expressly make an intent to defraud an essential element of the offense, and that under these statutes "an indictment failing to aver that intent would be defective; but under section 1114(b) such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat. (Citation.)" 285 U.S. 518, 521, 52 S.Ct. 416, 417. The court held that the general three-year statute of limitations covering offenses not involving fraud was applicable. Subsequently, the Scharton case was relied upon in holding that a statute [18 U.S.C.A. § 3287], suspending the statute of limitations during the period of hostilities in World War II for offenses "involving fraud or attempted fraud against the United States" did not apply to a violation of section 145(b). United States v. Beard, D.C., 118 F.Supp. 297, 303. It has also been held that the crime stated in section 145(b) is not an offense involving "moral turpitude" for purposes of a statute, 8 U.S.C.A. § 1251(a) (4), authorizing the deportation of resident aliens twice convicted of such offenses. United States v. Carrollo, supra, 30 F.Supp. 3, 7; see, also, United States ex rel. Giglio v. Neelly, supra, 208 F.2d 337, 340), and that the offense stated in section 145(b) is not "inherently a crime", but is a crime malum prohibitum. United States v. Pendergast, D.C., 28 F.Supp. 601, 609.

Two years after the decision in the Scharton case, the Supreme Court in United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381, had occasion to consider the meaning of the word "willfully" in section 145(a) of the Internal Revenue Code.[5] In that case the defendant was indicted for "willfully" refusing to supply information about deductions claimed in his tax returns. He based his refusal on a claim of privilege against self-incrimination under state statutes, but the court had held on an earlier appeal, United States v. Murdock, 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210, that the privilege could not be invoked. In defining the word "willfully" the court said that it "denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose (citations); without justifiable excuse (citations); stubbornly, obstinately, perversely (citations). The word is also employed to characterize a thing done without ground for believing it is lawful (citation), or conduct marked by careless disregard whether or not one has the right so to act (citations)." [290 U.S. 389, 54 S.Ct. 225.] The court held that although the defendant's refusal to supply information was without legal justification, "the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense." 290 U.S. 389, 394, 398, 54 S.Ct.

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[5] Section 145(a) states that any person "who willfully fails" to pay his taxes, make a return or declaration, keep records, and supply information as required by law is guilty of a misdemeanor, while section 145(b) makes a willful attempt to evade or defeat a tax a felony. The United States Supreme Court has made it clear that the element imported by the word "willfully" is the same for both crimes, and that the difference between the two offenses is to be found in the "positive attempt" that is required to violate section 145(b). The difference is thus one between willful omission and willful commission. See Spies v. United States, 317 U.S. 492, 497–499, 63 S.Ct. 364, 87 L.Ed. 418.

223, 226; see also Arnold v. United States, 9 Cir., 75 F.2d 144, 145–146. A similar definition of the word "willful" as used in section 145(b) has been given in a number of cases. See Spies v. United States, 317 U.S. 492, 497, 63 S.Ct. 364; United States v. Martell, 3 Cir., 199 F.2d 670, 672; Hargrove v. United States, 5 Cir., 67 F.2d 820, 823, 90 A.L.R. 1276.

[11] The foregoing cases establish that fraud is not an essential element of the offense proscribed by section 145(b), that some measure of bad faith or evil intent is an essential element, but that such bad faith or evil intent, which can be inferred from evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts, do not necessarily involve moral turpitude.

This conclusion finds support in the decisions of the courts of other states in proceedings to disbar attorneys convicted of violating section 145(b). Although most of these states have provisions for summary disbarment similar to that of California, in none of them was disbarment ordered solely on the record of conviction without an independent investigation of the question whether the attorney's conduct involved moral turpitude. In Re Diesen, 173 Minn. 297, 215 N.W. 427, 217 N.W. 356, on which the State Bar relies, the court referred the proceeding to a referee to investigate the question of moral turpitude, and on the basis of his report suspended Diesen for a period of three years. The Supreme Court of Louisiana has established the practice of having a committee of the State Bar Association investigate the question of misconduct, when an attorney has been convicted of violating section 145(b). Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 16 So.2d 843, 847; Louisiana State Bar Ass'n v. Connolly, 201 La. 342, 9 So.2d 582, 592. In the Connolly case, the State Bar Commissioner recommended that the proceeding be dismissed because Connolly had produced evidence to show that, despite his conviction, he was free of "dishonest and improper conduct." The court accepted the recommendation, concluded that no moral turpitude was involved in Connolly's violation of section 145(b), and dismissed the proceeding. Louisiana State Bar Ass'n v. Connolly, 206 La. 883, 20 So.2d 168, 170–172. In Rheb v. Bar Ass'n of Baltimore, 1945, 186 Md. 200 at page 204, 46 A.2d 289, the Supreme Court of Maryland said by way of dictum that a violation of section 145(a) (wilful failure to file a tax return) involves moral turpitude[6] but its holding was squarely based on a Maryland statute that directs summary disbarment for "'conduct prejudicial to the administration of justice'". 186 Md. at page 205, 46 A.2d at page 291. The dictum in the Rheb case was relied upon in In re Burrus, Mo.Sup., 1953, 258 S.W.2d 625, 626 where the court found that a violation of section 145(a) involved moral turpitude. The Missouri court, however, examined the evidence presented in the tax trial, concluded that there were extenuating circumstances, and suspended Burrus for a period of one year.

[12–14] Although every conviction for violating section 145(b) may not involve moral turpitude, some convictions may. In such cases discipline or disbarment should be imposed by non-summary procedures. Bus. & Prof. Code, § 6106 et seq., When, as in the present case, it appears that an attorney, whose conviction does not warrant summary disbarment, might nevertheless have been guilty of acts involving moral turpitude, we have established the practice of referring the matter to the State Bar for an investigation of the question whether in the commission of the crime the convicted lawyer was guilty of misconduct that requires his suspension or disbarment. In re Rothrock, supra, 16 Cal. 2d 449, 454, 106 P.2d 907; In re Richardson, 15 Cal.2d 536, 541, 102 P.2d 1076; In re Boyd, Bar Misc. 2205, Minute Order, March 17, 1954. This court has inherent power over the admission, suspension, and disbarment of attorneys, Johnson v. State Bar, 4 Cal.2d 744, 758, 52 P.2d 928, In re Lavine, 2 Cal.2d 324, 327–328, 41 P.2d 161, 42 P.2d 311, and in the exercise thereof can initiate disciplinary proceedings on its own motion, Bus. & Prof. Code § 6107, and, in so doing, it may adopt "any suitable process or mode of proceeding * * *." Code Civ.Proc. § 187; and see Barnes v. District Court of Appeal, 178 Cal. 500, 504, 173 P. 1100.

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[6] Citing In re Diesen, supra. It should be noted however, that the Diesen case was decided before United States v. Scharton, supra, and that the statute under which Diesen was convicted specifically made fraud an element of the offense. The Maryland court also cited in support of its dictum, In re Wiltsie, 1920, 109 Wash. 261, 186 P. 848 in which an attorney was disbarred for soliciting business and filing false claims for exemption from selective service. In re Peters, 1925, 73 Mont. 284, 235 P. 772, also cited, was a disbarment proceeding based on Peters' conviction for filing false reports as an officer of a bank with intent to deceive the U. S. Comptroller of Currency.

The motion to dismiss is denied and the matter is referred to the Board of Governors of the State Bar for a hearing, report, and recommendation on the question whether the facts and circumstances surrounding the commission of the offense of which Vincent W. Hallinan was convicted involved moral turpitude or other misconduct warranting disbarment or suspension.

SHENK, SCHAUER, and SPENCE, JJ., concur.

CARTER, J., did not participate herein.

126 Cal.App.2d 578

PEOPLE v. CROWDER.

Cr. 5171.

District Court of Appeal, Second District, Division 3, California.

July 15, 1954.

Rehearing Denied July 23, 1954.

Hearing Denied Aug. 10, 1954.

Prosecution of husband who was charged with forging four checks drawn upon his wife's bank account allegedly without her authorization or consent. From adverse judgment of the Superior Court, Los Angeles County, Mildred L. Lillie, J., the accused appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to establish a fraudulent intent on the part of the husband in signing the checks, the proceeds from which were used for family necessaries.

Judgment reversed.

1. Forgery 🔑44(1)

In prosecution of husband, who was charged with forging four checks drawn upon his wife's bank account allegedly without her consent or authorization, and who used the money for no other purpose than to meet the needs of the family, the evidence was insufficient to establish a criminal intent on part of the husband in signing the checks.

2. Criminal Law 🔑390

Where the question of intent to defraud is an element of the offense charged, the court must look to and weigh all the facts and circumstances which shed light upon the motives of the accused.

3. Criminal Law 🔑317

Where husband, who was charged with forging four checks drawn upon his wife's bank account, testified that he used the money to meet various needs of the family, and wife was not questioned with respect to her knowledge of use her husband had made of the money, there was a presumption that if the wife had been questioned with respect to her knowledge of use made of the money her answers would have been adverse to the prosecution and tended to corroborate husband's testimony. Code Civ.Proc. § 1963, subds. 5, 6.

4. Forgery 🔑37

In prosecution of accused, who was charged with forging four checks drawn upon his wife's bank account, wherein husband testified he used part of proceeds of one check to get his wife's typewriter out of pawn, it was error to sustain objection on cross-examination of wife whether, at the time one check was cashed, her husband had not taken her typewriter out of pawn for her.

5. Criminal Law 🔑695½

Where the preliminary transcript is used by the prosecution at the trial, objections made at the preliminary are reserved and rulings thereon are approved by the trial judge in the absence of any declaration or ruling to the contrary.

6. Forgery ⚷44(1)

In prosecution of husband, who was charged with forging four checks drawn upon his wife's bank account, sufficient evidence to prove that the withdrawals were unauthorized would not alone prove the charges of forgery since the use the husband made of the money was the principle factor in determining whether he had the necessary criminal intent.

7. Forgery ⚷5

The fact that wife had exclusive control of bank account consisting entirely of deposits of her earnings would not for that reason make the money deposited therein her separate property and make husband guilty of forgery for writing checks without her consent against the account for family necessaries.

8. Forgery ⚷35

Normally an intent to defraud may be, and often must be inferred from the circumstances in which a false instrument is executed or issued.

9. Forgery ⚷21

A husband or wife may be guilty of forgery, through the issuance of false document with intent to cheat or defraud the other, but as between spouses there is no more criminality in taking small sums from a bank account than there would be in taking them from a wallet or a handbag.

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Gerald J. Levie and Sam Bubrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Henry B. Crowder was accused of four offenses of forgery and having waived trial by jury was convicted of three offenses. The instruments allegedly forged were four checks drawn upon the bank account of defendant's wife. Upon this appeal from the judgment appellant argues the insufficiency of the evidence to prove criminal intent and that it was error to permit his wife to testify against him.

Each count of the information alleged forgery of a check with intent to "cheat and defraud" defendant's wife, the banking institution on which the check was drawn and the teller who cashed the check. The checks were drawn, respectively, for $25, $10, $15 and $20, between the 4th of August and the 8th of September, 1953. Defendant signed his wife's name to each check and as payee endorsed and cashed the same. Mr. and Mrs. Crowder were living together at the time but separated shortly before the criminal charges were filed. Mrs. Crowder was employed; Mr. Crowder had been unemployed for several weeks but was employed at the time the checks were written. Mrs. Crowder had an account in the Bank of America but it cannot be ascertained from the evidence whether she transferred this account or opened another in the Citizens National Bank. There was evidence of the following facts: They had previously had a joint bank account which had several times been overdrawn by defendant. It was agreed that an account should be opened in the name of Mrs. Crowder and that she should have control of it. Money she earned went into the account but not money earned by Mr. Crowder. Mrs. Crowder was attempting to save money in preparation for the birth of an expected child. She testified that she did not give her husband authority to sign her name to any of the checks nor consent thereto.

[1] We have concluded there was insufficient evidence to prove the element of criminal intent of the defendant. It appears to have been the theory of the People that in a prosecution for forgery every unauthorized signing of an instrument raises a presumption of an intent to cheat or defraud, although the statute, Penal Code, § 470, makes a specific intent an element of the offense. People v. Turner, 113 Cal. 278, 45 P. 331. The case was tried on the transcript of the testimony at the preliminary, at which defendant did not tes-

tify, the testimony of defendant at the trial and brief testimony of Mrs. Crowder in rebuttal.

Upon her direct examination at the preliminary Mrs. Crowder testified that she had a bank account and that she did not give her husband authority to sign any of the checks. Upon cross-examination she testified that she did not recall having received approximately $25 from her husband about September 8th, stating "I have received a little money from him, I don't recall when—very little." Questioned further she testified that she received $35 from him in the early part of September. The People objected to a question on cross-examination whether she and her husband had separated at about that time and another question whether her husband had redeemed her typewriter for her at the time the $10 check was cashed. The objections were sustained. Questioned whether she had received money from her husband on or about August 28th she answered "I believe that I could say no, because—well, I don't want to go into too much of our personal life, but at that time he wasn't providing at all for me—so I got no money from him." Questioned whether she received some of the proceeds of the $15 check of August 12th she answered "I don't really remember. At this time, I didn't know about these checks, and I wasn't keeping track of whether I received money or not." but she finally testified that she did not receive any money at that time.

At the preliminary the People also introduced the testimony of a police officer who arrested defendant about September 13th. The witness testified that defendant admitted having signed and cashed the checks and explained the circumstances. The explanations which he gave were the same as those he related upon the stand.

At the trial defendant testified that he signed, endorsed and cashed the four checks, but insisted that he had authority from his wife to withdraw small amounts. As to a $20 check of August 4th (Count IV), he testified that he had been out of work; that he had just obtained employment; his suit was in pawn for $8.50; he explained the situation to his wife by telephone at her place of employment; she was greatly pleased; she told him he could check on her account; he redeemed his suit; they went out to dinner, for which he paid, and he gave his wife the rest of the money; that on several other occasions his wife consented to his drawing small sums from her account. As to the $15 check of August 12th (Count III), defendant testified that he used part of the money for food which he took home and that he gave his wife any balance of the money that remained. He got a job August 5th and was employed from that date "on". Prior to that he had been unemployed for three or four weeks. Although he worked through August he was not paid until early September. He testified as to the $25 check of September 8th (Count I), that he gave $35 to his wife the day he cashed the check, September 8th, but that she did not know until later that $25 of the money had come from her account. As to the $10 check of August 28th (Count II), defendant testified that he used the proceeds and something over $7 of his own funds to redeem Mrs. Crowder's typewriter which was pawned for $17; that Mrs. Crowder had need for it for some extra work and that he delivered the machine to her.

The People called Mrs. Crowder in rebuttal. She testified she was living with defendant between August 4th and September 8th but separated from him September 13th; that the account was put in her name by agreement because defendant had previously overdrawn a joint account. On cross-examination she testified that the money she earned went into the account, the money Mr. Crowder earned they lived on for about three months—"it was so little it just went for expenses right away."

The People deemed it of no importance what use defendant had made of the money he received on the checks, although this was the very heart of the case. People v. Brierton, 132 Cal.App. 471, 23 P.2d 63. This attitude was manifested first by the objection to the question asked Mrs Crowder on cross-examination whether her husband had not taken her typewriter out of pawn. It was further manifested by ignoring the testimony of the defendant explaining how he had used the money. Altogether the checks amounted to $70. As previously mentioned, Mrs. Crowder testified that in the early part of September she received $35 from her husband. That left $35 unaccounted for. $17 was paid to get the typewriter out of pawn and $8.50 to redeem a suit of clothes the day defendant got a job. That left about $9.50 out of the $70. Defendant testified that he bought food for the home, took his wife out to dinner and gave her some money. When Mrs. Crowder was recalled, after defendant had testified, she was not questioned as to any of the incidents which he had related. She did not deny he cashed one check in order to redeem her typewriter, or that she had pawned it, or that he had paid $17 to redeem it and brought it home to her. She did not deny that he had telephoned her when he got a job, that they discussed getting his suit out of pawn and that she consented to his drawing money from the account for that purpose. She did not deny that he brought home food after drawing money from the bank. She admitted that he used his earnings for the support of the family. The prosecutor did not question her about these matters and, as previously noted, objected successfully to her being questioned with respect to the redemption of the typewriter. He questioned her only as to the receipt of money from her husband and as to this she testified both ways. The only logical conclusion is that the People were willing to accept the testimony of the defendant in all material particulars with respect to the uses he had made of the money for redemption of the typewriter and his suit of clothes and for food.

[2] Where the question of intent to defraud is an element of the offense charged the court must look to and weigh all the facts and circumstances which shed light upon the motives of the accused. People v. Eastman, 77 Cal. 171, 19 P. 266. We shall review what we deem to be important, surrounding facts.

Mr. and Mrs. Crowder were living together. So far as shown there was no thought of separation. Mrs. Crowder was employed; Mr. Crowder had not been steadily employed. When he was employed his earnings were used for the support of the family. For several weeks prior to August he had been out of work. He was looking for work. For three or four months previous to that the family had been supported by his earnings. Commencing August 5th he had a new job with a finance company. He and Mrs. Crowder were greatly pleased. It was not until he obtained employment that he drew checks on his wife's account. If he did so without authority it was with a salary in sight from which she could be reimbursed. He would not be paid until September 1st for his work during August. A few days after he gave Mrs. Crowder $35 she separated from him. She did not demand that he reimburse her nor did he indicate that he would not do so. She left him, and a few days thereafter had him arrested.

[3–5] In judging of the sufficiency of the evidence effect must be given to the presumption that if the prosecutor had questioned Mrs. Crowder with respect to her knowledge of the use her husband had made of the money, her answers would have been adverse to the prosecution and would have tended to corroborate his testimony. Code Civ.Proc. § 1963, subds. 5, 6; Julson v. Julson, 110 Cal.App.2d 797, 243 P.2d 558; People v. Alkow, 97 Cal.App.2d 797, 218 P.2d 607; 10 Cal.Jur., § 87, p. 781. We may not overlook the conflicts in the tesimony of Mrs. Crowder. She testified she could not remember what money she received during the month of August; that she kept no account of it; it was in small amounts. In one breath she denied having received money from her husband in the early part of September and in the next admitted having received $35. It was error to sustain the People's objection on cross-examination whether, at the time one check was cashed, her husband had not taken her typewriter out of pawn for her. In view of her denial that she had authorized him to issue any checks on her account the question was not only proper but highly important on cross-examination. While the ruling was made at the preliminary we would suppose that where the preliminary transcript is used by the People at the trial objections made at the preliminary are reserved and rulings thereon are approved by the trial judge, in the absence of any declaration or ruling to the contrary. However, the matter is unimportant in view of the fact that it should be presumed that Mrs. Crowder's answer to the question would have been favorable to the defendant.

[6] There was sufficient evidence to prove that the withdrawals of money were not authorized but that fact alone did not prove the charges of forgery. The use defendant made of the money was the principal factor in determining his intent. He was acquitted on Count I, the $25 check, presumably because he gave his wife the money, but was convicted on Count II, the $10 check transaction, in which he used that money, plus $7, in addition, to redeem her typewriter for her. He was convicted of Count III, the $15 check transaction, concerning which Mrs. Crowder was asked whether she had not received that money and answered "I really don't remember." He was convicted of Count IV, which involved the $20 check which was cashed when defendant learned he was going to work the next day, the money from which, he testified, was used to redeem his suit, and to buy food for the home.

[7] There was no evidence that defendant used any of the money for himself, or squandered it, or used it for any purpose other than to meet the needs of the family. There was no evidence as to how the family was supported during August, other than the testimony of defendant as to his purchases of food. Mrs. Crowder did not testify that she bought any food. Although it had been agreed that Mrs. Crowder should have control of the bank account, which, in fact, she had as a matter of law, with respect to her own earnings, the money was not for that reason her separate property, Civ.Code, § 171c, and there was no agreement that her earnings would be her separate property. There was a special reason for putting aside some of the wife's savings but that purpose was for meeting expenses of the community. The fact that the bank account was community property did not give defendant the right to sign his wife's name to checks but it had a most significant bearing upon his motives. If defendant had made off with community funds under circumstances which indicated that he intended thereby to cheat and defraud his wife of her community interest therein an entirely different question would have been presented. Can it be the law that a husband or wife spends each community dollar in the shadow of the Penal Code? It is sufficient to say presently that no fraudulent intent could be inferred from the use of the greater part of the money for the needs of the family and the retention of the remaining few dollars in the husband's pocket.

[8, 9] We are aware of no case in which conviction of forgery or any other offense has been upheld upon a state of facts comparable to those we have set forth. We think no one can deny that wives and husbands frequently use small sums of money nominally belonging to or under the control of the other spouse for mere convenience or the necessities of the family. And who would say that this is petit theft? Forgery, of course, is a serious offense but this is for the reason that it is a method of cheating which if tolerated would disrupt the most common and necessary method of dealing in credit. But there can be no forgery unless there exists a criminal intent and this is a fact to be proved. Normally an intent to defraud may be, and often must be inferred from the circumstances in which a false instrument is executed or issued. People v. Horowitz, 70 Cal.App.2d 675, 687, 161 P.2d 833; People v. Adair, 3 Cal.App.2d 323, 39 P.2d 274. And it may not be doubted that a husband or wife may be guilty of forgery, through the issuance of a false document with intent to cheat or defraud the other. People v. Graff, 59 Cal.App. 706, 211 P. 829; People v. Brierton, 132 Cal.App. 471, 23 P.2d 63, supra. But as between the spouses there is no more criminality in taking small sums from a bank account than there would be in taking them from a wallet or a handbag. We repeat that we can find no legally sufficient evidence of a fraudulent intent on the part

of defendant, however ill advised his actions may have been. Just when he commenced to reimburse his wife for the withdrawals from the bank she left him and had him arrested.

Defendant contends that in every case of the forgery of a check the bank alone will suffer since if the check is honored the depositor cannot be charged with the amount. For this reason, it is argued, the testimony of Mrs. Crowder could not be used against her husband, and it should have been stricken on his motion. It is unnecessary to discuss this contention. We may observe, however, that it was the manifest intention of defendant to claim he had authority from his wife to draw checks in her name upon the account. Had he succeeded in establishing that claim the bank would have lost nothing. Had he failed and actually defrauded his wife, the bank might have had to reimburse her. We do not say that both the depositor and the bank may not be defrauded by a forged check but inasmuch as we hold there was insufficient evidence to prove that defendant acted with fraudulent intent, it was insufficient to prove that he intended to commit a fraud upon the bank. If defendant acted in the honest belief that he had a right to use, and if he did use the funds for the joint benefit of himself and his wife, and especially if he intended to reimburse the account, he was not guilty of forgery.

We hold that in the light of the presumption that if the wife had testified as to the use her husband made of the money her testimony would have tended to show that he used it for the needs of the family, and in the absence of any evidence that he made any other use of it, the evidence was legally insufficient to establish his guilt of forgery. Upon the point of the failure of the prosecution to question witnesses as to material facts within their knowledge we direct attention to our remarks in People v. Alkow, 97 Cal.App.2d 797, 802, 218 P.2d 607, supra.

The judgment is reversed and the Superior Court is directed to dismiss the action.

PARKER WOOD and VALLÉE, JJ., concur.

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126 Cal.App.2d 624

HIEHLE
v.
TORRANCE MILLWORKS, Inc. et al.

Civ. 19959.

District Court of Appeal, Second District, Division 3, California.

July 20, 1954.

Action against corporation and its two incorporators to recover for money advanced to corporation. The corporation was adjudicated a bankrupt on its voluntary petition and the trustee in bankruptcy intervened. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment for plaintiff and incorporators appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that corporation had been formed pursuant to an agreement that it would be a mere agency or instrumentality through which incorporators would conduct their co-partnership business and that corporation had been in fact their alter ego and held that incorporators were personally liable for corporation's debts.

Judgment affirmed.

1. Corporations ⚷1

In action against two incorporators to recover moneys advanced to corporation, evidence justified finding that incorporators had formed the corporation pursuant to an agreement that it would be a mere agency or instrumentality through which they would conduct their co-partnership business and that it had been in fact their alter ego.

2. Corporations ⚷1, 30(6)

Where two incorporators, pursuant to a written agreement formed a corporation to be a mere agency or instrumentality through which they would conduct their co-partnership business and the corporation was in fact their alter ego and, in order to obtain a loan, for which the corporation gave its note, incorporators made book entries so as to picture the corporation's finances in a better light than the facts warranted, lender was not estopped to look beyond corporation to incorporators for payment and incorporators were personally liable for corporation's debts.

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Max Sisenwein, Los Angeles, for J. B. Archer.

Samuel Maidman, Los Angeles, for S. J. Glaser.

Edmond Gattone, Los Angeles, for Arno Hiehle.

Haskell H. Grodberg, Los Angeles, for E. A. Lynch, Trustee in Bankruptcy for Torrance Millworks, Inc.

SHINN, Presiding Justice.

On June 30, 1952, Arno Hiehle brought an action against Torrance Millworks, Inc., and defendants Archer and Glaser (hereinafter referred to as defendants), seeking to recover monies advanced by him to the corporation, $8,000 of which was represented by a promissory note of the corporation. On or about September 4, 1952, the corporation was adjudicated a bankrupt on its voluntary petition. On November 5th the Trustee in Bankruptcy, E. A. Lynch, intervened on behalf of the corporation, seeking a dismissal of plaintiff's action and a declaratory judgment that defendants were the alter ego of the corporation and hence responsible for its debts. The court awarded a judgment that plaintiff Hiehle recover $9,730.50, attorney's fees and costs, and that defendants Archer and Glaser were the alter ego of the corporation and personally liable for all its obligations.

The facts are as follows: Prior to January, 1951, defendant Archer owned and operated the J. B. Archer Cabinet Works in the City of Torrance. On January 2nd Archer and Glaser filed Articles of Incorporation for the Torrance Millworks. Archer, Glaser, and one Clara Den were appointed to act as its first directors. The first meeting of the directors was on January 9, 1951. On January 15th, at the second meeting of the directors, Clara Den resigned, and thereafter Archer and Glaser were the only directors and officers of the corporation. There was no other meeting of the directors. During the succeeding weeks, in pursuance of an agreement concluded by the parties in December, 1950, they set up the structure of the corporation as follows: The corporation acquired Archer's machinery and equipment for a stated price of $14,000. In exchange for these assets the corporation assumed $4,000 of Archer's obligations, became indebted to him for an additional $9,000, and later issued $1,000 in stock to him. Glaser contributed $9,000 to the corporation in the form of a loan. On January 31st the corporation applied to the Commissioner of Corporations for permission to issue $2,000 worth of stock to Archer and Glaser for cash. The application did not disclose that one of the directors had resigned and had not been replaced, and in explanation of the absence of a financial statement falsely represented that the corporation had not yet acquired either assets or liabilities. On February 6th the requested permission was granted, and thereafter the corporation issued 10 shares of $100 par value to Archer and 10 shares to Glaser. Glaser paid $1,000 for his stock. No other stock was ever issued. The corporation was unsuccessful from the start. By the end of February, 1951, the books showed a net loss of $4,371.33.

At the end of April, 1951, plaintiff was hired by the corporation as bookkeeper at a salary of $45 per week. During the next several months plaintiff at the request of defendants advanced to the business sums aggregating $4,500. On July 10th defendants delivered to plaintiff the corporation's 6 per cent promissory note for $4,000, payable on October 10th, signed by Archer and Glaser respectively as president and secretary of the corporation. The note was not paid on the due date. On October 12, 1951, Archer and Glaser caused to be removed from the books the $18,000 in obligations to them and caused the books to show their subscriptions for stock in that amount. The corporation's statement of financial condition of October 31st showed the elimination of the debts payable to Archer and Glaser, with explanation in the form of an item noting an $18,000 capital stock subscription. Thereafter plaintiff continued to advance funds to the corporation, and on November 28th surrendered his $4,000 note in exchange for a new note for $7,800, payable February 28, 1952. Archer and Glaser secured a $3,000 loan from the Union Bank and Trust Company on the strength of the financial statement of October 31st. No application for a permit to issue additional stock had been filed, and no stock was issued. After receiving his $7,800 note, plaintiff made further advances to the business, and from time to time was repaid small sums. On February 28, 1952, the $7,800 note was not paid, and on that date plaintiff accepted a new note of the corporation, payable May 28, for $8,000. The court found that in extending credit to the corporation after October, 1951, plaintiff relied on defendants' promise to extinguish the $18,000 corporate liability running to them.

In the bankruptcy proceedings which ensued after plaintiff brought his action on June 30, 1952, the schedules of assets and liabilities submitted by Archer and Glaser in support of the petition listed them as unsecured creditors with claims of $9,000 each. It further appears from these facts, and the trial court so found, that when it first acquired assets the corporation was undercapitalized, was insolvent, and that it continued to be undercapitalized and insolvent throughout its existence. It was also found by the court that the defendants used the assets of the corporation for their personal obligations. There was evidence that the telephone, gas and water services of the business were carried in Archer's name after the formation of the corporation.

[1] The complaint of plaintiff and the complaint in intervention alleged, and the court found, that the corporation was formed pursuant to an agreement that it would be a mere agency or instrumentality through which Archer and Glaser would conduct their copartnership business and that it was in fact their alter ego. Defendants contend that there was insufficient evidence to support this finding. We think it was sufficiently supported.

In their opening brief defendants first state that "Proof of control, ownership of stock, unity of interest, or negligence in the operation of a corporation, are not, in the absence of fraud, injustice, or inequity, sufficient to invoke the [alter ego] doctrine." They say next "Before the corporate 'Veil' or 'Entity' will be pierced it must be shown that there was bad faith in the organization and operation of the corporation." Their authorities are to this general effect but their argument deals quite loosely with the evidence and fails to recognize the significance of the array of facts found. The finding here was that it was agreed that the corporation would be formed and would function as an "instrumentality for convenience in carrying out their said agreement between themselves." The significance of this agreement is that as between Archer and Glaser their relationship was that of joint adventurers or partners. The findings designated them as partners. The corporation was not an entity into which their rights and relations were merged. The finding was justified by the evidentiary facts found and other facts in evidence. Elsbach v. Mulligan, 58 Cal.App.2d 354, 369, 136 P.2d 651; Conover v. Smith, 83 Cal.App. 227, 256 P. 835.

The agreement to form the corporation was in writing. While it provided that each party would subscribe $1,000 for stock to be paid for when issued it also provided that Archer would receive 10 shares of stock "*in lieu* of the cash", and Archer paid no cash. No permit was obtained allowing the issuance of stock in exchange for Archer's assets. The agreement provided that Archer and Glaser would each receive a nonnegotiable promissory note for $9,000. While the books of the corporation reflected an indebtedness of $9,000 to each of the parties the corporation did not execute either note. The agreement provided that the parties would receive equal payments on their notes and that if either advanced any money it would be as a loan to the corporation. Each party was to devote his entire time to the business, was not to engage in any competing business and they were to draw equal compensation for their services, the amount of which was not specified. It was provided that the parties and Clara Den should constitute the Board of Directors and that Clara Den should resign after the first directors' meeting. There was no provision that she would be replaced and she was not replaced.

The facts that the corporation did not function as a corporation through its Board of Directors, did not execute the notes to Archer or Glaser, did not receive from Archer any cash for stock, or obtain a permit authorizing the issuance of stock except for cash, the false representations made in its application to issue stock, the absence of an agreement to sell other stock in order to finance the corporation, the cancellation of the $18,000 of indebtedness to Archer and Glaser, the false entries in the records showing subscriptions for $18,000 worth of stock, the use of the false statements of the corporation to obtain credit, the agreement that each of the parties should receive the same amount of compensation for his services, and that they would be the only directors and officers all tended to prove that the relation of the parties was essentially that of partners and that the corporation was one in name only. Such facts have often been deemed sufficient to justify the court in disregarding the corporate entity and applying the alter ego doctrine. D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.2d 251, 79 A.L.R. 329; Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390; Minifie v. Rowley, 187 Cal. 481, 487–488, 202 P. 673.

Defendants contend that refusal to regard the corporation as their alter ego would have resulted in no injustice or inequity to plaintiff and the other creditors. We do not agree. It was the purpose of Archer to relieve himself of $4,000 of obligations by having the corporation assume them. The agreement that Archer would contribute the assets of his business for a note of $9,000, the corporation would assume $4,000 of his debts, that Glaser would advance $9,000, and that each party would contribute upon an equal basis $1,000, had all the aspects of a partnership arrangement. The equal participation in the management of the business, the time to be devoted to it, the compensation each was to receive were all typical of the relation of partners. The only difference was that as partners each would have been liable for debts of the partnership, whereas they would not have been liable for the debts of the corporation if it had acquired the status of a separate, independent entity. This is altogether a proper purpose for the formation of a bona fide corporation which is functioning as such, but it is an improper purpose where the corporate form is a mere empty shell and a blind for the operations of one or more individuals who dominate and manipulate it to the exclusion of all independent corporate action. Here the individuals contributed certain assets to the venture. That was the extent of their responsibility. They would draw compensation for their services. If the corporation was successful they would profit, if it fell into debt and failed they could lose nothing beyond the amounts they had hazarded. Moreover, if creditors should take over, the adventurers would each have a claim against the corporation for the amount of their respective contributions. As we have seen they scheduled their claims in the amount of $18,000 in the bankruptcy proceeding. The corporation started out owing money equal to the value of its assets. Its net worth was nil. There was abundant evidence that it was a sham corporation. It would be unjust to permit defendants to make use of it to escape from their personal liability for its debts.

[2] Defendants argue further that plaintiff may not look beyond the corporation because he accepted the corporation's note with full knowledge of the facts we have related. Lynch v. McDonald, 155 Cal. 704, 102 P. 918, and Hanson v. Bradley, 298 Mass. 371, 10 N.E.2d 259, are cited in support of the claim of estoppel. In the Lynch case a judgment denying application of the alter ego doctrine was affirmed. Both that case and Hanson v. Bradley were decided upon facts which distinguish them from the present case. They merely hold that the court may properly refuse to look beyond the corporation to the individuals who compose and control it where the plaintiff dealt with the corporation with full

knowledge of the facts and where considerations of equity and fair dealing do not require application of the doctrine in his behalf.

When plaintiff accepted the note in suit defendants had caused book entries to be made cancelling the corporation's indebtedness to them and purporting to show their own subscription for stock in the amount of $18,000. This manipulation, if it meant anything at all, reversed the position of the defendants and the corporation. Instead of the corporation owing the individuals $18,000 they ostensibly undertook to pay the corporation that amount for stock. They sought no permit for any such transaction. Such machinations could have had no purpose other than to picture the finances of the corporation in a better light than the facts warranted. After that plaintiff loaned additional sums. It is not a question whether plaintiff was actually defrauded but whether he is bound to accept as facts the illusions the defendants created. Having issued the note to plaintiff after charging themselves with an $18,000 stock subscription and cancelling the corporation's debt to them defendants are the ones to be estopped to say that plaintiff and the other creditors must look to the corporation alone while they seek to reinstate the corporation's obligation to them. In soliciting loans Glaser said *he* would pay as much as 15 per cent interest. Plaintiff borrowed the money he loaned the business on his life insurance and from a friend. He was dealing with individuals whom he trusted and he had every reason to believe that they were the corporation, as in fact they were. Archer and Glaser, not the corporation, were the ones who persuaded him to loan his money. Except for them there would have been no loans. The corporation had no financial worth which entitled it to credit. If the contentions of the defendants were to prevail the corporation would owe them $18,000 and they would owe nothing to plaintiff and the other creditors whose money and credit they have used. The creditors are not to be brushed off so lightly. Defendants, in reality, were essentially partners operating through a corporate form, and they are liable for its debts. The court looked through all the make-believe to the facts of the situation and, perforce, reached a just decision.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

126 Cal.App.2d 714

BIRCH et al. v. HARBOR INS. CO.

Civ. 4838.

District Court of Appeal, Fourth District, California.

July 26, 1954.

Judgment creditor's action against insurance company which had issued a motor vehicle liability insurance policy to the judgment debtor. From a judgment of the Superior Court, San Diego County, John A. Hewicker, J., in favor of the judgment creditor, the insurance company appealed. The District Court of Appeal, Barnard, P. J., held that under a policy provision covering an automobile acquired by the named insured and owner of described automobile if the insured notifies the company within 30 days after delivery of such additional automobile and if either it replaces the described automobile or the company insures all automobiles owned by insured at such delivery date, the company was liable for damage resulting from collision, within such 30 day period, involving the additional automobile, even though no notice of delivery of the additional automobile had been given.

Affirmed.

1. Insurance 🔑435.3

Under motor vehicle liability insurance policy provision covering automobile acquired by named insured and owner of described automobile if insured notifies company within 30 days after delivery of such additional automobile and if either it replaces described automobile or company insures all automobiles owned by insured at such delivery date, company was liable for damage resulting from collision, within such 30 day period, involving the additional automobile, even though no notice of delivery of the additional automobile had been given.

2. Insurance ⚷435.3

Under replacement automobile provision of motor vehicle liability insurance policy, there is automatic coverage after delivery of newly acquired automobile during period in which notice may be given, and requirement of notice is merely condition subsequent which must be complied with to keep such coverage in effect beyond that period.

Lindley, Lazar & Scales, John H. Barrett, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, Edgar A. Luce, Jr., San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action by a judgment-creditor against an insurance company which had issued a policy to the judgment-debtor. The policy, describing a 1950 Ford, was issued to one Martin on July 5, 1950, for a term of one year. On the evening of November 22, 1950, Martin acquired and took delivery of a 1935 Chevrolet. On the afternoon of December 22, 1950, Martin was involved in an automobile accident while driving the Chevrolet. As a result of that accident the Birches obtained a judgment against Martin for $3,114.97. The defendant herein denied liability on the policy, and this action followed.

There was evidence that Martin was assured by the agent from whom he ordered the policy, both before and after the accident, that he was automatically covered in the event he acquired an additional car. Without a finding on the matter of estoppel, the court found that the defendant company insured all automobiles owned by Martin at the date the Chevrolet was delivered to him; that the accident occurred within 30 days following the date of such delivery; that under the terms of the policy there was automatic coverage for a newly acquired car for a period of 30 days following the date of its delivery; and that this policy covered the use of said Chevrolet by Martin on the date and at the time of the accident. The defendant has appealed from the judgment which followed.

Appellant's sole contention is that the trial court's decision was based upon an erroneous interpretation of the wording of the policy. It is argued that under any reasonable interpretation of the language used in the policy there was no coverage, since no notice was given to the company by the insured within 30 days following the date on which the Chevrolet was delivered to him.

The questioned language appears in a part of the policy headed "Insuring Agreements". Subdivision I deals with coverage, including liability for damage arising from the "use of the automobile." A portion of Subdivision IV, reads as follows:

> "IV. Automobile Defined, Trailers, Two or More Automobiles, Including Automatic Insurance.
>
> "(a) Automobile. Except where stated to the contrary, the word 'automobile' means:
>
> "(1) Described Automobile—the motor vehicle or trailer described in this policy:
>
> "(2) Utility Trailer—(not here involved);
>
> "(3) Temporary Substitute Automobile—(not here involved);
>
> "(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not ap-

> ply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

The appellant contends that these provisions were intended for the protection of the assured; that they obviously contemplate some change of situation with respect to the described automobile; that the only conclusion to be drawn is that the insurer wished to provide protection where there would normally be none in the absence of some carry-over provision; that the company was entitled to fix reasonable limits within which this additional coverage should be effective; that the 30 days was a reasonable period of limitation within which to comply with the requirement of giving notice; that the Chevrolet was an additional car rather than a replacement; that the clause with respect to the company insuring all automobiles owned by the insured was "designed to cover situations in which an assured has a constant normal turnover of vehicles" and where the newly acquired vehicles will be identified and added to the policy at a later date, usually the end of the month; and that the provision that the insured shall pay any additional premium required indicates that "the insurer recognizes no obligation to furnish free insurance other than as specifically set forth."

While the interpretation of such a policy has not been considered in any decision in this state, there are a number of such decisions in other jurisdictions. In Continental Casualty Co. v. Trenner, D.C., 35 F. Supp. 643, the insured traded in his car on another without notifying the company and the collision occurred more than ten days later. The policy, under a clause headed "Automatic Insurance for Newly Acquired Automobiles", provided that the insurance should also apply to another vehicle acquired, as of the date of delivery, but subject to the *condition* that this provision should not apply "'unless the named insured notifies the company within ten days following the date of delivery of such other automobile'". In referring to that provision the court said: "The clause does give unconditional automatic insurance for newly acquired automobiles, but for a limited period only." It was then held that the automatic insurance did not extend beyond the 10 days, in the absence of notice within that time.

In Hoffman v. Illinois Nat. Casualty Co., 159 F.2d 564, 566, the Circuit Court of Appeals for the Seventh Circuit affirmed a judgment in favor of the insured. Under a similar policy, providing for automatic insurance for a newly acquired automobile, if it replaced the automobile described in the policy, it was further provided that this agreement should not apply "'unless the Named Insured notifies the Company within 30 days following the date of delivery'". The accident happened within 30 days and it was argued that no notice was given before the accident, and that the insured did not intend the second vehicle to replace the first. The court there said:

> "Since the language of the policy is to be construed in accordance with the principle that the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would have understood them to mean, it is clear that when the first tractor was wrecked and the second tractor was acquired and used in its place, a reasonable person in such a situation, from the language used, would have reasonably assumed that all coverage with respect to the first tractor was terminated and that the policy, without notice, was automatically transferred as of the date of the delivery of the second tractor for a period of 30 days to the newly acquired tractor."

It was held that, since the accident occurred within 30 days of the delivery of the second tractor, the insurance was in force.

In Melendez v. General Accident Fire & Life Assur. Corporation, Limited, 189 Misc. 392, 70 N.Y.S.2d 404, 405, a policy was issued on February 16, 1943, covering a Ford for one year. On March 6, 1943, the insured exchanged the Ford for a Plymouth and the accident occurred on March 26, 1943. The policy provided "'if the named insured who is the owner of the automobile acquires ownership of another automobile and so notifies the company within thirty days following the date of its delivery to him, such insurance as is afforded by this policy applies also to such other automobile as of such delivery date.'" The accident happened within 30 days and the company refused to defend. A jury disagreed on the question as to whether or not notice had been given within 30 days, the evidence on that point being conflicting. The Supreme Court granted the plaintiff's motion for a directed verdict on the ground that "there was an 'automatic' coverage of the new car within that period whether or not notice was given to the company." This decision of the Supreme Court was affirmed on appeal to the appellate division of the Supreme Court, 273 App.Div. 960, 79 N.Y.S.2d 307, and leave to appeal to the Court of Appeals was denied, 274 App.Div. 763, 80 N.Y.S.2d 725.

Similar rules were recognized in Blixt v. Home Mut. Ins. Co., 145 Neb. 717, 18 N.W. 2d 78, although it was there held that the time for notice had expired, and in Farm Bureau Automobile Insurance Co. v. Martin, 97 N.H. 196, 84 A.2d 823, 29 A.L.R.2d 811. They have also been at least partially recognized in three cases cited by the appellant: Ash-Grove Lime & Portland Cement Co. v. Southern Surety Co., 225 Mo.App. 712, 39 S.W.2d 434; Maryland Casualty Co., v. Toney, 178 Va. 196, 16 S.E.2d 340, and Mitcham v. Travelers Indemnity Co., 4 Cir., 127 F.2d 27, although in each of those cases recovery was denied since the accident happened after the period for notice had expired.

In Jamison v. Phoenix Indemnity Co. D.C., 40 F.Supp. 87, the accident happened within the 10-day notice period but the insured had given no notice within that time of the change in cars. The District Court there held that the automatic coverage provision applied only in the event that notice was given the insurer within the 10-day period. However, in Hoffman v. Illinois Nat. Casualty Co., 159 F.2d 564, the Circuit Court for the Seventh Circuit, although referring to that case, did not follow it.

In Merchants Mut. Casualty Co. v. Lambert, 90 N.H. 507, 11 A.2d 361, 363, 127 A.L.R. 483, a replacement was involved, and the policy contained similar provisions, with the added provision that the insurance would terminate on the replaced automobile. The accident happened the same day the insured acquired the replacing car. The court held that a provision that the policy should not cover the replacing car "'unless the named insured pays any additional premium required'" was not a condition precedent; that the insured had 10 days in which to notify the company of any replacement; and that "until that time and until a demand for an additional premium had been made," the insurance would be in force upon the replacing car. In discussing this case the appellant here says: "As for notice to the company, Lambert's accident happened the same day he acquired the vehicle, again bringing the situation within the intention to provide coverage until a reasonable opportunity was had to notify the company." This admission indicates the principle applied in practically all of the cases cited that such policy provisions disclose an intention to provide automatic coverage for a short period, giving a reasonable opportunity for notice to the company, and making any coverage beyond that period dependent upon the giving of such a notice This reasonable period was here fixed at 30 days.

[1, 2] These cases, with the exception of the Jamison case, support the view that under such policy provisions as here appear there is automatic coverage after the delivery of the newly acquired automobile during the period in which notice may be given, and that the requirement of notice is merely a condition subsequent which must be complied with in order to keep such coverage in effect beyond that period.

The appellant argues that these cited cases are "replacement" cases in which the insurance on the other car was terminated, and where the insured was required to accept the new risk; that in the instant case the newly acquired car was not a replacement and the insurance on the described car did not terminate; that in this case the appellant was not required to accept the risk of the newly acquired car; and that upon receipt of a notice within the 30 days the appellant would have been free to accept or reject the added risk. While conceding that these provisions were intended to provide the insured with protection, where there would normally be none in the absence of some carry-over provision, and that the provisions of an insurance policy should be liberally interpreted for the benefit of the insured, it is further argued that the company was entitled to define the limits within which "this extended coverage" should be available; and that justice requires a reversal.

While most of the cases above cited were "replacement" cases and some of them contain a provision terminating the coverage on a described car in that event, the policy provision here in question was not confined to any such replacement or such a termination with respect to the described car. It is obviously not limited to some change of situation with respect to the described automobile, and it refers to "an automobile" and not to any "constant normal turnover" of vehicles. This provision is in the alternative, applicable either if a newly acquired car is a replacement or if at its delivery date the company insures all automobiles then owned by the insured. The court found, on undisputed evidence, that the latter situation here existed. No good reason appears why the principles applied in the cited cases should not be equally applicable here, since this alternative provision was included in the policy.

In view of the established rules applicable to insurance contracts, we conclude that the trial court's interpretation of this policy was a reasonable one, and that it should not be set aside. At best, these provisions were somewhat ambiguous. A reasonable person might reasonably assume from the language used that automatic coverage of a newly acquired automobile was provided for 30 days, which would then cease in the event the required notice was not given. Under any other theory, no additional protection was given the assured and this provision would be meaningless and useless. If notice was required to effect any coverage, even during the 30-day period, the insured would be just where he would have been in the absence of any such provision. Without that provision he could apply for insurance on the other car and the company could accept or reject his application. If, as appellant argues, there was no coverage during the 30 days and the company was free to refuse the risk even if notice was given, no protection was added by this provision. Unless this provision was inserted in the policy for the purpose of deception, and this should not be assumed, it meant something and was intended to confer some benefit on the insured. It may reasonably be interpreted as intended to furnish an additional protection on a temporary basis; to be in effect, in appellant's language, "until a reasonable opportunity was had to notify the company." This reasonable opportunity was fixed at 30 days. If appellant's intention was otherwise, this provision should have been eliminated from the policy and such other intention more clearly expressed.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

126 Cal.App.2d 631

BILYEU v. CITY OF SAN DIEGO.

Civ. 4827.

District Court of Appeal, Fourth District, California.

July 20, 1954.

Action for damages arising from an automobile collision. From a judgment of the Superior Court of San Diego County, Joe L. Shell, J., on a jury's verdict for defendant city, plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that negligence of the driver of defendant's automobile in failing to see plaintiff's automobile turning left at a street intersection when such driver started across the intersection to turn left into the street from which plaintiff was turning and plaintiff's contributory negligence in entering the intersection after green lights for left turns thereat went off were questions for the jury and that the evidence was sufficient to support the verdict.

Judgment affirmed.

1. Automobiles 🔑244(11), 245(14, 80)

In action for damages arising from automobile collision at street intersection, negligence of driver of defendant city's automobile in failing to see plaintiff's automobile turning left into street from which defendant's automobile approached intersection when such driver started across intersection to make left turn into street from which plaintiff's automobile turned and plaintiff's contributory negligence in entering intersection after green lights for left turns therefrom went off were questions for jury and evidence was sufficient to support jury's verdict for defendant.

2. Trial 🔑260(1)

Portions of requested instruction to jury were properly refused as adequately covered by instruction given.

3. Trial 🔑240

In action for damages arising from automobile collision, plaintiff's requested instruction to jury that where traffic signals have only stop and go signs with no preliminary warnings of change, strict compliance with letter of law in every instance is almost impossible and bona fide efforts to effect such compliance would tend to defeat one of principal purposes of law to expedite traffic movement was properly refused as argumentative. Vehicle Code, § 476(f).

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Nottbusch & Nottbusch, Frank H. Nottbusch, Jr., San Diego, for appellant.

Jean F. DuPaul, City Atty., San Diego, Aaron Reese, Deputy City Atty. McInnis & Hamilton, John W. McInnis, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising from an automobile collision. A jury returned a verdict in favor of the defendant and the plaintiff has appealed from the judgment.

The accident occurred about 9:00 A.M. on October 17, 1951, at the intersection of Ash Street and Cabrillo Freeway in San Diego. This Freeway runs north and south, having two lanes for southbound traffic which are separated from the lanes for northbound traffic by a strip which is 54 feet wide. Ash Street comes into this Freeway from the west but does not cross it. There are islands at this intersection forming so-called "slots", one of which permits northbound traffic on the Freeway to make a circular turn to the left and enter Ash Street, and another of which permits traffic from Ash Street to make a similar left turn and enter the northbound lanes of the Freeway.

Traffic at this intersection is controlled by a system of mechanical signals. Those material here are the ones regulating traffic coming north on the Freeway and turning across the southbound lanes of the Freeway in order to proceed west on Ash Street, and regulating traffic coming from Ash Street and crossing the southbound lanes in order to proceed north on the Freeway. Two signals which are always red face a northbound driver on the Freeway who turns into the slot leading to Ash Street. When another red light stops southbound traffic on the Freeway two green arrows, which stay on for an interval of twelve seconds, permit a driver in this slot to cross those southbound lanes and proceed west on Ash Street. When those green arrows go off another green light comes on simultaneously, which permits a driver coming from Ash Street to cross the southbound lanes and to proceed north on the Freeway.

Another street, Russ Boulevard, comes into the Freeway from the east, about 120 feet south of the Ash Street intersection. On this occasion the plaintiff entered the Freeway from Russ Boulevard and traveled north. He testified that as he entered the Freeway from Russ there were no cars north of him on the Freeway, but that he saw two cars moving into Ash Street; that as he turned into the slot, preparatory to going into Ash Street, he saw the defendant's car where it was stopped, near the west edge of the southbound lanes of the Freeway; that he saw the green arrows as he turned into this slot; that he never stopped after he left Russ Boulevard until after the accident; that he was in high gear and going 15 miles an hour as he entered the intersection, and also at the time of the collision; that he stopped his car within 15 feet after the accident; that the green arrows on the two signal lights were showing all the time he was making his left turn, and as he crossed the east line of the southbound lanes of the Freeway; and that he did not see the defendant's car in motion at any time. He further testified that he was familiar with this intersection, had traveled it frequently and knew that the green arrows stayed on so many seconds and then went off.

The defendant's automobile was driven by one of its employees, Mr. Hager. He had approached on Ash Street and stopped at the westerly edge of the southbound lanes of the Freeway, waiting for the green signal permitting him to cross those lanes and proceed north on the Freeway. He started up and was proceeding in low gear at about five miles an hour when his front left fender came in contact with the right rear fender of the plaintiff's car. The collision occurred approximately on the center line between the southbound lanes of the Freeway, and approximately at the center line (extended) of Ash Street. Each car had traveled about 12 feet after it entered the southbound lanes of the Freeway. The defendant's car had traveled about 14 feet from the place where it had stopped, and the plaintiff's car had traveled about 18 feet from the place where it should have stopped if the green arrows were not then showing. It was, and is, the plaintiff's contention that the green arrows were showing at the time he passed that point.

Hager testified that as he came to this intersection on Ash Street he saw the red light against him and stopped his car; that while he waited for the green signal three cars passed in front of him and entered Ash Street; that when his signal turned green he proceeded into the intersection; that at that time there were no cars in the intersection and he saw none entering it; that he proceeded in low gear; that as he was making his left turn toward the slot leading to the northbound lanes of the Freeway he was watching directly ahead all the time; that he traveled about eight or ten feet before he saw the defendant's car; that he applied his brakes; and that there was then a slight impact. There was evidence that no skid marks were left by either car except light marks at the point of impact, showing that the rear wheels of the plaintiff's car had been moved sideways about two feet.

An eyewitness to the accident, who was in a car just behind the defendant's car, testified that the green light was showing at the time the defendant's car entered the intersection, and that the plaintiff's car had not come into the intersection at that time but was still in the slot, about halfway between the entrance to the slot and the intersection. It could be inferred from this testimony that the green arrows were not on when the plaintiff entered the intersection since those signals went off simultaneously with the coming on of the other green light, for which the driver of the defendant's car had waited.

[1] The appellant first contends that the evidence shows, as a matter of law, that the driver of the respondent's car was guilty of negligence which was the proximate cause of the accident, and that there was no evidence to support a finding of contribu-

tory negligence on his own part. It is argued that Hager was negligent since he failed to see the appellant's car which was already within the intersection at the time Hager started his car in motion; and that the evidence shows, without contradiction, that the appellant was operating his car in a reasonable and ordinary manner.

Under the theory relied on by the appellant, that he entered the intersection just before the green arrows went off, it would be almost impossible for the accident to have happened. Since he was traveling in high gear at 15 miles per hour he should cover the 18 feet to the point of the collision before Hager could reach it, from a standing start, and traveling some 14 feet in low gear and at about five miles per hour. In any event the evidence, with the reasonable inferences therefrom, supports the conclusion that the driver of respondent's car entered the intersection only when the green light in his favor came on, and that the appellant entered the intersection after the green arrows had gone off. There is also evidence indicating that the appellant traveled some 20 or 30 feet after the green arrows went off before he entered the intersection. Questions of fact were presented, which were for the jury, and it neither can be held as a matter of law that the driver of respondent's car was negligent nor that the evidence was not sufficient to show negligence on the part of the appellant. While some conflict appears, the evidence is sufficient to support the verdict.

[2, 3] It is further contended that the court erred in refusing, as covered and as argumentative, an instruction requested by the appellant, which reads:

> "Under certain circumstances, the law excuses disobedience to a mechanical traffic signal. One such circumstance is in any emergency in which a person of ordinary prudence, situated as the person in question, or would be likely to, or reasonably might, disobey the signal. Where often traffic signals have two signs only, 'stop' and 'go' with no preliminary warnings of change, strict compliance with the letter of the law in every instance would be almost impossible of achievement and bona fide efforts to effect such compliance would tend to defeat one of the principal purposes of the law. Traffic signals are not installed to retard traffic—on the contrary their principal purpose, along with promoting safety for users of highways generally, is to expedite traffic movement."

It is argued that this instruction defined the word "emergency" as contained in Subdivision (f) of Section 476 of the Vehicle Code; that by failing to give this instruction the court failed to instruct the jury in that regard; and that this obviously confused the jury as to the rights of the parties.

The first two sentences of the requested instruction were adequately covered in another instruction which was given, and the last two sentences were clearly argumentative. The court read to the jury all of Section 476 of the Vehicle Code, including subdivision (f). It also gave this instruction:

> "In respect to traffic on the cross street, not already within the intersection, the driver who enters the intersection on a Go or Caution signal and who, himself, is exercising ordinary care, has a right to assume that such cross-traffic will not proceed into the intersection against the Stop sign, and hence he is not required before entering or while crossing to look out for such cross-traffic as could endanger him only by violating the Stop signal. However, such a driver, although he has the right of way, may not ignore danger apparent to him; and his duty is to exercise ordinary care to avoid a collision whenever he perceives that another vehicle has entered or is about to enter the intersection against a Stop signal.
>
> "Under certain circumstances, the law excuses disobedience to a mechanical traffic signal. One such circumstance is when, from the viewpoint of the driver involved, disobeying a signal is necessary to avoid a collision and would appear to be so necessary to a reasonably prudent person in the same situation. Another such circumstance is any other emergency in which

> a person of ordinary prudence, situated as the person in question, would, or would be likely to, or reasonably might, disobey the signal."

These instructions adequately covered any possible issues in this connection, and neither error nor prejudice appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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127 Cal.App.2d Supp. 834

PEOPLE v. NEVAREZ.

Cr. A-21.

Appellate Department, Superior Court,
San Bernardino County, California.
Aug. 2, 1954.

Defendant was convicted of failure to provide for his minor child. The Municipal Court, San Bernardino Judicial District, Edward P. Fogg, J., entered judgment, and defendant appealed. The Superior Court, Appellate Department, Mitchell, J., held that fact that father had letter showing that he was rated as 10% disabled and that he had applied for employment at one time was not sufficient to relieve father of his legal obligation to provide for his minor child.

Judgment affirmed.

1. Parent and Child 🔑17(6)

After father is shown to have failed to provide necessary food, etc., for his child, presumption is created that the neglect was willful and without legal excuse.

2. Parent and Child 🔑17(6)

Fact that father had letter showing that he was rated as 10% disabled and that he had applied for employment at one time was not sufficient to relieve father of his legal obligation to provide for his minor child.

Alberto E. Nevarez, in pro. per.

Lowell E. Lathrop, Dist. Atty., San Bernardino, for respondent.

MITCHELL, Judge.

Appellant was convicted of the offense of failure to provide for his minor child. From this judgment he appeals.

According to the Statement on Appeal the People introduced testimony which established the fact that appellant had failed to support his minor son. Hence a prima facie case was made.

Appellant suggests that because of the "presumption of innocence" there was a burden upon the respondent to prove that he had the ability to so provide and to prove that his neglect was wilful.

The statute under which he was convicted provides that proof of the omission by the father to furnish necessary food and clothing for his child is prima facie evidence that such neglect was wilful and without lawful excuse.

[1] As soon as it is shown that the father has failed to provide necessary food, etc., for his child, the statute creates a valid presumption that the neglect was wilful and without legal excuse, People v. Yates, 114 Cal.App.Supp. 782, 298 P. 961 and People v. Norton, 47 Cal.App.2d 139, 117 P.2d 402.

The record on appeal indicates that appellant introduced a letter showing that he was rated as ten percent disabled. He also testified that he had applied for employment at one place.

[2] The Trial Court was not convinced that these facts relieved the appellant of his legal obligation to his child.

This conclusion was adequately supported and justified.

The judgment is affirmed.

COUGHLIN, P. J., and HILLIARD, J., concurred.

GARDNER et al.
v.
BASICH BROS. CONST. CO. et al.*
Civ. 20002.

District Court of Appeal, Second District, Division 1, California.
July 6, 1954.

Hearing Granted Sept. 2, 1954.

Action by highway carrier for freight undercharges. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment for carrier. Shipper appealed. The District Court of Appeal, Drapeau, J., held that where shipper had not given carrier written notice of intention to ship under hourly rates, carrier was entitled to ton-mileage rates notwithstanding alleged failure of carrier to notify shipper of intention to claim such rates and carrier's acceptance of payments based on hourly rates.

Affirmed.

1. Automobiles ⚷121

Under Public Utilities Commission rule permitting hourly rates for services of highway carriers only when notice in writing is given carrier of shipper's intention to ship under such rates, notice need be given only once, before transportation commences, and not before each haul. Gen. Laws, Act 5129a, § 10.

2. Automobiles ⚷121

Where no written notice of intention to ship under hourly rates was given to highway carrier, carrier was entitled to ton-mileage rate under Public Utilities Commission rule, notwithstanding alleged failure to notify shipper of intention to claim such rate and carrier's acceptance of hourly rate from shipper.

3. Carriers ⚷196

In action by highway carrier to recover freight undercharges, wherein representative of Public Utilities Commission testified as to amount due carrier as undercharge based on applicable ton-mileage rate, evidence sustained trial court's finding as to amount of undercharge.

4. Limitation of Actions ⚷34(1)

Where carrier was not notified in writing of shipper's intention to ship under hourly rates and was therefore entitled to payment based upon ton-mileage rates under Public Utilities Commission rule, action for undercharges was based upon liability created by statute and was subject to three-year statute of limitations. Gen.Laws, Act 5129a, § 10; Code Civ.Proc. § 338, subd. 1.

5. Limitation of Actions ⚷58(1)

Cause of action for freight undercharges accrued on day that shipper failed to pay legally prescribed rate pursuant to tariff promulgated by Public Utilities Commission, and action commenced within three years from such date, though more than three years after date performance of work began, was not barred by three-year statute of limitations. Code Civ.Proc. §§ 312, 338, subd. 1.

◆

Stephen Monteleone, Los Angeles, for appellants.

Ernest W. Pitney, Los Angeles, for respondents.

DRAPEAU, Justice.

In 1948, under a contract with the State Department of Public Works, Division of Highways, defendants constructed a public highway between El Centro and Brawley. This required the hauling of material by dump trucks.

Plaintiffs were licensed highway carriers under the Highway Carriers' Act, Chapter 223, Stats.1935, Deerings Gen.Laws, Act 5129a. They owned their own trucks, which they used to transport material for the construction of thirteen miles of the highway during the period from April 1st to early in July, 1948.

Section 10, Highway Carriers' Act, supra, gave to the Railroad Commission (now Public Utilities Commission) the power to make rules and regulations establishing schedules of rates for transportation services and the enforcement thereof.

The commission had established two rates which were applicable to the type of hauling here involved: (1) ton-mileage; (2) hourly.

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* Vacated 281 P.2d 521.

Section No. 4, page 40, Highway Carriers' Tariff No. 7, issued by the commission on October 15, 1947, and still in effect on February 11, 1953, provided:

"Rates in this section are Hourly Rates and * * * will apply only when notice in writing is given to the carrier, before the transportation commences, of the shippers' intention to ship under such rates. When such notice is given rates in Sections Nos. 2 and 3 will not apply." Section 2 has reference to the ton-mileage rates.

Plaintiff W. E. Gardner testified at the trial that he discussed the hauling job with defendant Nikola Basich and also with defendants' foreman, Cramer. In both instances he told them that he would haul a legal load or a small fraction over on the nine to ten mile rate which was $3.85 per ton; that he would not be willing to work on an hourly basis for less than $3.85 and would need a written requisition before starting the work. Otherwise, the hauling would be based on the commission's standard rate, to-wit: On the ton-mileage basis. This witness also testified that he received no written requisition or work order.

However, cards were furnished daily by defendants to plaintiffs' drivers to be filled out by them showing the number of hours worked. And on May 18, June 10, and July 9, 1948, defendants gave to plaintiffs a written schedule of the number of hours worked during the previous month. Attached thereto, in each instance, was a check payable to plaintiffs based on the hourly rate. The schedules and checks were accepted by plaintiffs without objection.

This action to recover undercharges (the difference between what was paid on the hourly rate and what would have been due on the ton-mileage basis) was initiated by plaintiffs on April 30, 1951.

The answer affirmatively alleged that defendants orally notified plaintiffs that the hourly rate prescribed by the commission would apply to the work performed. It also set up the Statute of Limitations as a defense. Subd. 1, sec. 338, and Subd. 1, sec. 339, Code of Civil Procedure.

From a judgment in favor of plaintiffs for the sum of $6,260.84, plus interest and costs, defendants appeal.

Appellants concede, and properly, that the reason for giving the written notice before transportation begins is "to apprise a carrier * * * as to what rate schedule shall apply beforehand, so that there can be no question at a later date; and to give the shipper the privilege of accepting the more favorable rate before shipment commences."

It is here argued that the requirement that written notice be given before each haul during the operation would be impracticable and an absurdity.

[1] The phraseology of the rule clearly contemplates that the required notice be given once: "before transportation commences", and not before each haul. And, as respondents point out, no such notice was given.

[2] Appellants also assert that because respondents accepted payment based on the hourly rate and at no time notified appellants that they intended to claim the ton-mileage rate, they thereby waived their right to receive the required notice that the hourly rate would apply.

Written notice was a prerequisite to the application of the hourly rate. It was not incumbent upon respondents to notify appellants that they were relying on the ton-mileage rate. However, as hereinbefore mentioned, the witness Gardner testified that he told Mr. Basich he would not be willing to work on an hourly basis for less than $3.85; and "that I would have to have a written requisition before I started hauling in order to haul on the hourly basis."

As stated in Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 730, 158 P.2d 23, 25: "The schedule of minumum rates thereby established and prescribed and the rules and regulations governing the same became a part of every contract between a highway contract carrier and the shipper. Pittsburgh, C. C. & St. L. R. R. Co. v. Fink, 1919, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed.

1151; Johnston v. L. B. Hartz Stores, 1938, 202 Minn. 132, 277 N.W. 414. The tariff applicable, on the facts, to any particular shipment cannot be changed by an agreement between the parties (New York Cent. & H. R. R. Co. v. York & Whitney Co., 1921, 256 U.S. 406, 41 S.Ct. 509, 65 L.Ed. 1016, and the carrier or its assignee is entitled to collect the proper rate. 13 C.J.S., Carriers, § 393, pp. 873–875; see also note, 83 A.L.R. 245 et seq., and cases there cited. Otherwise the statute would be ineffectual for the purpose for which it was enacted."

Appellants next assert that the undisputed evidence failed to support the trial court's finding as to the amount of respondents' claim based on a ton-mileage basis.

[3] Mr. Jess B. Young, Assistant Transportation Representative, Public Utilities Commission of the State of California, was presented as a witness by respondents. He testified that in the regular course of his duties with the commission, he made an investigation of the hauling job here involved. The records of the State Highway Division in the El Centro office were made available to him and also the payroll records of appellants. He checked the different mileages on the ground. During this time he discovered that "there was no signed agreement for hauling by the hour." His testimony was based on the data he prepared in making his investigation. After completing his survey, he made an audit and a computation of the amount due as an undercharge based on the rate applicable to this particlular job, to-wit: ton-mileage.

The evidence is amply sufficient to sustain the trial court's finding as to the amount of respondents' claim based on the ton-mileage rate.

With respect to the statute of limitations, appellants urge that the obligation to pay on the ton-mileage rate was one not fixed by statute but was a contractual obligation and that the two-year statute, i. e., subdivision 1, section 339, Code of Civil Procedure, is applicable. Appellants also urge that in any event, a portion of the alleged claim is barred by the three-year statute: subdivision 1, section 338 of the same code.

[4] The alleged undercharges here sued upon arise by virtue of the Highway Carriers' Act, supra. The purpose of that act, among other things, is to establish just and reasonable rates for the transportation of property by motor vehicle over the public highways of the state and to prevent discrimination among the shippers of this class. To this end the act confers jurisdiction on the Public Utilities Commission to hold hearings and establish and prescribe schedules for minumum rates for contract highway carriers and to make rules and regulations governing the same. It was pursuant to this authority that the Public Utilities Commission promulgated the tariffs establishing and fixing schedules of minumum rates upon which this action is based. Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 730, 158 P.2d 23, 25, where it is stated: "The tariff applicable, on the facts, to any particular shipment cannot be changed by an agreement between the parties * * * and the carrier or its assignee is entitled to collect the proper rate." See, also, Sunset Pac. Oil Co. v. Los Angeles & S. L. Railroad Co., 110 Cal.App.Supp. 773, 782, 290 P.2d 434.

Accordingly, section 338, subd. 1, Code of Civil Procedure, which provides that "An action upon a liability created by statute, other than a penalty or forfeiture", must be brought within three years, is applicable in the instant situation.

[5] Appellants point out that while the work was performed beginning April 1, 1948, action was not commenced until April 30, 1951.

Section 338, supra, must be read in conjunction with section 312 of the same code, which provides that civil actions can only be commenced within the periods prescribed by this title, *"after the cause of action shall have accrued"*.

As said in Leahey v. Dept. of Water & Power, 76 Cal.App.2d 281, 286, 173 P.2d 69, 72: "The term 'accrue' means: 'To come into existence as an enforceable claim; to vest as a right; as, a cause of action has *accrued* when the right to sue has become vested.' Webster's New International Dictionary. A cause of action *ac-*

crues when a suit may be maintained thereon, and the statute of limitations begins to run at the date of *accrual.*" (Emphasis included.)

The record herein discloses that payment for the hauling done by respondents in April of 1948 was not made by appellants until May 18, 1948. When on that day appellants failed to pay the legally prescribed rate, pursuant to the tariff promulgated by the Public Utilities Commission, respondents' cause of action accrued, and not before. As a result, the instant action was commenced in time and was not barred by the three-year statute of limitations.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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126 Cal.App.2d 447

MALONE

v.

CITY OF LOS ANGELES et al.

Civ. 20220.

District Court of Appeal, Second District, Division 2, California.

July 7, 1954.

Rehearing Denied July 22, 1954.

Hearing Denied Sept. 2, 1954.

Proceedings by guardian of minor son of deceased city fireman for writ of mandate to compel City of Los Angeles and members of its Board of Pension Commissioners to resume payment of pension. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment for plaintiff and ordered issuance of writ, and defendants appealed. The District Court of Appeal, Moore, P. J., held that since Los Angeles charter provided that pension should be paid to guardian of child after remarriage of widow of fireman who died as result of injury received during performance of his duty, pension rights of such fireman's son had become vested upon remarriage of widow and were not affected by his adoption by his stepfather long subsequent to such fireman's death.

Judgment affirmed.

1. Municipal Corporations 🔑200(6)

Language of Los Angeles charter, which provides that annual pension shall be paid to legally appointed guardian of child of fireman who shall die as result of injury received during performance of his duty until such child shall have attained age of 18 years or shall have married, is mandatory, and courts are powerless to disrupt effective operation of pension rights thereby created. St.1947, p. 3682, § 183.

2. Municipal Corporations 🔑200(6)

Under doctrine of "expressio unius est exclusio alterius", Los Angeles charter, which provided that pension rights of parent of fireman who should die as result of injury received during performance of his duty should terminate when such parent's dependency terminated, but contained no such provision as to minor son of such fireman, emphatically rejected notion that such son's pension rights were terminated when he became adoptee of stepfather. St.1947, p. 3682, § 183.

3. Pensions 🔑2

Pensions are granted by sovereign authority for two purposes: (1) to assure recipient of support by supplying his economic needs, and (2) to maintain stable public economy.

4. Municipal Corporations 🔑220(9)

Pension provisions are part of contemplated compensation of city employee and therefore consideration of employment contract.

5. Constitutional Law 🔑102(2)

Municipal Corporations 🔑200(6)

Since Los Angeles charter provided that pension should be paid to guardian of child after remarriage of widow of city fireman who died as result of injury received during performance of his duty, pension rights of such fireman's son became vested upon remarriage of widow and were not affected by his adoption by his stepfather long subsequent to such fireman's death. St.1947, p. 3682, § 183.

6. Constitutional Law ⟹102(2)

When pension system has been established by city, and employee has fulfilled all conditions required of him as beneficiary thereof, payment of sums provided in pension statute become indefeasible, vested property right. St.1947, p. 3682, § 183.

7. Pensions ⟹1

Pension statutes are to be liberally construed with view to protection of pensioner and his family.

Roger Arnebergh, City Atty., Bourke Jones, John J. Tully, Jr., Asst. City Attys., Los Angeles, for appellants.

Collins & Woolway, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the son of a deceased employee of the City of Los Angeles, under the age of eighteen years who has been adopted by his stepfather, is still entitled to a pension as the orphan of such deceased employee.

One Joseph William Kacl was employed by the city as a fireman and was a member of the Fire and Police Pension System. He was killed in performance of his duties November 6, 1939. A pension having been awarded to respondent as the widow of Fireman Kacl, it was discontinued in 1945 on her marriage to Gerald Malone. Subsequently she was appointed guardian of the person and estate of her son Joseph William Kacl II, whereupon she applied to appellants for a pension for Junior under the provisions of section 183 of the City Charter, St.1947, p. 3682,[1] and the child was granted such pension. Thereafter, by decree of the court, Gerald Malone adopted the boy on November 20, 1946, and Joseph William II has lived with his mother and Gerald in their home.

Proceedings were duly instituted by the Board of Pension Commissioners who gave notice to respondent that no further pension would be paid on the ground that the minor had ceased to be a son of respondent's deceased husband and thereby ceased to be entitled to benefits of section 183. Thereafter, no pension was paid to the adopted son and the Pension Board notified respondent that no further pension benefit would be paid to Joseph William II and demanded restitution of all sums paid to the child as pension money prior to November 28, 1952, in the total sum of $6,304.53. Subsequently, respondent as guardian of her minor son petitioned the superior court for a writ of mandate to compel appellants to resume payment of the pension to Joseph William II. Upon the issues raised by the "return" of the Board of Pension Commissioners, the court tried the controversy and made findings in accordance with the allegations of Mrs. Malone and concluded that the Board should resume payment of all sums to which the minor son is entitled "computed back to November 28, 1952." Judgment followed.

Appellants now demand a reversal on the grounds that (1) the adoption of the minor by Gerald Malone terminated the boy's pension rights; (2) section 183 of Article XVII of the City Charter does authorize the termination or forfeiture of the minor's pension rights upon, or by reason of, his adoption during the period of his entitlement; (3) it was error to order the issuance of a writ of mandate commanding appellants to make such payments.

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[1] Section 183, Los Angeles City Charter: "Whenever any member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty * * * then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents * * *. Said pension shall be paid to the widow during her lifetime or until she remarries, and thereafter a pension shall be paid * * * to the legally appointed guardian of the child or children of such deceased member until such child or children shall have attained the age of eighteen years * * * or to his dependent parent or parents during their lifetime or during such dependence, should there be no widow or child. * * * and provided, further, that if such widow, child or children shall marry, then the pension paid to the person so marrying shall cease, and provided, further, that should the dependency of such parent or parents terminate, then the pension paid to such dependent parent or parents shall cease."

Discontinuance of the Minor's Pension, Not Lawful

[1] There is no uncertainty in section 183 wth respect to the child of a member of the Fire Department. Its language is mandatory that an annual pension shall be paid to the child of a fireman who "shall die as a result of any injury received during the performance of his duty * * * in equal monthly installments * * * to the legally appointed guardian of the child * * * until such child * * * shall have attained the age of eighteen years" and not have married. The section does not vest any court with power to enlarge or restrict the pension rights so granted. The section is a firm expression of the public policy of the State. It was adopted by the people of the City of Los Angeles and approved by the Legislature, and will continue to be the law until repealed by that lawmaking body. Courts are powerless to disrupt the effective operation of the pension rights thereby created. McCarthy v. City of Oakland, 60 Cal.App.2d 546, 549, 141 P.2d 4. Because sections 25 and 196 of the Civil Code make it the legal obligation of a parent to support his son throughout minority, appellants contend that the authors of the Charter must have intended the pension provided for a fireman's child should be paid to a child only to whom the deceased in his lifetime was obligated to support. From this it is contended that by providing for the termination of such a pension upon the son's attainment to the age of eighteen years, it was intended by the authors of the Charter that such a pension was to be paid only so long as such son "continues to be in the specified and qualifying status of dependency" upon the deceased fireman and that same is to be terminated when the son has lost or should lose the qualifying status by reason of actual financial self-sufficiency.

[2] But section 183 does not divest a minor son of his pension rights if his dependency should terminate. The only causes for a divestiture of a minor son of his pension rights are two: (1) becoming eighteen; (2) his marriage. While it is provided that the pension rights of a parent shall terminate when his dependency terminates, no such provision as to a minor son is found in the Charter. Under the doctrine of *expressio unius est exclusio alterius* the section emphatically rejects the notion that the son's pension rights were terminated when he became the adoptee of Mr. Malone. See Regents of University of California v. Johnson, 2 Cal.App.2d 203, 205, 37 P.2d 473.

[3, 4] The proposition of terminating pension rights upon the adoption of a minor son of a deceased employee is sociologically unsound. Pensions are granted by sovereign authority for two purposes, namely, (1) to assure the recipient of support by supplying his economic needs; (2) to maintain a stable, public economy. It will be remembered that pension provisions are a part of the contemplated compensation of the city employee and therefore a consideration of the employment contract. Kern v. City of Long Beach, 29 Cal.2d 848, 852, 179 P.2d 799. Of course, it is a fairly reasonable assumption that when a boy is adopted, his adoptive parents will provide him the support necessary for his bodily welfare. But such assumption is not a guaranty. The adoptive father of the minor son of a deceased city employee may fail, become helpless or die. Should such minor suffer even though the law has made provision for his economic security? Moreover, inasmuch as the framers of the Charter knew the likelihood of the widow of a deceased employee to remarry, it is a fair presumption that they contemplated the new husband might adopt the widow's children. Therefore, in the absence of a Charter provision to terminate the pension rights of an orphan of the deceased employee, it must be concluded that the Charter framers did not intend that a son of a deceased employee should be deprived of his pension by reason of his adoption.

[5, 6] Appellants' contention that the adoption of the child made the Charter's pension provisions no longer applicable is without support. The authorities cited pertain only to the effect of adoption on the laws of inheritance. See 2 Cal.Jur.2d 46; In re Jobson's Estate, 164 Cal. 312, 128 P.

938, 43 L.R.A.,N.S., 1062; In re Darling's Estate, 173 Cal. 221, 159 P. 606; In re Pillsbury's Estate, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396. The adoption of decedent's son by his stepfather long subsequent to the father's decease is quite another question. When respondent married Mr. Malone, the boy's pension rights had already become vested. They were not affected by anything that occurred and cannot be altered until the boy shall have married or attained the age of 18 years. McCarthy v. City of Oakland, supra, 60 Cal.App.2d 550, 141 P.2d 4. While the adoption changed his legal relationships with respect to his inheritance, it had no such effect as to deprive him of a vested right. Merely because Mr. Malone assumed the burden of supporting the boy, the latter was not thereby deprived of his possession whether it was money in the bank or in the City Treasury. Decedent's contract with the municipality bound it to pay him a pension after his retirement, and a pension to his son if the father should die in the pursuit of his duties as a fireman. Either pension is a part of decedent's compensation for his services to the city. If the framers of the Charter had intended that the boy's pension should cease when a good fairy should come into his life, they could have said as much. They concluded otherwise. They computed a pension that would support him during the first 18 years of his minority. That it should be payable in monthly installments was a detail to aid both payor and payee. At any rate, when a pension system has become established by a city and an employee has fulfilled all the conditions required of him as a beneficiary thereof, the payment of the sums provided in the pension statute becomes an indefeasible, vested property right. Kern v. City of Long Beach, supra, 29 Cal.2d 851, 179 P.2d 799; Klench v. Board of Pension Fund Commissioners of Stockton, 79 Cal.App. 171, 182, 249 P. 46.

[7] In view of the doctrine that pension statutes are to be liberally construed with the view to the protection of the pensioner and his family, England v. City of Long Beach, 27 Cal.2d 343, 346, 163 P.2d 865; McKeag v. Board of Pension Commissioners, 21 Cal.2d 386, 390, 132 P.2d 198; Lundrigan v. City of Los Angeles, 82 Cal.App.2d 238, 253, 186 P.2d 12, the conclusions derived from the record of this action, the Charter provisions, and the cited authorities cannot be fairly obviated.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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126 Cal.App.2d 490

HERNANDEZ
v.
NATIONAL DAIRY PRODUCTS CO.,
Inc., et al.
Civ. 20010.

District Court of Appeal, Second District,
Division 1, California.
July 13, 1954.
Hearing Denied Sept. 8, 1954.

Action for personal injuries sustained in automobile collision in Maryland. The Superior Court, Los Angeles County, John J. Ford, J., entered order granting motion to quash attempted service of amended complaint upon Maryland corporation. Plaintiff appealed. The District Court of Appeal, Mosk, J. pro tem., held that where grounds enumerated in notice of motion were that corporation was not licensed to do business in California and had not been served with summons, motion raised no contention other than lack of jurisdiction over corporation and appearance was special, though defendant raised other matters in supporting affidavits.

Order affirmed.

1. Appearance 🔑9(1)

In determining whether appearance is special or general, character of relief asked, and not intention of party that it shall constitute special appearance, is controlling.

2. Appearance 🔑9(2)

Where defendant, in contesting jurisdiction of court over his person raises any other question or asks for any relief which could be granted only upon hypothesis that court has jurisdiction of his person, appearance is general, though termed special.

3. Motions ⚷21

Notice of motion must sufficiently define issues for information and attention of adverse party and court, and unless leave of court is obtained, motion may not be made upon any grounds other than those enumerated in notice of motion. Code Civ.Proc. § 1010.

4. Appearance ⚷9(2)

Contention that court is without jurisdiction to proceed in matter because accident giving rise to cause of action did not occur in jurisdiction is not properly raised by special appearance.

5. Courts ⚷7

An action in tort, being transitory, may be maintained in any state where defendant is found.

6. Motions ⚷21

Grounds set forth in notice of motion may not be enlarged by supporting affidavits or by oral argument.

7. Appeal and Error ⚷927(2)

Where affidavit in support of motion to dismiss action stated grounds not enumerated in notice of motion, it was assumed on review that trial judge ignored such material in supporting affidavit and limited his consideration to grounds urged in notice of motion, in absence of any indication to the contrary in record.

8. Appearance ⚷9(5)

It is preferable procedurally for one appearing specially for purpose of challenging court's jurisdiction over his person to do so by motion to quash service rather than by motion to dismiss, but use of latter method does not per se constitute submission to jurisdiction of court.

9. Appearance ⚷9(3)

Where defendant filed notice of motion to quash service of complaint and dismiss action on grounds that defendant was not corporation licensed to do business in California and had not been served with summons, motion as noticed raised no contention other than lack of jurisdiction over defendant and appearance was, therefore, special, though defendant raised other matters in supporting affidavits.

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David Schwartz and Merton L. Schwartz, Beverly Hills, for appellant.

F. J. Finucane, Gibson, Dunn & Crutcher, By: Norman S. Sterry, Los Angeles, for respondent.

MOSK, Justice pro tem.

While driving his automobile in the City of Frederick, Maryland, on July 9, 1952, appellant Peter L. Hernandez, a resident of Los Angeles, sustained personal injuries as a result of a collision between the vehicle he was operating and a large milk truck and trailer purportedly owned and operated by the respondent, Chestnut Farms-Chevy Chase Dairy Company.

The appellant instituted this action in the Superior Court of Los Angeles County, on February 3, 1953. Service of process was made upon National Dairy Products Co., Inc., a Maryland corporation and codefendant, by serving a designated agent in the State of California.

Thereafter, on March 13, 1953, though not having been served, respondent Chestnut Farms-Chevy Chase Dairy Company through counsel filed a pleading entitled "special appearance and notice of motion to dismiss action against defendant Chestnut Farms-Chevy Chase Dairy Co." The notice of motion prayed that the specially appearing defendant "be relieved as party defendant in the above entitled case and that the action be dismissed as to defendant Chestnut Farms-Chevy Chase Dairy Co. for the reason that Chestnut Farms-Chevy Chase Dairy Co. is not and has not been a corporation licensed to do business in the State of California, has not been served with summons in the above entitled action within the State of California." In support of its motion the respondent submitted the affidavit of its counsel, F. J. Finucane, which stated that the specially appearing defendant is a corporation organized and existing under the laws of the State of Delaware, is not qualified to do business in the State of California, has not been served with summons in the action and further that "the cause of action therein sued on as appears more fully in plaintiff's complaint on file herein, did not occur within the State of California and that the above entitled court is without jurisdiction to proceed therein."

This motion was argued on March 19, 1953, at the same time as a demurrer of the defendant National Dairy Products Co., Inc., was heard. The demurrer was sustained with leave to amend and the respondent's motion was denied.

Subsequently an amended complaint was filed and served on counsel for the respondent. Thereupon the respondent on April 6, 1953, again filed its "special appearance and notice of motion to quash service and dismiss action against Chestnut Farms-Chevy Chase Dairy Co.", on identical grounds previously stated. This motion was argued on April 13, 1953, at which time the court took the matter under submission and thereafter, according to the minutes of the court, the motion to quash attempted service of the amended complaint was granted.

From that order the appellant has appealed, maintaining that the respondent, despite its avowed determination to appear specially only, has actually made a general appearance.

[1, 2] It is clear that the character of the relief asked, and not the intention of the party that it shall constitute a special appearance, is material and controlling. In re Clarke, 125 Cal. 388, 392, 58 P. 22. As stated in Olcese v. Justice's Court, 156 Cal. 82, at page 87, 103 P. 317, at page 319: "So it is well settled that, if a defendant, under such circumstances, raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons." Therefore, although the motion here was characterized as a special appearance, we must look behind the label and examine the contents for their actual nature and effect.

[3] A notice of motion must state the grounds upon which the motion is to be made. Code Civ.Proc. § 1010. Unless leave of court is obtained, the motion may not be made upon any grounds other than those enumerated in the notice of motion. If new matter were permitted in the actual motion, a notice of motion would be reduced to little purpose other than to advise the time and place of hearing. Actually, however, it must also sufficiently define the issues for the information and attention of the adverse party and the court. Doehla v. Phillips, 151 Cal. 488, 496, 91 P. 330.

In Westphal v. Westphal, 61 Cal.App.2d 544, 550, 143 P.2d 405, 408, the court said: "The grounds of the motion must be stated in the notice (sec. 1010, Code of Civil Procedure) and the court can only consider the grounds so stated * * *." To the same effect are W. H. Marston Co. v. Kochritz, 80 Cal.App. 352, 359, 251 P. 959; Garrett v. Garrett, 31 Cal.App. 173, 159 P. 1050; Mojave, etc., R. Co. v. Cuddeback, 28 Cal. App. 439, 442, 152 P. 943.

In the instant case, therefore, the court was limited to a consideration of the ground or grounds enumerated in respondent's notice. Those were "* * * for the reason that Chestnut Farms-Chevy Chase Dairy Co. is not and has not been a corporation licensed to do business in the State of California, has not been served with summons in the above entitled action within the State of California." Nothing in that statement of grounds for the motion can be construed as invoking the jurisdiction of the court, nor does it purport to raise any issue other than jurisdiction over the corporate entity. This is consistent with a special appearance.

[4, 5] It is true that the affidavit filed by respondent's counsel attempted to raise an issue relating to the jurisdiction of the court over the entire cause of action. When counsel, as an affiant, maintained that the "cause of action therein sued on as appears more fully in plaintiff's complaint on file herein, did not occur within the State of California and that the above entitled

court is without jurisdiction to proceed therein", he was going clearly beyond a mere challenge to jurisdiction over the person. He was then invading the area of subject matter. In addition, his position expressed in the affidavit was untenable, for it is elementary that an action in tort being transitory may be maintained in any state where the defendant is found. Schultz v. Union Pacific R. Co., 118 Cal.App.2d 169, 178, 257 P.2d 1003; Loranger v. Nadeau, 215 Cal. 362, 366, 10 P.2d 63, 84 A.L.R. 1264.

[6, 7] But regardless of the merits of counsel's affidavit, the grounds set forth in a notice of motion may not be enlarged by supporting affidavits or by oral argument. Since the record discloses nothing to the contrary, we must assume the learned trial judge, being aware of this rule, ignored the irrelevant material in the supporting affidavit and limited his consideration to the grounds urged in the notice of motion.

Appellant relies upon Bank of America Nat. Trust & Savings Ass'n v. Harrah, 113 Cal.App.2d 639, 248 P.2d 814, and Nelson v. Superior Court, 75 Cal.App.2d 372, 171 P.2d 52. In the former case, the motion was based on section 581a of the Code of Civil Procedure, and, as the court said, 113 Cal.App.2d at page 641, 248 P.2d at page 815, was "appealing to the equity and discretion of the court." In Nelson there was a motion not only to quash service, but to vacate an order appointing a receiver. It must be conceded, however, that some language in the opinion suggests the affidavit and oral argument, having gone to the merits, elevated the motion to quash to a general appearance. While the precise point was not discussed, we cannot agree that a mere affidavit or argument in support of a motion may expand the nature and grounds of the motion itself.

[8] Appellant contends that a motion to dismiss a pending action can be made only by submitting to the jurisdiction of the court. While it is preferable procedurally for one appearing specially for the purpose of challenging the court's jurisdiction over his person to do so by motion to quash service rather than by motion to dismiss, there are no cases holding the latter method *per se* constitutes submission to jurisdiction. To the contrary, in Frohman v. Bonelli, 91 Cal.App.2d 285, 291, 204 P.2d 890, a motion to dismiss was held to be a special appearance only.

Cases primarily relied upon by appellant involved questions of jurisdiction over subject matter. Roberts v. Superior Court, 30 Cal.App. 714, states at page 720, 159 P. 465, at page 467: "The motion to dismiss the complaint on the ground that the court was without jurisdiction *of the subject-matter* of the action amount, substantially or in legal effect, to a demurrer to the complaint on that ground." The same rule is recited in Morte v. Justice's Court, 139 Cal.App. 605, 607, 34 P.2d 748, Taylor v. Superior Court, 93 Cal.App. 445, 447, 269 P. 727, and Molfino v. Pippo, 122 Cal.App. 437, 10 P.2d 78. In Olcese, also quoted several times by appellant, the court pointed out, 156 Cal. at page 88, 103 P. at page 319: "In the present case the defendant made his motion to quash the service of the summons. In this his appearance was undoubtedly special, as he limited it solely to a request for this specific relief. * * * But here he went further, and demurred to the jurisdiction of the court *over the subject-matter* of the action, a request for relief which the court could not grant him, saving upon the theory that he was regularly before the court." (Italics ours.)

Proctor & Schwartz, Inc., v. Superior Court, 99 Cal.App.2d 376, 221 P.2d 972, is a case more directly in point, the court there holding that an objection to jurisdiction over the person, even though phrased in the language of a demurrer, is only a special appearance. " 'The test is' ", said the court, 99 Cal.App.2d at page 377, 221 P.2d at page 973, " 'Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party?' "

[9] Applying that test here, we find nothing in the motion as noticed that raises

any contention other than lack of jurisdiction over the defendant corporation. This was, therefore, but a special appearance.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

127 Cal.App.2d 34

TROMANHAUSER
v.
MUNICIPAL COURT.

Cr. 2538.

District Court of Appeal, Third District, California.

Aug. 3, 1954.

Hearing Denied Sept. 2, 1954.

Proceeding upon petition for writ of error coram nobis. The Superior Court, Sacramento County, Coughlin, J., entered order denying petition, and petitioner appealed. Defendant moved to dismiss appeal. The District Court of Appeal, Van Dyke, P. J., held that where petition was addressed to Superior Court rather than to the Municipal Court which entered judgment of conviction, and petitioner set forth no reason whatever to excuse his failure to apply to the municipal court for the writ, the Superior Court, even if it had jurisdiction to entertain originally the motion to vacate judgment of municipal court, acted well within its discretion in denying the petition.

Appeal dismissed.

1. Criminal Law ⇨997(13)

A petition for a writ of error coram nobis is essentially a motion to vacate a judgment upon factual grounds not appearing upon record of court pronouncing judgment under attack, and hence, ordinarily, such motion must be made in court which rendered that judgment.

2. Criminal Law ⇨997(16)

Whether or not a writ of error coram nobis will be granted always rests largely in discretion of court to which application is made.

3. Criminal Law ⇨997(13)

Where application for writ of error coram nobis is made to a court which stands in relation of a reviewing court to the court which rendered the judgment, grounds must be shown why the application was not made to that court itself.

4. Criminal Law ⇨997(13), 998

Municipal court which entered judgment of conviction had jurisdiction to entertain a motion to vacate its judgment, or to entertain a petition for writ of error coram nobis.

5. Criminal Law ⇨997(13)

Where defendant petitioned Superior Court for writ of error coram nobis, instead of petitioning the municipal court which entered judgment of conviction, and in his petition showed no reason whatever to excuse his failure to apply to the municipal court for the writ, the Superior Court, even if it had jurisdiction to entertain originally the motion to vacate judgment of municipal court, acted well within its discretion in denying the petition.

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Leslie S. Tromanhauser, in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is a motion to dismiss an appeal from an order denying petition for writ of error coram nobis. Throughout this proceeding appellant has acted in pro. per. The following appears from the record. Appellant was charged in the Sacramento Municipal Court with peace disturbance and with resisting an officer. On arraignment he entered a plea of not guilty to each charge and demanded a trial by jury. He was represented by counsel. He spent eleven days in jail and was then released on bail. While he was in a hospital in San Francisco his attorney appeared in court and moved the court for permission to withdraw the former pleas of not guilty. This motion was granted and thereupon, and in petitioner's absence, his attorney entered a plea of guilty to each count on appellant's behalf. Thereupon the court sentenced him to time already served.

He alleged in his petition for writ of error coram nobis that he was unaware of his attorney's actions in these matters and did not learn of them in time either to appeal or to move the court to vacate its judgment, restore him to the status of not guilty pleas and accord him a trial. He complains that the record of his pleas and the following judgment is obnoxious and harmful to him. He alleges that not only did his attorney have no authority whatever to withdraw his pleas of not guilty and enter pleas of guilty in lieu thereof, but that such action was taken against his express directions communicated to his counsel. The judgment which he attacks was rendered in the municipal court on September 21st and on January 27th following he filed his petition for writ of error coram nobis in the Superior Court of Sacramento County. That court entered an order reciting that it had heard and considered on the merits the petition for the writ and that the petition was denied. From this order of denial this appeal was taken.

[1–5] The motion is made upon the ground that the appeal is without merit and ought, therefore, to be dismissed without further consideration. Ordinarily this court is loath to dismiss an appeal upon these grounds, preferring, as is usual with courts, that all matters before it be disposed of upon the merits. However, it appears clearly that appellant has no real ground for appeal. A petition for a writ of error coram nobis is essentially a motion to vacate a judgment upon factual grounds not appearing upon the record of the court pronouncing the judgment under attack. Ordinarily, therefore, such motion must be made in the court which rendered that judgment. Whether or not a writ of error coram nobis will be granted always rests largely in the discretion of the court to which the application is made. If, therefore, the application is made to a court which stands in the relation of a reviewing court to the court which rendered the judgment grounds must be shown why the application was not made to that court itself. In the present case appellant in his petition for the writ showed no ground whatever why he had not applied to the municipal court. All that is said in his petition upon that subject is that: "Correspondence re/ this information and petition was forwarded to Judge McDonnell [Judge of the Municipal Court which acted upon the criminal charges] under dates of November 25th, 30th, and December 17th last. No replies have been received." Such matter constitutes no excuse whatever for not applying to the municipal court for an order vacating its judgment. That court had jurisdiction to entertain a motion to vacate its judgment, or, what is the same thing, to entertain a petition for writ of error coram nobis. People v. Superior Court, 28 Cal.App.2d 442, 446, 82 P.2d 718. And although the trial court may have, and certainly justifiably could have, refused to enter into correspondence with petitioner concerning such a proceeding, nevertheless it cannot be assumed that there was on the part of that court any refusal to act upon a petition had it been filed. Appellant in his petition here under review further states that: "My motions to have the Guilty Plea expunged from my record; to dismiss the action because of insufficient evidence on the part of the State of California, and a request to reset for trial at any early date have been made all to no avail." If by the quoted language petitioner meant to aver that he had moved the municipal court to vacate its judgment, then no reason is given why upon denial of his motion he did not appeal therefrom to the Superior Court of Sacramento County, the court which has appellate jurisdiction over the municipal court. Dale v. City Court of City of Merced, 105 Cal.App.2d 602, 234 P.2d 110.

From the foregoing it is apparent that, even if the superior court had jurisdiction to entertain originally a motion to vacate the judgment of the municipal court—a matter of considerable doubt, but which it is not necessary for us to decide—yet it acted well within its discretion when, no reason being given it why the application was not made originally to the municipal court, it denied the petition. Assuming merit in fact in appellant's contentions that the judgment of the municipal court ought to be vacated, it is still open to him to move that court for such an order, although by his mistaking the proper forum in which the motion should be originally made he may by lapse of time have jeopardized his chances of success.

The appeal is dismissed.

PEEK and SCHOTTKY, JJ., concur.

126 Cal.App.2d 702

PEOPLE v. ANDERSON.

Cr. 5195.

District Court of Appeal, Second District, Division 3, California.

July 26, 1954.

Rehearing Denied Aug. 3, 1954.

Hearing Denied Aug. 19, 1954.

Defendant was convicted of grand theft. The Superior Court, County of Los Angeles, Orlando H. Rhodes, J., entered judgment and defendant appealed in propria persona. The District Court of Appeal, Vallée, J., held, inter alia, that where cause was set for trial in presence of defendant and his counsel and no objection was made that date was beyond statutory limitation, objection was deemed waived and that evidence supported conviction.

Affirmed.

1. Criminal Law 🔑617

Where cause was set for trial in presence of defendant and his counsel and no objection was made that date was beyond statutory period, objection was deemed waived. Pen.Code, § 1382, subd. 2.

2. Criminal Law 🔑576(4)

Defendant lost his right to claim that his cause should have been tried within 60 days of filing of information where defendant was fugitive when 60 days period elapsed. Pen.Code, § 1382, subd. 2.

3. Criminal Law 🔑295

In prosecution for grand theft, there was no evidence to support defendant's implication that he had been previously prosecuted for same offense.

4. Criminal Law 🔑1144(9)

Where defendant claimed on appeal that he had never been in position to request copy of information but he had waived reading of information at arraignment and record did not show that he had not received copy, court would presume that copy had been delivered to defendant. Pen.Code, § 988; Code Civ.Proc. § 1963, subd. 15.

5. Criminal Law 🔑1137(5)

Where defense counsel, in defendant's presence, submitted cause on transcript of preliminary examination, reserving right to present further evidence, defendant had no cause to complain.

6. Larceny 🔑65

Evidence supported conviction for grand theft of air compressor from construction job on which defendant was superintendant.

Robert Anderson, in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In an information defendant was charged with grand theft and a prior conviction of grand theft and issuing a check without sufficient funds. The court found him guilty of grand theft and that the alleged prior conviction was true. He appealed from the judgment. Appearing in *propria persona* he asks for a reversal "Due to the innumerable errors, based on delay, and a verdict passed on the findings of the original preliminary transcript testimony, and that the defendant was not given proper defense to justify a counter, to ascertain all of the facts, necessary to arrive at a fair and unbiased verdict."

Defendant's first point appears to be that he was not brought to trial within sixty days after the filing of the information. Pen.Code, § 1382(2). The information was filed on September 13, 1951. Defendant was arraigned on September 17, 1951, and at his request the time to plead was continued to September 24, 1951. On September 24, on defendant's motion, a physician was appointed pursuant to section 1871 of the Code of Civil Procedure and the time to plead was continued to October 8, 1951. On October 8, 1951, defendant failed to appear and a bench warrant issued for his arrest. On October 19, 1953, defendant appeared in court, the cause was restored to the calendar, at defendant's request a physician again was appointed under section 1871 of the Code of Civil Procedure to examine defendant and report his findings to the court, and the time to plead and further proceedings were continued to November 2, 1953. On November 2, 1953, defendant, with his counsel present, plead not guilty of grand theft, denied the prior conviction, and the cause was set for trial for November 30, 1953. No objection was made that the trial date was beyond the statutory period. The cause came on for trial on November 30; defendant was present with counsel; trial by jury was waived by defendant and his counsel; on stipulation the cause was submitted on the transcript of the preliminary examination subject to the introduction of additional evidence by either side; and the further trial was continued to December 7, 1953. The trial was resumed on December 7, at which time the People introduced a record of defendant's prior conviction in evidence and defendant testified. Both sides then rested and the court found defendant guilty as charged in the information and that the prior conviction charged was true.

[1, 2] Where the cause is set for trial in the presence of the defendant and his counsel, and no objection is made to the date being beyond the statutory period, the objection is deemed waived. Krouse v. Justice's Court, 103 Cal.App.2d 311, 314, 229 P.2d 806. Defendant waived the right to have the cause tried within sixty days after the filing of the information. Further, defendant was a fugitive from September 24, 1951, to October 1953. He was thus a fugitive at the time the sixty-day period elapsed. A defendant who is a fugitive at the time the sixty-day period elapsed loses the right to claim that his cause should have been tried within the period. People v. Seely, 75 Cal.App.2d 525, 526–527, 171 P.2d 529.

[3] Defendant implies that he was subjected to a second prosecution for an offense for which he was once prosecuted. The record does not support the implication. There is no showing that defendant had been prosecuted previously for the offense of grand theft charged in the information.

Complaint is made that counsel for defendant, a deputy public defender, was biased against him and negligent in handling his cause. We have examined the record and find no basis whatever for the contention. Defendant was zealously and ably represented.

[4] Defendant says he was never "in a position to propose any request" for a copy of the information. At the time of arraignment he waived a reading of the information. The record does not show that he did not receive a copy. In the absence of a contrary showing, we must presume that official duty was regularly performed and that a true copy of the information was delivered to defendant as a part of the arraignment as required by section 988 of the Penal Code. Code Civ.Proc. § 1963 (15).

It is next contended that the deputy district attorney was guilty of inflammatory remarks in his opening argument. The contention is wholly without foundation. The cause was submitted to the court without argument.

[5] Defendant has no cause for complaint because his counsel, in his presence, submitted the cause on the transcript of the

preliminary examination reserving the right to present further evidence. People v. Wallin, 34 Cal.2d 777, 778, 781–782, 215 P.2d 1.

[6] The evidence fully supports the finding that defendant was guilty of grand theft. An air compressor was stolen from a construction job. Defendant was a superintendent on the job at the time. He was seen attaching the compressor to a car and driving it away. He did not have permission to take it. A few days later he sold the compressor for $1,150.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

126 Cal.App.2d 534

In re GIBSON'S ESTATE.

GIBSON et al. v. GIBSON.

Civ. 4855.

District Court of Appeal, Fourth District, California.

July 14, 1954.

Proceeding to determine heirship, wherein deceased's children asserted claim to estate as deceased's separate property, and deceased's surviving wife asserted claim to it as community property. The Superior Court, Imperial County, L. J. Mouser, J., rendered judgment that a portion of the estate was separate property and widow appealed. The District Court of Appeal, Mussell, J., held that there was substantial evidence to support finding that deceased had died possessed of property considerably in excess of the community earnings and that the excess over community earnings after deducting community expenses was separate property.

Judgment affirmed.

1. Husband and Wife 🔑262(1)

Under the circumstances shown in proceeding to determine heirship, wherein issue was whether estate was separate or community property, presumption that family expenses had been paid from community earnings was properly applied.

2. Husband and Wife 🔑262(1)

It is presumed that expenses of the family are paid from community earnings.

3. Husband and Wife 🔑262(1)

It is presumed that the excess over community earnings less community expenses is separate property.

4. Descent and Distribution 🔑71(7)

Where most of property involved in proceeding to determine heirship, wherein issue presented was whether estate was separate or community property, was presumptively community property, but trial court found that in fact it was separate property, question was whether there was satisfactory evidence to support such finding.

5. Husband and Wife 🔑264

Fact that most of property purchased was placed in separate name of husband was some evidence, in proceeding to determine heirship wherein issue was whether estate was community or separate property, that deceased intended it to be his separate property.

6. Husband and Wife 🔑264

Where only evidence is that separate and community property are commingled, entire fund must be treated as community property if separate funds have not been identified, but such rule has no application where there is other evidence.

7. Husband and Wife 🔑262(1)

Where it appeared, in proceeding to determine heirship, wherein issue was whether estate was community or separate property, that real and personal property had been acquired in deceased's name and that decedent had had considerable property at time of his marriage, presumption that where community and separate property are commingled the entire fund must be treated as community property if the separate funds have not been identified did not apply.

8. Appeal and Error ⚷1011(1)

The findings of the trial court upon conflicting evidence will not be disturbed upon appeal if there is evidence of a substantial character which reasonably supports the judgment.

9. Appeal and Error ⚷1011(1)

Conclusions of the trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal.

10. Husband and Wife ⚷264

In proceeding to determine heirship, wherein issue was whether decedent's estate was separate or community property, there was substantial evidence to support trial court's finding that decedent had died possessed of property considerably in excess of the community earnings and that the excess over community earnings after deducting community expenses was separate property. Probate Code, § 1080.

11. Descent and Distribution ⚷71(7)

Trial court's findings, in proceeding to determine heirship, were sufficient on the material issue raised.

◆

Horton & Knox, El Centro, for administratrix-appellant.

James B. Abbey, San Diego, Dickenson & Sattinger, El Centro, for respondents.

MUSSELL, Justice.

This is a proceeding to determine heirship and was brought pursuant to the provisions of section 1080 of the Probate Code. The petitioners, Calvin Hall Gibson, Holt Thomas Gibson and Willis A. Gibson, adult sons of C. T. Gibson, deceased, and Helen Oreleane Mayo, daughter, allege that they are the heirs of said deceased; that the estate was the separate property of the decedent at the time of his death and not community property; and that they are entitled to have distributed to them two-thirds of the entire estate of said decedent in four equal shares. Appellant, Carmen Gibson, the surviving spouse of said decedent, alleges in her petition for letters of administration that all of the property of the estate is community property and that she is the widow of said decedent and is entitled to succeed to the entire estate.

The trial court found that of the estate left by said decedent $70,586.32 was community property and $48,067.54 was separate property. Judgment was entered ordering distribution to the petitioners of two-thirds of said separate property, to be divided equally among the four petitioners and distributing to appellant Carmen Gibson one-third of the said separate property and all of the said community property of said estate. The principal and controlling question to be here decided is whether the evidence was sufficient to sustain the findings and judgment of the trial court with respect to the character of the property involved, whether separate property of the decedent or community property.

C. T. Gibson died intestate on or about October 14, 1951, and respondents are the adult sons and daughter of decedent and his first wife, Hallie M. Gibson, to whom he had been married twice. They were first married in 1911 or 1912. This marriage was annulled in 1917 and their remarriage, which took place within several months thereafter, was dissolved by divorce in 1924. Appellant Carmen Gibson was decedent's second wife. They were married in August, 1926, and lived together until his death in 1951. In October of that year appellant filed a petition for letters of administration, alleging that all of the estate was community property, and on November 5, 1951, letters of administration were granted to her. In March, 1952, she filed an inventory of the estate listing two parcels of real estate of the appraised value of $45,000 and personal property appraised at $73,653.86. The petition to determine heirship and the interests of petitioners in the property involved was filed in May, 1952.

The real property described in the inventory as item No. 1 was purchased by the decedent from the National Bank of Imperial on January 25, 1923, and there is testimony indicating that the purchase price thereof was the sum of $30,000. The real property described in item No. 2 of the inventory and known as the "ranch property" was acquired in two separate transactions.

The portion described therein as a portion of lots 2, 3, and 5 in section 4 and all of lot 7 in section 5, township 15 south, range 13 east was acquired by C. T. Gibson, a married man, on May 1, 1944, for a consideration of $4,000 and the remaining parcel was acquired by and title was vested in C. T. Gibson, a married man, on June 29, 1948. The consideration for this transaction was the sum of $1,500. The government bonds listed in item No. 3 were purchased by the decedent in 1941, 1942 and 1945 for a total sum of $43,024. The Spear promissory note described in item No. 4, appraised at $16,080, was apparently acquired by the decedent on September 6, 1951, and the note described in item No. 5 for $825.09 in September, 1949. The 1951 Pontiac automobile, valued at $1,750, and the Chevrolet coupe, valued at $1,000, were registered to appellant and decedent as legal and registered owners. The evidence does not show when the bank account referred to in item No. 6 was opened and the deposits therein were made. Apparently there was $10,974.77 in the account at the time the inventory was taken.

At the time decedent married Hallie Gibson in 1911 or 1912 he started a small secondhand store in Imperial. About a year later he acquired lots 10 and 11 in block 74 of the city of Imperial and erected a building thereon in which he conducted a hardware and implement business. This property, together with the merchandise and equipment then on hand, was sold on June 5, 1945, for the sum of $7,000, less escrow expenses. The check therefor was made payable to C. D. Gibson and Carmen Gibson and the deed was executed by them. Testimony was introduced to the effect that decedent, while married to Hallie Gibson, bought out other implement stores, bought and sold cattle and hay, ran a theatre business, loaned money, operated a small ranch near Imperial and acquired the property known as the "bank building" and described in item No. 1 of the inventory.

There was substantial evidence from which the court determined that at the time of his marriage to appellant in 1926 decedent's stock of merchandise in the implement and hardware store was valued at the sum of $50,000 and that decedent had cash, notes and trust deeds of an undetermined amount which he kept in his safe. Decedent managed the implement store from 1926 to 1945 and after 1945 worked at the ranch. Apparently no books of account were available at the time of the trial to show the actual income and expense of the various business transactions conducted by the decedent. His earnings and those of appellant were all deposited in a common bank account which was handled by them "altogether".

Appellant was employed as a teacher and during the time of her marriage to decedent her individual earnings amounted to $70,586.32. All of her earnings, commencing in 1927, were turned over by her to the decedent and all of the expenditures "on account of business and other matters" were made from the common bank account of appellant and decedent. The income tax returns for 1940 to 1951, inclusive, and referred to in the record, indicate that in addition to appellant's earnings the income consisted of interest, rentals, profits from business, and a small profit from farming operations. Decedent's earnings are not set forth. However, it is apparent that he was able to buy government bonds valued at $43,024 between October, 1941 and November, 1945, and other real and personal property.

[1-3] The trial court, in arriving at its determination and judgment that $70,586.32 of the estate was community property and $48,067.54 was separate property found that the said sum of $70,586.32 was community earnings and the evidence amply supports the finding that this amount was earned by the appellant and contributed to the common bank account. The court then applied the presumption that the community expenses were paid out of the community property. Under the circumstances shown, we are of the opinion that the presumption was properly applied. "It is presumed that the expenses of the family are paid from community earnings." In re Estate of Ades, 81 Cal.App.2d 334, 338, 184 P.2d 1, 4; Huber v. Huber, 27 Cal.2d 784, 792, 167 P.2d 708. The trial court also applied the presumption that

"where one dies possessed of property considerably in excess of community earnings, that the excess over community earnings after the deduction of community expenses is separate property." In Re Estate of Smith, 86 Cal.App.2d 456, 473, 195 P.2d 842, 852, where it was shown that the total value of deceased's estate far exceeded his community earnings, and further that there was change of title of much of the property from separate to joint and back to separate, and the family expenses and total community income was established, the court said:

> "It is a well-settled presumption in such cases that the expenses of the family are paid from community earnings, and that the excess over community earnings less community expenses is separate property. Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; Van Camp v. Van Camp, 53 Cal.App. 17, 199 P. 885; In re Estate of Tompkins, 123 Cal.App. 670, 11 P.2d 886; In re Estate of Ades, 81 Cal.App.2d 334, 184 P.2d 1."

Applying these rules, the court properly concluded that the excess over the proven community earnings of $70,586.32 was separate property.

[4-7] Appellant argues that all of the property listed in the inventory was her community property and that the presumption that where community property and separate property are commingled, the entire fund must be treated as community property if the separate funds have not been identified and that this presumption must prevail in the instant case. The record shows that the real property described in item No. 1 of the inventory was acquired by decedent prior to his marriage to appellant and the remaining property was acquired after this marriage. Whether the bonds or other property was acquired in whole or in part with separate or community funds is not clear. The real and personal property were acquired in decedent's name with the exception of the two automobiles and there is evidence that decedent had considerable property at the time of his marriage to appellant. As was said in Estate of Smith, supra, 86 Cal.App.2d at page 472, 195 P.2d at page 852:

> "There can be no doubt that most of the property here involved, at the start of the trial, was presumptively community property, for the reasons set forth by appellant. But the trial court has found that, in fact, it was separate property. The real question is whether there is 'satisfactory' evidence to support that finding, and that means not only direct evidence, but reasonable inferences from that evidence. It is obvious that this man died possessed of property valued far in excess of the money he earned during marriage. While most of the property was purchased with money from the joint account, the real question is the intent with which money from that account was later used to buy property taken in his name alone. The fact that most of the subsequently purchased property—the automobile and trailer and the Mariposa property, as well as the money in the safe deposit box and the money in the Fresno account—were placed in the separate name of decedent although paid for, in the main, with money from the joint account, is some evidence that the decedent intended it to be his separate property. While it is true that when the only evidence is that separate and community property are commingled, the entire fund must be treated as community if the separate funds have not been identified. (Fountain v. Maxim, 210 Cal. 48, 290 P. 576; Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714), that rule has no application where there is other evidence."

Under the circumstances shown, the presumption is not here applicable.

[8-10] Appellant argues that under the terms of the property settlement agreement entered into between Hallie M. Gibson and decedent in their divorce action, Hallie M. Gibson fell heir to the larger portion of the decedent's property and that the decedent was permitted to retain only the bank building, the implement and real es-

tate business and bank stock; that decedent's investments were completely wiped out prior to 1935 due to the depression, the failure of the bank and other facts and circumstances recited in his affidavit in the divorce action; that the testimony of Hallie M. Gibson and Mr. Tarvin as to the property owned by the decedent was inconsistent with other statements made by them and therefore are of no probative value. The property settlement agreement was executed in 1924. In it decedent agreed to transfer real property in San Diego and Riverside counties to Hallie Gibson and she quitclaimed her interest in the bank property (lots 11 and 12, block 74, original townsite of Imperial) to decedent, as well as her interest in the real property described in item No. 1 of the inventory. She also waived any interest she might have in all personal property owned by the decedent. This personal property was not described in the agreement and there is no statement as to its value at that time. The affidavit of decedent filed in his divorce action was apparently filed in an effort to obtain a modification of a court order for support of his children, and while it indicates that decedent's bank investment became valueless, it does not contain a statement that his business was a complete failure. The evidence as to the terms of the property settlement agreement and the statements in decedent's affidavit were matters to be considered by the court in determining the weight to be given to the testimony of Hallie Gibson and Mr. Tarvin and the other evidence. The finding of the trial court upon conflicting evidence will not be disturbed upon appeal if there is evidence of a substantial character which reasonably supports the judgment. Likewise the conclusions of the trier of fact from evidence or testimony that is reasonably susceptible of conflicting or opposing interests will not be set aside by an appellate tribunal. Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 597, 234 P.2d 16. There was "substantial evidence" as defined in Re Estate of Teed, 112 Cal.App.2d 638, 644, 247 P.2d 54, to support the trial court's finding that the decedent died possessed of property considerably in excess of the community earnings and to support its conclusion that the excess over the community earnings after deducting community expenses was separate property under the rule stated in Estate of Smith, supra.

[11] Finally, it is argued that the findings are deficient for failure to state the probative facts. However, the principal issue was whether decedent's estate consisted of separate or community property and the court specifically found the amount of each. This was a sufficient finding on the material issue raised.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

BUDGET FINANCE PLAN
v.
SAV-ON FOOD CLUB, Inc. et al.*
(two cases).
Civ. 20197, 20198.

District Court of Appeal, Second District,
Division 2, California.
July 1, 1954.
Hearing Granted Aug. 26, 1954.

Two actions by assignee of conditional sales contracts against sellers for breach of warranties were consolidated for trial. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgments for defendants, and assignee appealed. The District Court of Appeal, McComb, J., held, inter alia, that where seller under conditional sales contract assigned the contract "with recourse", and assignee, upon buyer's default and without seller's consent, retook possession of the property, thereby waiving his right to sue for the balance of the purchase price, seller was thereby exonerated and assignee waived any further rights against seller.

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* Opinion vacated 283 P.2d 694.

Judgments affirmed.

1. Sales ⚷479(2, 15)

A seller under a conditional sales contract, upon buyer's default, may terminate the contract, retake the property and retain the money paid therefor, or he may treat the transaction as a sale and sue for the balance of the purchase price.

2. Sales ⚷479(11)

Where seller's assignee under conditional sales contract, upon buyer's default, elected to retake possession of the property, assignee thereby waived his right to sue for balance of the purchase price.

3. Sales ⚷475

Where seller under conditional sales contract assigned the contract "with recourse", and assignee, upon buyer's default and without seller's consent, retook possession of the property thereby waiving his right to sue for the balance of the purchase price, seller was thereby exonerated and assignee waived any further rights against seller. Civ.Code, § 2819.

4. Sales ⚷475

In action by assignee of conditional sales contract against seller for breach of warranty, evidence sustained finding that initial payments had been received in cash by seller as warranted in assignment conditioned to be "with recourse" in event of any warranty made therein.

5. Appeal and Error ⚷905

Where there was nothing in the record to show that trial judge did not take judicial notice of a regulation of the federal government promulgated by virtue of a Presidential order based on authority conferred under Defense Production Act of 1950, reviewing court would assume that trial judge performed his duty and did take judicial notice of the regulation. Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.Appendix, § 2061 et seq.

Mario L. Clinco and Edgar J. Melchione, Los Angeles, for appellant.

J. George Bragin, Hollywood, for respondent.

McCOMB, Justice.

From judgments in favor of defendants after trial before the court in two actions, which were consolidated for trial, to recover for breach of warranties, plaintiff appeals.

Plaintiff filed two complaints against defendants, both for breach of warranties. In the first case, hereinafter referred to as "with recourse assignment" case, it was alleged that defendants had sold food freezers to certain persons on conditional sales contracts, and that said contracts were thereafter assigned to plaintiff under the terms of a "with recourse assignment," which provided in part:

"The undersigned (defendant) jointly and severally hereby guarantee full performance of said Agreement in all its terms and the prompt payment of any and all sums provided therein * * * and agrees to pay any attorney's fees and costs incurred in enforcing this guaranty. The undersigned (defendant) jointly and severally hereby agree that in the event of the non-compliance with any of the conditions of said agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder (plaintiff) against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to said Agreement and without waiving any rights as to time of repossession. The undersigned jointly and severally hereby agree that in the event of repossession, or default by the purchaser, the entire balance outstanding under said Agreement shall become immediately due and payable."

The first case further alleges that the purchasers had failed to make the payments provided in said contracts and under the terms of the "with recourse assignment" defendants became indebted to plaintiff for the balance remaining unpaid on the sales contracts.

After the filing of the complaint plaintiff repossessed the freezer which had been sold.

[1] This is the sole question presented for determination relative to this complaint:

Since plaintiff had repossessed the property after the buyer had become in default on the conditional sales contract, did such act constitute an election of remedies upon the part of plaintiff which prevented it from recovering the balance due on the conditional sales contract?

Yes. The rule is settled that a vendor under a conditional sales contract is given an election of remedies. He may terminate the contract, retake the property and retain the money paid therefor, or he may treat the transaction as a sale and sue for the balance of the purchase price. (James v. Allen, 23 Cal.App.2d 205, 207, 72 P.2d 570; Commercial Discount Co. v. Howard, 107 Cal.App. 83, 86[2], 289 P. 906; Stavnow v. Winfree, 99 Cal.App. 566, 568[2], 278 P. 905.)

[2, 3] In the instant case plaintiff having elected to retake possession of the freezer waived his right to sue for the balance of the contract price. Therefore since under section 2819 of the Civil Code of the State of California a surety is exonerated if by any acts of the owner without the consent of the surety the remedies of the creditor against the principal are impaired, it is clear that in the instant case plaintiff by its election waived any further rights against defendants.

In the second complaint known as the complaint "without recourse assignment," it was alleged that defendants had sold a freezing locker to certain persons on a conditional sales contract, and that the contract was thereafter assigned to plaintiff under the terms of an assignment containing this provision:

"E. That the initial payment shown by the said agreement has been actually received by the undersigned in lawful money of the United States, or, in the event used merchandise has been accepted by the undersigned in part payment of the property described herein, the allowance to said purchaser is not in excess of the reasonable market value thereof."

It was further alleged that in the event of breach of any of the warranties the terms of the "with recourse assignment" should apply to the contract; that the warranty by defendants that they had received the down payment set forth in the contract was untrue; that therefore defendants became indebted to plaintiff for the balance remaining unpaid on the conditional sales contract.

[4] This is the sole issue relative to this cause of action:

Was there substantial evidence to sustain the trial court's finding that the initial payment shown by the contract had been actually received by defendants?

This question must be answered in the affirmative. Ledgers and journals of defendants were received in evidence and disclosed that the initial payments were received in cash by defendants. This constituted substantial evidence to sustain the trial court's finding.

It is immaterial, as held by the trial court, whether the payment was made directly by the vendee to defendants or by defendants' salesman to defendants. The important fact is that the payment was, as stated by defendants, actually made.

[5] There is no merit in plaintiff's contention that the trial court did not take into consideration Regulation W of the federal government which had been promulgated by virtue of a presidential order based on authority conferred under the Defense Production Act of 1950, 50 U.S.C.A.Appendix, § 2061 et seq.

There is nothing in the record to show that the trial court did not take judicial notice of such regulation. We must therefore assume that he performed his duty and did take judicial notice of it.

No error appearing in the records, the judgments are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

126 Cal.App.2d 659

PEOPLE v. WATTS.

Cr. 970.

District Court of Appeal, Fourth District, California.

July 22, 1954.

Rehearing Denied Aug. 2, 1954.

Hearing Denied Aug. 19, 1954.

Defendant was convicted in the Superior Court, San Bernardino County, Carl B. Hilliard, J., of issuing and passing a bad check, and he appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to support finding by jury that defendant had passed check with intent to defraud.

Judgment and order affirmed.

1. Criminal Law ⚷1031(1)

Where complaint by defendant, convicted of passing bad check, that he was not taken before magistrate within time prescribed after his detention was first presented on appeal, District Court of Appeal would not review contention. Pen.Code, § 476a, Pen.Code, § 825.

2. Criminal Law ⚷1166½(1)

Where counsel for defendant, convicted of passing bad check, appeared and apparently conducted defense at trial in a proper manner, denial of defendant's motion to have attorney relieved as counsel would not be held prejudicial error, especially in view of fact that defendant never thereafter indicated dissatisfaction in reference to manner in which case was conducted by counsel. Pen.Code, § 476a.

3. Criminal Law ⚷706

Cross-examination by district attorney of defendant, accused of passing bad check, as to two previous convictions of felony was permissible as a means of impeaching defendant's testimony and did not indicate any malice or misconduct on part of district attorney. Code Civ.Proc. § 2051, Pen.Code, § 476a.

4. False Pretenses ⚷49(2)

In prosecution for passing bad check, evidence was sufficient to support finding by jury that defendant had passed check with intent to defraud. Pen.Code, § 476a.

5. Criminal Law ⚷1166½(1)

On appeal from conviction for passing of bad check, refusal of defendant's attorney to call certain witness to testify that there was no felonious intent to defraud would not be held prejudicial error, where there was no sufficient showing made in reference to what witness would testify, or of its competency or materiality, and there was no indication that defendant called this fact to attention of counsel or court at time of trial or indicated that such witness was available and would so testify. Pen.Code, § 476a.

6. Constitutional Law ⚷83(1)

On appeal from conviction for passing bad check, record did not support contention that defendant's constitutional rights had been violated by cruel and inhuman treatment inflicted upon him by officers prior to trial. Pen.Code, § 476a.

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Richard Watts, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Los Angeles, for respondent.

GRIFFIN, Justice.

Defendant, who was represented by an attorney at all stages of the proceedings, was convicted by a jury of the crime of violating section 476a of the Penal Code in issuing and passing a check in the sum of $61.50 on the Lovely Lady Shop, in Colton, without having any funds in the bank to meet the check at the time. He admitted two prior convictions of felonies.

About 5:30 p. m. on October 19, 1953, defendant appeared at the dress shop with a woman with whom he had been living. They selected several garments and defendant gave his personal check on a bank in Colton in payment thereof. The banker testified that defendant had never had an account or credit with that bank.

The only question presented to the jury was whether defendant informed the dress shop clerk that he had no account at the time but expected to have one in a short time, and asked her to notify him if it was not paid upon presentation.

The clerk testified that about closing time the defendant wrote out the check in payment of the merchandise; that she remarked: "Oh, a check at this time of the night?" And defendant said: "Sure, haven't you ever seen a check before?" and that she replied: "Yes—but at this time of the night it is certainly irregular"; that he assured her it would not "bounce" and that all the money he had was in that bank; that he had just arrived in Colton from the East and had his money transferred here; that she asked for identification and the defendant presented his driving license from Ohio, and another card with his picture on it; that nothing was said by the defendant about not having any account with the bank and he made no request to hold the check.

Defendant testified he told the clerk he intended to pay for the merchandise by check; that he did not have the cash; that the clerk asked him if he had money in the bank and he told her he did not know whether the money would be in the bank yet, but he was expecting some money from his father and also some from back home from a loan on his automobile and it should be there within the next two days and that he would give her his name and address and she could notify him if the check was not paid and he would then see that it was taken care of immediately. He then testified that the clerk took the check; that he had four days previously attempted to make some arrangements to borrow money on his car and expected the loan to go through any time to meet the check, but that the loan was not accepted.

At the time of defendant's apprehension on October 23rd, when interviewed by an officer, defendant stated that he had written the check in question and also some other checks, and that he had no account with the bank but hoped to sell his car and obtain a loan on it and pay off the checks. Defendant at that time made no statement to the officer that the clerk in the store here in question was informed by him that he had no account in the bank or that he expected to have money therein within the next few days. Defendant admitted on cross-examination that he did not mention this claimed fact to the officer.

Defendant, in propria persona, appealed from the judgment of conviction and order denying a new trial, and contends generally: (1) that too great a delay resulted after his detention before he was taken before the magistrate for arraignment. (2) That he was erroneously denied a motion to have his attorney relieved as his counsel because "he was not cooperative", and that by reason thereof his constitutional rights were violated. (3) That he was misinformed of his rights when his counsel told him that if he admitted the prior felonies they could not be brought up at the trial before the jury, but that on cross-examination the district attorney nevertheless asked him if he had not been convicted of these same felonies. (4) That the district attorney maliciously questioned the defendant in respect thereto. (5) That no felonious intent to defraud was shown by the evidence in reference to the passing of the check in question and that defendant's attorney refused to call a certain witness who would be able to testify on this subject. (6) That cruel and inhuman treatment was inflicted upon the defendant prior to trial because of the acts of the officers in destroying medicine given to the defendant for his ulcers, and that their statement to him that he should die and that if he did die it would be just one "G-D-S-O-B less" in the world, was all in violation of his constitutional rights.

[1] As to complaint number (1) the record does not disclose the facts other than defendant's statement in his brief on appeal. Accordingly, defendant may not complain for the first time on appeal that he was not taken before the magistrate within the time prescribed by section 825 of the Penal Code.

[2] As to complaint number (2) the record shows that defendant was represented by competent counsel up to the time of his arraignment. At his attorney's request and with the consent of the defendant he was relieved as counsel for the defendant and another competent attorney was appointed by the court as counsel to represent the defendant. Defendant

and his appointed counsel appeared and entered a plea of not guilty. No justification appears for defendant's request that his appointed counsel be relieved from further service to defendant. At the trial defendant's counsel appeared and apparently conducted, in a proper manner, such defense as defendant was able to present, and defendant never thereafter indicated any dissatisfaction in reference to the manner in which his counsel conducted his case. No prejudice appears in this respect. People v. Ives, 17 Cal.2d 459, 476, 110 P.2d 408; People v. Stroble, 36 Cal.2d 615, 226 P.2d 330.

[3] As to complaints numbers (3) and (4), no impropriety or misconduct resulted when the district attorney inquired on cross-examination whether defendant had suffered two previous convictions of felonies. Section 2051 of the Code of Civil Procedure permits this inquiry as a means of impeachment of defendant's testimony. People v. Romer, 218 Cal. 449, 23 P.2d 749. Defendant should have been familiar with the provisions of this section, and the action of the district attorney in this respect does not indicate any malice or misconduct.

[4, 5] Complaint number (5) that no intent to defraud was shown is answered by the recitation of the people's testimony which the jury had the right to believe. It had the right to disregard defendant's testimony in this respect. People v. Boyce, 87 Cal.App.2d 828, 197 P.2d 842; People v. Brown, 72 Cal.App.2d 717, 720, 165 P.2d 707. There was no sufficient showing made in reference to what any witness which defendant claimed his counsel failed or refused to call would testify, or of its competency or materiality. There is no indication that defendant called this fact to the attention of his counsel or of the court at the time of trial or indicated that such a witness was available and would so testify. No prejudicial error resulted.

[6] The last complaint made, number (6), that defendant was given inhuman treatment by the officers, is not supported by the record other than defendant's bald, unsworn statement to this effect in his opening brief. If true, it is apparent from the statement claimed to have been made by the officer, that he did not want to be accused of understating his opinion of the defendant. There is no indication that defendant made any statement or confession as a result of or by reason of his claimed mistreatment by the officers. It cannot be said that the defendant was thereby prejudiced.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

126 Cal.App.2d 357

PEOPLE v. MARSHALL.

Cr. 2966.

District Court of Appeal, First District, Division 1, California.

June 30, 1954.

Hearing Denied July 28, 1954.

Convict's appeal from order of Superior Court, Alameda County, O. D. Hamlin, J., denying his petition for writ of error coram nobis to vacate convictions and sentences. The District Court of Appeal, Bray, J., held that the statute which prohibits a wife from testifying against her husband without his consent did not apply where the second count of the information charged the convict with an assault upon a person he claimed to be his wife.

Affirmed.

1. Criminal Law 🔑997(15)

Medical records dealing merely with physical condition failed to support convict's contention, in proceeding for writ of error coram nobis to vacate convictions and sentences, that he had been mentally deranged when he pleaded guilty.

2. Witnesses 🔑61(1)

Statute which prohibits a wife from testifying against her husband without his consent did not apply where one count of information charged defendant with assault upon person he claimed to be his wife. Code Civ.Proc. § 1881, subd. 1.

3. Criminal Law ⚷997(15)

Record, in proceeding for writ of error coram nobis to vacate convictions and sentences, failed to establish that convict had been denied effective aid of counsel, or that his confession had been obtained by promises of medical treatment or light sentence.

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Robert Marshall, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

BRAY, Justice.

In the Superior Court of Alameda County appellant was charged in an information with two felony counts: (1) assault with a deadly weapon with intent to commit murder on Sammie L. Boykin; (2) a similar assault on Rosa Lee Boykin. A prior felony conviction of burglary in the state of West Virginia was also charged. While represented by the Public Defender of Alameda County, appellant pleaded guilty under both counts to assault with a deadly weapon and admitted the prior conviction. No appeal was ever taken from the judgments entered on his pleas. On September 22, 1950, he was sentenced to the state prison. On May 26, 1953, in propria persona he petitioned said superior court for a writ of error coram nobis to vacate the said judgments and sentences. The matter was heard upon his petition, the accompanying exhibits, the records of the court, and upon certain affidavits filed in opposition to the petition. He appeals from the order denying that petition.

[1–3] We can find no error in the action of the trial court in denying the petition. Appellant contends his pleas of guilty should be set aside for five reasons: First, he contends that he has new medical evidence which shows that he was mentally deranged at the time he pleaded guilty. The medical records, merely dealing with a physical condition, which he attaches to his petition, fail to support this contention. Secondly, he contends he was denied effective aid of counsel in that the public defender was completely incompetent. There is no support for this contention. Thirdly, he contends the court erred at the preliminary hearing in admitting the testimony of the woman he claims was his wife. He would apply the portion of section 1881, subdivision 1, Code of Civil Procedure, which prohibits a wife from testifying against her husband without his consent, but would completely ignore the exception there stated to the rule—"this exception does not apply to * * * a criminal action or proceeding for a crime committed by one against the other * * *." The victim in the second count of the information is the woman whom appellant claims to be his wife. Fourthly, he contends his confession (apparently used at the preliminary examination) was obtained by promises of proper medical and diabetic care. The affidavits filed in opposition to the petition refute this contention. Fifthly, he contends his plea of guilty was prompted by the promise of the public defender that he would receive only a light sentence if he pleaded guilty. This is refuted by the affidavit of the public defender.

Practically all of these contentions were raised and denied in a prior application to the Alameda County Superior Court for writ of error coram nobis, which proceeding was considered by the trial court in this matter. Moreover, the records of other courts show that since his conviction he has made six applications for writs of habeas corpus to the following courts respectively: United States Supreme Court, United States District Courts (two applications), Sacramento County Superior Court, California District Court of Appeal (two applications). In addition, the United States District Court and the United States Circuit Court denied a certificate of probable cause, and the United States Supreme Court denied an appeal therefrom. It would appear that as said in Vernon v. Rappaport, 25 Cal.App.2d 281, 77 P.2d 257, appellant's right to raise these contentions and the right of the courts to rule on them "has been 'exercised and exhausted'". 25 Cal. App.2d at page 284, 77 P.2d at page 258.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

126 Cal.App.2d 554

PACIFIC GAS & ELECTRIC CO.

v.

INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16129.

District Court of Appeal, First District, Division 2, California.

July 15, 1954.

Proceeding to review an award by Industrial Accident Commission of permanent disability rating to an employee for injuries sustained in course of employment. The District Court of Appeal, Kaufman, J., held that award of 77% permanent disability rating for injuries sustained by employee was proper even though employee had, prior thereto, received 25½% partial permanent disability award for injury to another part of body.

Award affirmed.

1. Workmen's Compensation ⚷1030

Under provision of labor code regulating compensation for permanently disabled employee who has suffered a new injury, Industrial Commission determining what portion of total disability is to be charged against employer and what portion is to be charged against special injury fund must consider the later injury apart from the prior disability, and it must not be considered in relation to the prior injury or impairment in determining the rating of disability. Labor Code, § 4750.

2. Workmen's Compensation ⚷854

The period of temporary total disability of an employee, in computing disability rate, is that period when the employee is totally incapacitated for work.

3. Workmen's Compensation ⚷1030

Legislation providing for the Subsequent Injuries Fund was enacted with a view toward encouraging employment of handicapped persons. Labor Code, § 4751.

4. Workmen's Compensation ⚷851

Award of 77% permanent disability rating for injuries sustained by employee was proper, even though employee had, prior thereto, received 25½% partial permanent disability award for injury to another part of body. Labor Code, §§ 4658, 4662, 4750, 4751.

5. Workmen's Compensation ⚷1792

Doctrine of res judicata applies to awards of the Industrial Accident Commission and to issues actually decided in such cases as between the same parties or those in privity with them.

6. Workmen's Compensation ⚷1030

Rating of prior disability of employee was not an issue in proceeding brought to recover compensation from a new employer for subsequent injury.

Robert H. Gerdes, Raymond W. White, R. A. Whittlesey, C. T. Van Deusen, San Francisco, for petitioner.

Everett A. Corten and T. Groezinger, San Francisco, for respondent Industrial Acc. Commission.

KAUFMAN, Justice.

This is a petition for a writ of review in which petitioner Pacific Gas & Electric Company seeks to review an award of the Industrial Accident Commission of 77% permanent disability to its employee, Edwin C. Burton, for an injury sustained in the course of his employment.

On July 6, 1942, Burton was awarded partial permanent disability indemnity against the Associated Indemnity Corporation for permanent disability of 25½%

arising out of an accident while in the employ of the National Tank & Manufacturing Company. He sustained some loss of motion in his left ankle and foot, and some damage to the lower leg, for which he was compensated for 102 weeks at $13.58 per week.

On January 6, 1951, Burton while employed by Pacific Gas & Electric as a hand pipe wrapper, was knocked down and run over by a backing truck, sustaining fractures of the pelvis, fracture dislocation of the right sacroiliac joint with displacement of the innominate bone and traumatic asphixia with capillary hemorrhages of the upper chest, neck, face and scalp.

On July 2, 1952, Burton filed application for adjustment of claim, and the Subsequent Injuries Fund was joined as a party defendant. At the hearing Burton testified on cross-examination by counsel for the Subsequent Injuries Fund that there was an improvement in his left ankle during the ten-year period following the ankle injury. The 1951 injury caused a one-inch shortening of the employee's right leg, as well as other disabilities. The Permanent Disability Rating Specialist recommended a permanent disability rating of 77% attributable solely to the injury of January 6, 1951. Only 5% was added for the preexisting injury (which in 1942 had been rated at 25½%), making a combined permanent disability rating of 82%.

Petitioner contends that the Commission has no power to award a percentage of permanent disability in excess of 100% to an individual employee, and argue that if the permanent disability rating of 25½% is added to 77% the total is 102½%. Since the Labor Code refers to total disability as synonymous with 100%, petitioner maintains that it is illogical to assume that an employee could be more than 100% permanently disabled. Sec. 4658, Labor Code provides that if the injury causes permanent disability "the percentage of disability to total disability shall be determined and the disability payment computed" according to the schedule set forth in the section.

Sec. 4750, Labor Code, provides as follows: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

"The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury *as though no prior disability or impairment had existed.*" (Emphasis ours.)

[1] From a study of Sec. 4750 we must conclude that in cases such as the present, the Commission must consider the later injury apart from the prior disability, and it must not be considered in relation to the prior injury or impairment in determining the rating. See, Wolski v. Industrial Accident Commission, 70 Cal.App.2d 427, 429–431, 161 P.2d 283. It is clear from the reports and Findings of the referee that the 77% permanent disability was attributable solely to the 1951 injury without reference to the injury of 1940. When the preexisting disability was added to the later injury of 77%, the combined injuries produce a rating of 82%. The additional 5% could not, of course, be assessed against the present employer, under section 4750, Labor Code, but under provisions of sec. 4751, he was entitled to receive the 5% from the Subsequent Injuries Fund provided by the State.[1]

[2] Petitioner cited State Compensation Insurance Fund v. Industrial Accident Commission, 43 Cal.App.2d 233, 110 P.2d 510, a case in which an employee sustained

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[1] "Sec. 4751, Labor Code: If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous

two separate injuries suffering total temporary disability from each of them. The periods of total temporary disability overlapped, and the Commission held that the employee could not receive 200% total temporary disability for the overlapping period, holding in effect that the employee could not be more than 100% temporarily totally disabled *at one time*. The period of temporary total disability is that period when the employee is totally incapacitated for work. It is entirely logical to maintain that an employee can be only 100% incapacitated for work at any given time. And under the Commission's rating schedule an employee cannot be more than 100% permanently disabled, in any one accident. Nor can he be more than 100% permanently disabled by a series of accidents as measured by the Commission's rating schedule when ratings are combined, even though if added they total over 100%.

In the instant case the employee received a rating of 25½% permanent disability in 1942 entitling him to compensation for 102 weeks thereafter. When the 102 weeks had expired some time in 1944 the employee received no further compensation for the 1940 injury. It must be assumed that the employee was then fully compensated for the loss of earning power suffered in that accident. The theory of permanent disability rating, according to Campbell, is that the employee will be able to rehabilitate and readjust himself to his new earning capacity within an average period, and the ratings are computed so as to provide disability during that estimated period. (1 Campbell, Workmen's Compensation, Sec. 820, Vol. 1). Petitioner's interpretation of permanent disability, on the other hand, is that the injured workman can never be rehabilitated beyond the point when the permanent rating is made. It is contended that the employee herein must forever after in any proceedings be considered 25½% permanently disabled, and have therefore only a potential possibility of 74½% disability, even though conceivably he might sustain later injury conclusively presumed to be 100% under section 4662, Labor Code. If the employee herein, during the 105 weeks in which he received the compensation payments for the 25½% permanent disability rehabilitated himself by training to become a skilled telegrapher, and then sustained industrial injury resulting in the loss of both his hands, the conclusive presumption of 100% permanent disability would have to be applied, and clearly the 25½% for the ankle injury could not be subtracted, even though the mathematical total of the two would be more than 100%.

[3] The legislation providing for the Subsequent Injuries Fund has been enacted with a view toward encouraging employment of handicapped persons, and if that fund occasionally is resorted to for payment of compensation of a worker more than 70% permanently disabled from a combination of industrial injury and prior impairment or injury, such a legislative policy appears to be wiser and more economical than one which would discourage industry from employing handicapped workers no matter how skilled they might be. It cannot be contemplated that such policy will discriminate against an injured worker and in favor of industry. In this type of case the employer would have to pay 77% permanent disability for this one injury to a worker who had not previously been injured, but would pay less to a worker who had some prior though unrelated handicap under petitioner's theory.

[4] Petitioner relies on Gardner v. Industrial Accident Commission, 28 Cal.App. 2d 682, 83 P.2d 295, as authority that the percentage of disability which claimant sustained in a prior accident should be subtracted from the percentage awarded for the later accident. There a combined rating of 58¾% was given for the whole injury when a workman's left leg was ampu-

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disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article."

tated above the knee. From that was subtracted a 12% rating which was awarded in the State of Nevada for an injury to his left foot. The opinion does not indicate whether or not the employee was at the time of the accident still being compensated for injury to the leg which was amputated. The case is, on its facts, clearly distinguishable from the present case, as here we do not have a case of injury to the same part of the body. The case reiterates the rule that the determination as to the later injury must be made without relation to the earlier injury, and that no compensation for disability attributable solely to the prior injury or disease may be included in the award for which the employment was in nowise responsible. The employer herein has not shown that the evidence does not support a finding that all of the described factors of disability which were rated 77% were caused solely by the 1951 injury, nor have they shown that any factor of disability from the 1940 injury was included in arriving at the rating of 77% for the last injury.

[5, 6] Petitioner contends finally that the percentage of 25½% is res judicata on the percentage to be given the prior injury. It is true that the doctrine of res judicata applies to awards of the Industrial Accident Commission and to issues actually decided in such cases as between the same parties or those in privity with them. French v. Rishell, 40 Cal.2d 477, 254 P.2d 26. The only issue to be decided in the present case that is of any concern to petitioner is the percentage of the last injury. No issue concerning this injury was involved in the 1942 award. No factors of the 1940 injury were used in arriving at the 77%. As far as the Subsequent Injuries Fund is concerned, it is a new party, and its liability for the residual disability in excess of 77% is a new issue.

No error appears to have been committed by the Commission in assessing petitioner's liability and the award should be affirmed.

Ordered award affirmed.

NOURSE, P. J., and DOOLING, J., concur.

HILDEBRAND
v.
ATCHISON, T. & S. F. R. CO. et al.*
Civ. 20060.

District Court of Appeal, Second District,
Division 2, California.
July 7, 1954.
Hearing Granted Sept. 2, 1954.

Action for personal injuries resulting from collision of motorcycle with locomotive at crossing. The Superior Court, Los Angeles County, Anthony Brazil, J., granted railroad's motion for a nonsuit on grounds motorcyclist was contributorily negligent as a matter of law and motorcyclist appealed. The District Court of Appeal, Moore, P. J., held that where operator of motorcycle was proceeding at 20 miles per hour when he struck locomotive directly across his path after motorcyclist had first sighted locomotive 100 feet away while going 35 miles per hour, motorcyclist was contributorily negligent as a matter of law.

Judgment affirmed.

1. Railroads ⟾333(2)

Where operator of motorcycle was proceeding at 20 miles per hour, when he struck locomotive directly across his path after he had first sighted locomotive 100 feet away while going 35 miles per hour, motorcyclist was contributorily negligent as a matter of law. Vehicle Code, §§ 648, 670.

2. Negligence ⟾65
Railroads ⟾324(1)

The defense of contributory negligence stems from the implication of such negligence on the part of defendant as would justify a recovery by plaintiff if he were not also in fault and the exercise of ordinary care by motorist at a railroad crossing is not excused by the railroad's failure to exercise such care.

3. Railroads ⟾324(1), 327(1, 3)

A motorist or pedestrian is required to exercise ordinary care in attempting to cross railroad tracks and if he relies upon not hearing or not seeing a train or a signal, and takes no further precaution, he does so at his own risk.

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* Vacated 281 P.2d 249.

4. Railroads ⇐327(1)

Motorist on highway has duty to exercise care commensurate with perils known by him to inhere in the premises occupied by railroad tracks and to look and listen until he sees that it will be safe for him to proceed.

S. L. Kurland and Robert H. Green, Los Angeles, for appellant.

Robert W. Walker, Louis M. Welsh, William L. Pemberton, Los Angeles, for respondents.

MOORE, Presiding Justice.

In his action for personal injuries resulting from driving his motorcycle into a locomotive at a crossing, appellant was denied relief pursuant to a motion for nonsuit by defendants on the ground that there was "no attempt to show that the Santa Fe was involved" and as to defendant Los Angeles Junction Railway Company, "the evidence * * * establishes beyond a question of a doubt that the accident occurred at the crossing near 61st Street * * * and that it would be impossible for it to have happened at the lower crossing" as contended by appellant.[1]

After an evening with a lady friend at the theater, appellant was on his way home about 3:30 o'clock in the morning. He was operating a new motorcycle in a northerly direction on Eastern Avenue in Los Angeles, a highway familiar to him. He knew the avenue was crossed by railroad tracks and even contends that the collision occurred at a crossing 1,000 feet south of the actual scene. The night was clear and dark, and the pavement dry. Although familiar with the area, he did not bring his vehicle to a stop to look and listen, but, having passed a rise in the road, at a distance of 100 to 150 feet from the track, he first saw 250,000 pounds of locomotive moving eastward and directly across his path, illuminated by his own headlight. His course was about three feet to the east of the center, double white line. He promptly applied his brakes by both hand and foot, reducing his speed to less than 20 miles per hour at the point of collision. He saw no wigwag; heard neither whistle nor bell, nor the issue of steam. Just before crossing Eastern Avenue the locomotive had stopped 40 feet away without even ringing a bell. Descending at a speed of 35 miles an hour from the rise in the avenue with his motorcycle light shining on the mogul engine, appellant crashed into the monster, with disastrous results to motorcycle and himself.

[1] The motion for nonsuit was granted on the ground that appellant was contributorily negligent as a matter of law. Judgment was entered denying appellant relief. He now contends that such ruling was prejudicial error and demands a reversal. Such contention has no factual basis and its triumph would be error. He testified that when he struck the engine, he was going at a speed of 20 miles an hour. Either he stepped on the throttle again after the brakes had been applied or he had been moving at a faster speed than he testified.

A motorcycle must be equipped with brakes that will cause the machine going 35 miles per hour to come to a complete stop within 113 feet. Vehicle Code, § 670. If he applied his brakes and they were in working order when 150 feet away from the engine, he would have stopped within 113 feet. If he had reduced his speed to such extent as to be able to stop in another 13 feet, by the simple expedient of turning to right or left he would have avoided hitting the engine; he would not have reached the tracks. Having a headlight that enabled him to discern "a person or vehicle at a distance of at least 100 feet ahead",

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[1] While appellant complained that the accident occurred at a point 150 feet north of Randolph Street on Eastern Avenue, the fireman Plumley testified it happened about 1,000 feet north of Randolph on the Angelus Paper track spur. This discrepancy is not vital to the principles involved.

Vehicle Code, § 648, the huge engine was in plain view when he was 100 feet south of the tracks.

[2–4] Conceding the absence of wigwags, bells and other warnings by the operatives of the engine, the position of appellant is not improved by such concession. He lost, not because of a lack of negligence of the operatives but by virtue of his contributory negligence. The defense of contributory negligence stems from the implication of such negligence on the part of defendant "as would justify a recovery by the plaintiff if he were not also in fault." Herbert v. Southern Pacific Co., 121 Cal. 227, 232, 53 P. 651, 652. In deciding whether the nonsuit was correctly ordered, this court's attention is focused upon whether appellant was negligent and, if so, whether his negligence proximately contributed to cause his collision. A railroad crossing is a place of danger and is, itself, a sufficient warning always to be heeded. The exercise of ordinary care at such crossing is not excused by the railroad's failure to exercise such care. While the quantum of a motorist's care required as reasonable may be less where there is a flagman, a wigwag, or other warning, still such warnings are no guaranty of safety. A motorist or pedestrian is still required to exercise ordinary care in attempting to cross the tracks. If he relies upon not hearing or not seeing a train or a signal, and takes no further precaution, he does so at his own risk. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 435, 45 P.2d 183; Koster v. Southern Pacific Co., 207 Cal. 753, 763, 279 P. 788; Collom v. Bloch, 70 Cal.App. 33, 36, 232 P. 486. If a traveler is familiar with a railroad crossing, damages for injuries sustained there may not be recovered on the ground of a lack of warning of the perils. A person approaching a railroad track knows he is in the presence of danger. He must therefore take advantage of every reasonable opportunity to look and listen before going upon the roadbed. He cannot rely upon either the custom or the duty of an engineer to give signals. He has no right not to look or not to listen because he has heard no such signals. He is not entitled to rely upon the engineer's performance of his duty "so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see." 207 Cal. 753, 765, 279 P. 793; Koch v. Southern Calif. Railway Co., 148 Cal. 677, 680, 84 P. 176, 4 L.R.A.,N.S., 521; Green v. Los Angeles Terminal Railway Co., 143 Cal. 31, 35, 76 P. 719; Hutson v. Southern Pacific Railway Co., 150 Cal. 701, 704, 89 P. 1093; Herbert v. Southern Pacific Co., supra; Larrabee v. Western Pacific Railway Co., 173 Cal. 743, 748, 161 P. 750. It is the duty of a motorist on any highway to exercise a care commensurate with the perils known by him to inhere in the premises occupied by railroad tracks and to look and listen until he sees that it will be safe for him to proceed. Christianson v. Southern Pacific Co., 133 Cal.App. 515, 520, 24 P.2d 536.

In New York Lubricating Oil Company v. United Railroads of San Francisco, 191 Cal. 96, 215 P. 72, the driver of the truck, fully aware of the approach of the electric car, closed his eyes to the danger of trying to cross the track and drove his truck into the path of the on-coming train. Since he could have stopped his truck at any time prior to the collision within a distance of three feet, his failure to do so was negligence and a proximate cause of his injury. Also, in Dolton v. Green, 72 Cal.App.2d 427, 164 P.2d 795, the plaintiff, headed west, stopped at a stop sign, 58 feet from the point on the tracks where he was to cross. The train was then a block away, coming eastward at a speed of 50 miles an hour. He proceeded to turn south onto the tracks behind another automobile which, in stopping for vehicular traffic, brought him to a standstill on the tracks as the train was coming 200 feet distant. Although he was in a safe position 58 feet from the tracks and in approaching the point of impact he could have stopped within 12 feet, he heedlessly continued into the jaws of danger and thereby contributed to his own injuries.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

126 Cal.App.2d 636

LARRAMENDY et al. v. MYRES et al.

Civ. 19879.

District Court of Appeal, Second District, Division 3, California.

July 21, 1954.

Hearing Denied Sept. 8, 1954.

Action for burns received by minor plaintiff when a smoke-producing device, used by her in dancing act, set fire to dress. The Superior Court of Ventura County, Walter J. Fourt, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Parker Wood, J., held that novelty company owners were liable for burns received by plaintiff even though device had been purchased by directors of the dancing exhibition and no privity of contract between defendants and plaintiff.

Judgment affirmed.

1. Negligence 🔑27

Duty of care exists even in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril.

2. Negligence 🔑27

Novelty company owners were liable for burns received by plaintiff when smoke-producing device, advertised and sold by company, and used by plaintiff in dancing act, set fire to her dress, even though device had been purchased by directors of the dancing exhibition and there was no privity of contract between defendants and plaintiff.

3. Evidence 🔑150

Where certain tests of a smoke-producing device sold by defendant and which had set fire to dress of plaintiff were made by chief of fire department prior to trial for injuries received by plaintiff but there was no competent evidence that powder used for testing such device was the same quality as that received from the company with the device, reception of testimony regarding such tests was error.

4. Evidence 🔑150

Reception or rejection of evidence belonging to the class of evidence designated as experiments lies largely within the discretion of the trial court, except that it must be shown that substantially the same conditions existed at the time of the experiment as existed at the time of the original occurrence and that the evidence is of such a character as to aid rather than to confuse the minds of the jurors with collateral matters.

5. Trial 🔑27

In action for burns received by plaintiff when smoke-producing device set fire to her dress, permission given to demonstrate operation of device in court room during trial was not error.

6. Damages 🔑132(1)

Award of $52,528.24, being $7,528.24 for special damages and $45,000 for general damages, to 12 year old female plaintiff for injuries received from first, second and third degree burns covering more than 40% of body, as result of which plaintiff was in hospitals about 7½ months and in bed at home several months, and had many scars on body, was not excessive.

* * *

Jack Schnider, Robert J. Sullivan, Santa Monica, for appellants.

James C. Hollingsworth, Hammons, Willard & Todd, Ventura, for respondents.

PARKER WOOD, Justice.

Action for damages resulting from burns received by the minor plaintiff when a smoke-producing device, used by her in a dancing act, set fire to her dress. In a trial without a jury, plaintiffs obtained judgment against defendants Abbott and Bordner, individually, and against defendants Abbott and Bordner doing business as Abbott's Magic Novelty Co. Those defendants appeal from the judgment.

Upon motion of plaintiffs the action was dismissed as to defendants Myres, Groves, and High School District. Motions for nonsuits were granted as to defendants

Francine Lanteri, Jolene Lanteri Jenkins, and George Boston.

Defendants Francine Lanteri and Jolene Lanteri Jenkins, known as the Lanteri sisters, conducted a dancing school in Ventura. Deanna Larramendy, plaintiff herein, 12 years of age, was a pupil in that school who had been taking ballet and toe dancing lessons about two years. On April 15, 1950, the Lanteri sisters staged a dancing exhibition in the auditorium of the Ventura Junior College wherein several pupils of the dancing school participated. Deanna was chosen for the leading role—to play the part of Persephone in a ballet, based on the myth of the seasons, known as "The Underground Queen." It was a part of her role, while dancing, to step on or trip a smoke-making device and thereby cause a puff or cloud of smoke to arise from the floor. Then, out of the smoke or "illusion," Pluto would arrive on the stage.

Francine Lanteri read, in a catalogue or trade magazine "for stage props," an advertisement regarding a smoke-making device known as "Abbott's Pufferoo." She wrote to Abbott's Magic Novelty Company, located on Sunset Boulevard in Los Angeles and ordered the smoke-making device sent to her by mail C.O.D. Thereafter she received the device by mail C.O.D. Defendants Abbott and Bordner operated Abbott's Magic Novelty Company located at 6505 Sunset Boulevard in Los Angeles. In October, 1949, an advertisement bearing the title "Abbott's Pufferoo" was placed in a magazine, known as "Genii," by Abbott's Magic Novelty Company, Colon, Michigan.

The device was received in evidence, but it has not been forwarded to this court. It has not been described in any of the briefs or in the reporter's transcript. It seems from statements made by witnesses in explaining how the device was operated (and from written directions which were with the device) that the device consisted of: a receptacle into which explosive powder was poured; a 4½ volt battery; a filament wire which extended horizontally through the middle of the powder receptacle and was connected with one end of the battery and a metal piece above a contact post; and another wire which was connected with the other end of the battery and with the contact post. In the package in which the device was received, there was a bottle of explosive powder and also a piece of paper containing directions for operating the device. The writing which was on that paper is set forth below.[1] After the receptacle was half filled with powder—to the place where the powder touched the filament wire, and after the device was placed on the floor, the device was operated by stepping on the metal piece (above the contact post) which contact lighted the filament wire which ignited the powder. There was evidence that the device would not work if the receptacle was more than one-half filled with powder and the powder covered the filament wire. (It was stated that if the powder covered the wire, the

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[1] "Abbott's Improved Pufferoo
"Abbott's
"Colon, Mich.

"First connect loose wire from battery to contact post. Half Fill the hole with the powder supplied. Hold away from face while doing this as you may accidently press contact.

"Place on floor and press down on metal piece with foot to make contact to light element wire. The puff will take place a few seconds later. Be sure to stand back when making contact so that puff will not strike face.

"In this improved model we send you extra element wire for replacement. This should be done after every six workings. To do this, unscrew nuts from posts near hole. Cut off about two inches of wire, twist ends around each post and refasten nuts. Then with finger gently push down middle part of wire into hole.

"Battery replacements	$1.00
"Powder replacements	.25 per bottle or 3.00 per pound.

"Abbott's Magic Novelty Co.
"Colon, Michigan.
"Phone Hollywood 5679
"Abbott's
"Magic Novelty Company
"6505 Sunset Boulevard
"Geo. L. Boston "Hollywood,
"Manager California."

wire would not ignite the powder because the powder would absorb the heat.)

Prior to the production of the play, there were three rehearsals in which the smoke device was used. On one of those occasions the device did not work when Deanna stepped on it. On the two occasions when it worked, Deanna did not see any flame coming from it. Francine Lanteri did not see any flame come from the device when it was used at rehearsals. During rehearsals Deanna wore shorts or tights. During the play she wore a ballet costume which was a flimsy dress with a full skirt made of six or seven layers of tarlatan or tulle. The bottom hem of the skirt was about nine inches from the floor, and the diameter of the skirt at the bottom hem was about three feet.

The device was placed on the stage for use by Deanna. During the play when she stepped on the metal contact piece there was a puff of smoke, and a flame from the device set fire to her dress and she was severely burned.

The court found, in part, as follows: The device was manufactured, sold, and supplied by defendants Abbott, Bordner, and Abbott and Bordner doing business as Abbott's Magic Novelty Co. The device was designed, manufactured, sold and supplied for the purpose of emitting a puff of smoke and creating an illusion in the staging of performances such as said ballet performance. The device was imminently, inherently, and manifestly dangerous in that in addition to producing a puff of smoke it produced a large flash of flame when operated according to the instructions furnished by said defendants, and when so operated it was likely to cause dress material such as that worn by Deanna to become ignited, all of which was known or should have been known by said defendants. At said performance Deanna stepped on the device in accordance with directions accompanying the device, and as a proximate result thereof a flash of flame was emitted which ignited the dress and caused it to burst into flame and severely burn Deanna. The device was dangerous for its intended use, namely, that of creating an illusion, and said danger was known or should have been known to said defendants. The device was used pursuant to directions which accompanied the device. Said defendants neglected to reasonably warn and inform Deanna of the dangerous propensities of said device. The only warning and information given to Deanna was that set forth in said directions, and said warning and information advised her only as to the danger from smoke and not as to the danger of fire. Deanna was not contributorily negligent. There was no intervening causation or negligence of a third person that would relieve said defendants from liability.

[1, 2] Appellants contend that they owed no legal duty to plaintiffs and that consequently there was no liability on the part of appellants. They argue that there was no evidence of any personal relationship between them and plaintiffs; that the device was purchased by the Lanteri sisters, and that the purchase involved no oral representations and was based on an advertisement. "The courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril." Sheward v. Virtue, 20 Cal. 2d 410, 412, 126 P.2d 345. "It is universally recognized that a manufacturer or seller of an article which is inherently and imminently dangerous to human life or health, or which, although not dangerous in itself, becomes so when applied to its intended use in the usual and customary manner, is liable to any person, whether the purchaser or a third person, who, without fault on his part, sustains an injury which is the natural and proximate result of negligence in the manufacture or sale of the article, if the injury might have been reasonably anticipated. Liability does not rest on the ground of warranty; nor does liability depend on privity of contracts, but rather on a breach of a public duty owing to all persons into whose hands the article may lawfully come, and by whom it may be used, and whose lives may be endangered thereby, to exercise care and caution commensurate with the peril and not to expose human life to danger by carelessness or negligence." 65

C.J.S., Negligence, § 100, pp. 621, 622, 623. In Restatement, Torts, page 1039, section 388, it is said: "One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so." The court found, as above stated, that the device was inherently dangerous. That finding was supported by the evidence. The device, which was operated by igniting powder with a lighted electric wire, caused a fire-producing explosion. The court also found, upon sufficient evidence, that defendants neglected to reasonably warn of the dangerous propensities of said device. The written directions, which were with the device when it was received, warned: to hold the device away from the face while filling the hole with powder; and to stand back when making contact (when the device is on the floor) so that "puff" will not strike face. There was no warning of danger from fire. There was liability on the part of appellants.

[3–5] Appellants contend further that the court erred (1) in receiving testimony regarding certain tests of the device which the chief of the fire department of Ventura made prior to the trial and (2) in permitting a demonstration of the operation of the device to be made in the courtroom during the trial. The chief, called as a witness by plaintiffs, testified that prior to the trial he operated the device numerous times by following said directions (which were received with the device), except that he did not use the powder which came with the device; that in those tests he held material, similar to the material of Deanna's dress, eight or ten inches above the device and in each test the fire that was produced was at least eight inches high and it would ignite anything of a tarlatan-type nature; that a chemist made an analysis of the powder (which came with the device) and he (witness) used powder of the same quality in making the tests. In the courtroom while he was a witness, he operated the device by following said directions and using powder that came with the device. In that test he held tarlatan, which was a part of Deanna's dress, about ten inches above the device, and the fire that came from the device hit the tarlatan and caused it to smolder or glow but it did not blaze. Appellants argue that the evidence regarding the tests should not have been received because the tests were not made under conditions that were substantially the same as the conditions under which the accident occurred. As to the tests made prior to the trial, there was no competent evidence that the powder used was the same quality as the powder which was received with the device, and the evidence regarding those tests should not have been received. As to the demonstration in the courtroom of the operation of the device, appellants argue that there was no evidence that the draft conditions there were the same as the draft conditions on the stage at the school when the accident occurred. The reception or rejection of evidence, belonging to the class of evidence designated as experiments, "lies largely within the discretion of the trial court, with this limitation—that it must be shown that substantially the same conditions existed [at the time of the experiment as existed at the time of the original occurrence], and, further, that the evidence shall be of such a character as to aid rather than to confuse the minds of the jurors with collateral matters." People v. Ely, 203 Cal. 628, 632–633, 265 P. 818, 820. The trial court did not err in permitting a demonstration of the operation of the device to be made in the courtroom.

[6] Appellants also contend that the amount of damages awarded was excessive. The judgment was for $52,528.24, being $7,528.24 for special damages, and $45,000 for general damages. The minor plaintiff received first, second, and third degree burns which covered more than 40 per cent

of her body. She was in hospitals about seven and one-half months, and in bed at home several months. There were several skin-grafting operations and during those operations she was under a general anesthetic. There were many blood transfusions. Many scars are on her body. The bills for hospital and medical services amounted to $7,028.24, and there was evidence that bills for further treatments would amount to $500. This contention is not sustainable.

The judgment is affirmed. The appeal from the order denying the motion to enter a different judgment is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

126 Cal.App.2d 655

SWEETWATER FRUIT CO.

v.

CITY COUNCIL OF NATIONAL CITY et al.

Civ. 4836.

District Court of Appeal, Fourth District, California.

July 22, 1954.

Mandamus proceeding brought to require city council to adopt an ordinance de-annexing and excluding from city certain annexed territory. The Superior Court of San Diego County, John A. Hewicker, J., issued peremptory writ and entered judgment for petitioner, and city appealed. The District Court of Appeal, Mussell, J., held, on sole issue as whether petitions to exclude property had been signed by property owners holding more than 75 per cent in assessed valuation of annexed property petitions were sufficient even if contested valuations were excluded.

Judgment affirmed.

1. Municipal Corporations 🔑33(5)

Electors who signed petition to exclude property annexed by city under provisions of Uninhabited Territory Act of 1939 could not, after filing of petition, by withdrawing their names defeat the jurisdiction of the body with which the petition was filed. Government Code, §§ 35300–35326, 35561.1.

2. Mandamus 🔑168(4)

In mandamus proceeding brought to require city council to adopt an ordinance de-annexing and excluding from city certain annexed territory, wherein sole issue was whether petitions were signed by property owners holding more than 75 per cent in assessed valuation of annexed property, petitions showed total assessed valuation of more than 75 per cent, even with deduction of all contested valuations. Government Code, § 35561.1.

Edwin M. Campbell, National City, for appellants.

Merideth L. Campbell, National City, James B. Abbey, San Diego, for respondent.

MUSSELL, Justice.

On April 18, 1951, annexation proceedings, under the provisions of the Uninhabited Territory Act of 1939, Government Code sections 35300–35326, were completed by the city of National City, a municipal corporation of the sixth class, annexing thereto certain territory known as "Rancho Mesa". Thereafter, within two years, petitions were filed pursuant to the provisions of section 35561.1 of the Government Code, to exclude all of the property so annexed. The city refused to pass an ordinance excluding said area on the ground that the persons signing and filing petitions with the city clerk requesting exclusion of the territory known as Rancho Mesa do not constitute "owners of property within said territory owning not less than 75 percent of the land in the territory * * * by assessed value, as shown on the last equalized assessment roll of the county * * *."

The trial court found that the petitions were sufficient in this respect and complied in all respects with all the provisions and requirements of said section 35561.1 of the Government Code. A peremptory writ was issued and judgment was entered requiring the city council to forthwith adopt an ordinance de-annexing and excluding from the city the territory known as Rancho Mesa. The city appeals from this judgment.

The parties to this appeal, through their respective counsel, have filed herein a written stipulation that all of the parcels of property within the territory known as "Rancho Mesa" are as therein set forth; that the identification number set forth before each parcel is the San Diego county assessor's arbitrary assessment number; that the valuation set forth after each parcel is the assessed valuation of each parcel of property within Rancho Mesa as shown on the 1951–1952 equalized assessment roll of the assessor of San Diego county; that the owners of said property, both at the date of signing said petition and at the date of the filing of said petition with the city clerk and at all times thereafter up to and including December 16, 1952, the date of rejection of all petitions by the city council are as therein set forth as follows:

"Arbitrary Number:	Owner:	Assessed Value:
33–1A–1	Rancho Hills, Inc.	$ 270.00
33–1A–2	Sweetwater Fruit Co.	2,840.00
33–1A–3	Rancho Bonita, Inc. also known as Sweetwater Fruit Co.	1,210.00
33–1A–4	Rancho Hills, Inc.	1,050.00
33–1A–5	City of San Diego	320.00
33–1B–1	Bank of America Trust & Savings, in trust for Rancho Bonita, Inc. also known as Sweetwater Fruit Co.	390.00
33–1B–2	Goldie & Clarke Bequeaith	300.00
33–1B–3	Homer Brown	80.00
33–1B–4 & 5	Anne Chincoll Kelly	90.00
33–1B–6	Sweetwater Fruit Co.	620.00
33–1B–7	Harlan & Gladys Dwiere	1,270.00
33–1B–8	V. R. & Ora E. Buff	1,740.00
33–1B–9	City of San Diego	20.00
33–1B–10	Joseph & Lydia Willkomm	1,760.00
33–1B–11	John & Verna McIntosh	2,990.00
32–135C–1 to 14, inc.	Verda Adams	280.00
32–135A–1 to 10, inc.	Verda Adams	200.00
32–135a–11	Unknown	50.00
32–135B–1 & 2	Verda Adams	40.00
32–135B–3, 4 & 5	West Coast Corporation	120.00
32–135B–6	Verda Adams	20.00
32–62A–1	Sylvain & Frances Uterwyk	1,980.00
32–62A–2	Daniel P. Bauert	1,960.00
32–62A–3	Quayle & Althea Mumford	1,680.00
32–62A–4	Matiana & Eligio Vidrio	1,250.00
32–62A–5 & 6	Antonio & Margareta Martinez	690.00
32–62A–7	Feliz Mediano	220.00
32–62A–8	E. O. & Mrs. E. O. Crutchfield	1,170.00
32–62A–9A	Darwin Newell	470.00
32–62A–9B	George & Ina Newell	470.00
32–62A–10	Maxinano & Avis Tulao	2,590.00
32–62A–11	Silver Potter	150.00
32–62A–12	Unknown	20.00
		$28,310.00"

The statute in question, Government Code, § 35561.1, provides that a petition for de-annexation must be signed by owners of property located in the area annexed of not less than 75 per cent in area and not less than 75 per cent in assessed valuation. It is conceded by the appellants that there is no question that the petitions were signed by owners of property holding more than 75 per cent of the *area* of the territory known as Rancho Mesa. The sole question, therefore, for consideration is whether the petitions were signed by property owners holding more than 75 per cent in assessed valuation of the property sought to be excluded.

[1] Appellants contend that since George H. Newell, Mrs. George Newell, Feliz Mediano and A. E. Martinez, whose names are listed in said stipulation, withdrew their signatures from the petitions after they were filed with the clerk, that the valuations set opposite their names should not be considered in computing the total assessed value. There is no merit in this contention for, as was held in Rogers v. Board of Directors of City of Pasadena, 218 Cal. 221, 223, 22 P.2d 509, signers of a petition of this general character may not, after filing, withdraw their names and thereby defeat the jurisdiction of the body with which the petition was filed.

Appellants next contend that the assessed valuation of the property of Quayle and Althea Mumford, as shown by the stipulation, should be reduced by one-half since the petition for exclusion was signed only by Quayle Mumford and the property was owned by and assessed to both Quayle and Althea Mumford. If this reduction in the assessed value was allowed, the total would be reduced in the sum of $840.

Appellants also contend that no part of the assessed valuation of the property owned by Matiana and Eligio Vidrio ($1250) should have been considered by the city council in determining whether or not sufficient assessed valuation was shown. Apparently this petition was signed by Encarnacion Vidrio, as agent for the Vidrios and filed with the clerk. Subsequent to the filing thereof a power of attorney, date January 13, 1953, was signed by the Vidrios empowering Encarnacion Vidrio to act as their attorney in fact in ratifying and approving his acts in signing the said petitions for exclusion.

Finally, it is argued that Sylvain Uterwyk, Frances Uterwyk and Daniel P. Bauert withdrew their signatures from their petitions on December 6, 1952, said date being prior to the filing of these petitions with the city clerk. The stipulated assessed value as to these parties amounts to the sum of $3940.

[2] The total assessed value, as shown by the stipulation, is $28,310, and it was necessary for the petitioners to file petitions for exclusion signed by the owners of property within the territory sought to be excluded owning property of not less than 75 per cent of the total assessed value, namely, $21,232.50. If we deduct the assessed values of the properties of the Vidrios ($1250), the Uterwyks ($1980), Bauert ($1960) and $840 in the Mumford case, a total of $6030, the petitions still show a total assessed valuation of $22,280, or more than that required by section 35561.1 of the Government Code.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

126 Cal.App.2d 587

PEOPLE v. PRIEGEL.

Cr. 800.

District Court of Appeal, Fourth District, California.

July 15, 1954.

Prosecution for escape from county hospital while detained there as prisoner. Defendant was convicted in the Superior Court of San Diego County, John A. Hewicker, J., and defendant appealed. The District Court of Appeal, Barnard, P. J., held that under order transferring defendant from jail to hospital and specifying that he be kept there without guard until returned to sheriff's custody, defendant remained prisoner while in hospital so that his escape constituted criminal offense.

Judgment affirmed.

1. Judgment 🔑524

Entire order of court must be considered as whole, and not merely one phrase therein, to determine its meaning and effect.

2. Escape 🔑1

Under order transferring defendant from jail to county hospital for treatment and specifying that he should be kept there without guard until returned to sheriff's custody, defendant remained prisoner while in hospital so that his escape therefrom constituted criminal offense. Pen.Code, § 107.

Robert N. Reynolds, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of escape from a county hospital, in violation of section 107 of the Penal Code, and was further charged with three prior convictions. He admitted the prior convictions, and pleaded not guilty and not guilty by reason of insanity. He later withdrew the plea of not guilty by reason of insanity, and waived a jury trial. The court found him guilty as charged, and he has appealed from the judgment.

While the defendant was confined in the county jail, awaiting trial on another felony charge, a judge of the Superior Court made an order, on August 20, 1953, for his removal to the County Hospital. This order, after reciting that it appeared by affidavit that the defendant is a prisoner confined in the county jail under due process of law, and that he requires attention which cannot be furnished in said jail, reads:

> "It is therefore ordered that said Priegel, Jerome D. be removed from said County Jail to the San Diego County Hospital for treatment, and be kept there and so treated, and upon his recovery be returned to the custody of the Sheriff of San Diego County.
>
> "It is further ordered that said Priegel Jerome D. be kept at said San Diego County Hospital during the period of his treatment without guard."

Pursuant to this order defendant was taken by two of the sheriff's deputies to the County Hospital, where he was placed in the psychopathic ward. He was in handcuffs from the time the officers took him from the jail until they arrived inside this ward, after which the handcuffs were removed and the doors of the ward were again locked. In addition to the other locked doors of this ward, the defendant was placed in a room the door of which was kept locked. The window of this room was covered with a heavy mesh grating which was locked with a padlock. Early in the morning of August 23, the defendant escaped through this window. A piece of steel was found in his room, the padlock from the window was sprung, and the wire mesh was bent. The defendant was found and again taken into custody two days later, and this proceeding followed. The defendant testified, among other things, that he was sent to the county hospital at his own request; that he had asked to go there for medical attention; that he had complained of pains in his head; that he had been in the psychopathic ward once before; that he could not say definitely whether or not he had asked to be sent to the psychopathic ward; and that he would not say that he was sent to the psychopathic ward against his will.

The sole contention here made is that the evidence is not sufficient to support the judgment of conviction. It is argued that at the time of his alleged escape the defendant was not a "prisoner" within the meaning of section 107, since the provision in the court's order that he be kept "without guard" means that he was not to be guarded or restrained in any way; that the phrase "without guard" controls over the word "kept"; that it appears that he was not in custody since the court order provided that upon his recovery he should be "returned to the custody" of the sheriff; that any restraint imposed upon him by the hospital attendants was illegal, since the court's order provided that he was not to be guarded or restrained; and that it conclusively appears that by the order made the court released him upon his own recognizance.

[1] The entire order made by the court must be considered as a whole, and not merely one phrase therein, in order to determine its meaning and effect. The fact that the defendant was to be kept "without guard" does not eliminate the effect of the provision that he was to be "kept", and does not indicate that he was being released from custody, or that he was free to stay in the hospital or leave as he chose. It was ordered that he be "removed" from the jail to the hospital "for treatment, and to be kept there and so treated", and further ordered that on his recovery he was to be "returned" to the custody of the sheriff. Instead of indicating an intention to release the defendant from custody for a time, the order clearly discloses an intention to maintain continuous custody, the only change being with respect to the place of custody. It is specifically ordered that he is to be "kept" in the hospital "during the period of his treatment", and to be then returned to the custody of the sheriff.

The use of the phrase "without guard" relieved the sheriff of the duty of furnishing a deputy to guard the defendant during the period of treatment but in no way affected the duty placed on the hospital authorities to keep him there during that period, and until he was returned to the custody of the sheriff. The only way they could carry out the court's order was to lock the defendant up, and the evidence is that the only facilities they had for keeping a patient locked up was by placing him in the psychopathic ward. This was done, and while the defendant was thus being kept behind locked doors and windows he broke out and escaped.

[2] The order cannot, as a matter of law, be interpreted as one releasing the defendant on his own recognizance, or in any way releasing him from custody, and the evidence sustains the judgment of conviction.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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126 Cal.App.2d 560

PEOPLE v. FOX.

Cr. 2935.

District Court of Appeal, First District,
Division 2, California.
July 15, 1954.

Rehearing Denied July 30, 1954.

Hearing Denied Aug. 10, 1954.

Defendant was prosecuted with others for violation of bookmaking statute and for conspiring to violate the statute, and was prosecuted alone on a separate indictment for substantive violation of the statute. The co-defendants having pleaded guilty to a substantive offense, other charges against them were dismissed and defendant was separately convicted on both indictments. The Superior Court, in and for the City and County of San Francisco, H. A. Van der Zee, J., granted a new trial on the conspiracy charge and rendered judgment on other charges, and defendant appealed. The District Court of Appeal, Dooling, J., held that grant of new trial on the conspiracy charge required that a new trial be granted on the substantive offenses charged in first indictment, but that evidence supported conviction under second indictment.

Order denying motion for new trial on substantive counts in first indictment reversed with directions; judgments and order on second indictment affirmed.

1. Criminal Law ⇨1167(2)

That trial court, in prosecution of defendant and others for conspiracy and for the substantive offense, dismissed the conspiracy charge against co-defendants without setting forth any reason for the dismissal, was not prejudicial to defendant.

2. Criminal Law ⇨59(1)

A conspirator, even though not present when crimes involved are committed by his coconspirators, is criminally responsible for the substantive offenses committed in furtherance of the conspiracy, and equally guilty of such substantive offenses.

3. Criminal Law ⇨964

Where defendant was indicted with others on an indictment charging conspiracy to violate bookmaking statute and with substantive violations of the statute, the substantive offense having been committed by defendant's coconspirators alone, and, after coconspirators had pleaded guilty to a substantive offense, the conspiracy charge against them was dismissed and defendant was convicted on both charges, grant of new trial on conspiracy charge required a grant of new trial on the substantive charge. Pen.Code, §§ 337a, subds. 1–5, 1385.

4. Criminal Law ⇨406(1)

In prosecution for violation of bookmaking statute, evidence of the corpus delicti was sufficient foundation to admit evidence of defendant's admissions. Pen.Code, § 337a, subds. 1–5.

5. Criminal Law ⇨406(1)

Slight or prima facie proof of the corpus delicti furnishes a sufficient basis for the introduction of evidence of the defendant's admissions.

6. Gaming ⇨98(3)

Evidence was sufficient to sustain conviction for violation of bookmaking statute. Pen.Code, § 337a, subds. 1–5.

7. Criminal Law ⇨406(1)

That defendant, who was charged with violation of bookmaking statute, had not been informed of his constitutional rights before he made certain admissions did not vitiate the admissions. Pen.Code, § 337a, subds. 1–5.

8. Criminal Law ⇨372(3)

In prosecution for violation of bookmaking statute, police officer could testify that he had previously arrested defendant under similar circumstances, even though the charge following his previous arrest had been dismissed. Pen.Code, § 337a, subds. 1–5.

9. Criminal Law 1170½(1)

Allowing stenographer to testify from transcribed notes concerning statements made by defendant, who was charged with violation of bookmaking statute, without allowing defendant to see the notes was not prejudicial where the statements read were only cumulative. Pen.Code, § 337a, subds. 1–5; Code Civ.Proc. § 2047.

10. Criminal Law ⇨824(5)

Trial court's failure to give, on its own motion, an instruction that defendant's admissions should not be considered without first finding from other evidence existence of corpus delicti, was not prejudicial error.

11. Criminal Law ⇨824(1), 829(3)

Trial court's failure to give, in prosecution for violation of bookmaking statute, an instruction that act and intent are both necessary to the crime, was not prejudicial error where instruction was not requested and necessity of intent was elsewhere stressed. Pen.Code, §§ 20, 337a, subds. 1–5.

12. Criminal Law ⇨1186(4)

Reviewing courts are required to leave to censure alone a prosecutor's misconduct where it does not appear to have resulted in a miscarriage of justice. Const. art. 6, § 4½.

13. Criminal Law ⇨1186(4)

Prosecutor's claimed misconduct in prosecution for violation of bookmaking statute was not prejudicial. Pen.Code, § 337a, subds. 1–5; Const. art. 6, § 4½.

Joseph C. Haughey, Toland C. McGettigan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wm. K. Coblentz, Dep. Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was charged in one indictment (No. 46,039) jointly with certain occupants of Room 417 of the Graystone Building at 948 Market Street in San Francisco in four counts. Count 1 charged a conspiracy of the defendants to violate section 337a, Penal Code. Count 2 charged the defendants with the substantive offense of pool selling and bookmaking on or about June 23, 1951 (a violation of subd. 1, section 337a, Pen. C.). Count 3 charged a violation of subd. 2 of that section on or about the same day (keeping and occupying rooms located at 948 Market Street with books, papers and other paraphernalia for the purpose of recording and registering bets). Count 4 charged a violation of subd. 4 of section 337a on the same date (recording and registering bets). For convenience this indictment will hereafter be called the joint indictment.

Appellant was also charged in a separate indictment in which he was the only defendant (No. 46,042) with violations of subdivisions 1, 2, 4 and 5 of section 337a. These offenses were charged also as occurring on or about June 23, 1951 in Rooms 306 and 307 of the same building. This indictment will hereafter be called the separate indictment.

The other defendants charged with appellant in the joint indictment all pleaded guilty to the substantive offense charged in Count 3 thereof. Thereafter on motion of the district attorney the remaining counts of the joint indictment were dismissed as to all defendants except the appellant.

The two indictments were consolidated for trial and the jury returned verdicts finding appellant guilty as charged in all counts of both indictments. The court granted a new trial on Count 1 of the joint indictment (the conspiracy charge) but denied appellant's motion for new trial on all other counts of both indictments. The judgments provide that the sentences on all counts shall run concurrently.

The evidence showed that on June 23, 1951 after a meeting in the district attorney's office with Thomas C. Lynch, district attorney and Harold Robinson, deputy director of the California Department of Justice, Thomas P. Judge, special agent of the State Department of Justice went to the Graystone Building accompanied by Frank Brown, an assistant district attorney of San Francisco. The two of them proceeded to the third floor of the building and tapped on the door of room 306 with a key. There was no answer to their knocking so they waited about four minutes. They heard a noise inside and identifying themselves as police officers they broke the glass of the door in order to open it.

No one was in room 306 but there was a locked door leading to room 307. Therefore they returned to the hall and broke the glass of the door to room 307. A small corridor led to another door which in turn led to room 307. This door was opened by a man later identified as the appellant. He was in his shirt sleeves and his coat was hanging in a closet.

The room contained a table, two chairs, three telephones, an adding machine, a radio, a clock and a wastepaper basket. The radio dial was set at 1300 and race results were coming in on the radio. There was also found a daily racing form dated June 23, 1951, and a pad with various lines drawn thereon and handwriting on the top sheet. Scraps of paper were found in the wastepaper basket and pieced together. Also found in the room were colored pencils, adding machine tape, totals which corresponded to totals computed from the figures on the scraps of paper pieced together, a key which opened the door to room 417 in the same building, and a piece of paper on the desk with the same numerical notations on it as a piece of paper found in the wastebasket.

When asked what he was doing in the room appellant explained that he was a bettor and that he was there to get tips on the horses. He stated that a Mr. Roger Hill was the bookmaker but had stepped out to lunch fifteen minutes before. Appellant had been there for 45 minutes. Appellant admitted that two different parties called to place bets while he was there but said that he did not record them. During the time that Judge and Brown were there the phone rang several times and Judge answered about 14 calls. Each time the person on the line asked for "Abe". When Judge replied, "This is Abe" the calling party would hang up. One caller asked for "Curley Top". Appellant stated the call was for him and talked to the party for several minutes. After hanging up he identified the caller as his wife. There was also a long distance call from Reno and the party asked for "Abe". When Judge answered, "This is Abe" the party hung up.

At the same time that Judge and Brown were in room 307 Ernest Wenberg, a special agent of the State Department of Justice and Cecil Poole, an assistant district attorney, went to room 417 of the same building. They tapped on the glass door with a coin and the door was opened by James Cernusco. Upon entry Wenberg identified himself and immediately announced that the persons present were under arrest. There were four men in room 417. In addition to Cernusco, there was a John Gregory standing near the door; an Alphonse Vella seated at a desk against the north wall; a William Mendello was standing near a hot plate and a radio on the south wall. There were two more men in room 418. A Nick De Melio and Jack Cohen were seated at a table. In room 417 there was a table against the north wall, two telephones, two chairs at the table, two separate sets of bookmaking paraphernalia, a hot plate with a coffee percolator and a radio. In room 418 there were six telephones, a radio, electric clock, filing cabinets, strong box, adding machine, and some separate sets of bookmaking paraphernalia. A key was found in a strong box in room 418 which opened the lock on the door to room 307. While Wenberg and Poole were in room 417 the elevator operator of the building came to warn the occupants of room 417 that the offices downstairs were being raided. Wenberg testified that he answered all the telephones for two hours and that the parties calling would either ask for a particular individual or identify themselves by what appeared to be nicknames and immediately start reading off bets either by the rundown number of the horses or by actually naming the horses that were running at the tracks.

Russell Miller, an accountant employed by the managers of the building at 948 Market Street during the period from January to July 1951, testified that he collected the rent once or twice for rooms 306 and 307 from appellant and the latter had requested Miller to remove a partition cutting in half the office in room 307. Appellant also informed Miller where he wanted the telephones placed if the telephone man came in in his absence. Appellant asked Miller to come to room 307 to pick up some insurance papers and appellant also paid the rent at that time. Miller stated that the bills were made out to Roger Hill, but the only one from whom Miller collected rent was appellant. An index card bearing the notation, "Abe Sutter 1–3764" which was the number of one of the telephones in room 307 was filed in the offices of Klinger & Lichtman, the lessees of the office space in the building.

Inspector Marion C. Overstreet of the San Francisco Police Force had been attached to the vice squad for six years and was qualified as an expert in bookmaking cases. Over strong objection he testified that he had arrested appellant in 1946 and at that time Fox said he was a visitor and not a bookmaker at the premises. The inspector testified that the handwriting pad found in room 307 could be used to record bets. He interpreted some markings on the pad to mean that $150 was bet on a horse to win bearing rundown number 33. The straight line drawn through the column on the extreme right indicated that the horse had lost the race. Scraps of paper found in the wastebasket and pieced together were shown to the witness, and he stated the figures indicate it was a betting sheet. The figures and the names on the sheet were interpreted by the witness to represent amounts of money owed or due from certain individuals. The difference between the collect and pay column amounted to

$1836. The amount was found on another piece of paper and had evidently been carried over to the betting sheet for the following day. According to testimony of an expert witness all of the above documents were in appellant's handwriting.

Betting sheets were found in room 417 with the name "Abe" on them. These were described as lay off sheets showing to whom the bets were spread in order to distribute the risk among various individuals. The expert witness demonstrated by mathematical computation how certain figures on the document found in room 417 were determined and that it indicated these were lay off bets made by appellant to the bookmakers in room 417.

Mario Peruzzo testified that he worked as a bookmaker in rooms 417 and 418 within a month prior to June 23, 1951. He testified that appellant telephoned room 417 several times and usually identified himself by stating "This is Abe calling." If appellant wished to talk about a bet Peruzzo would turn the call over to some one else in the room. He stated that the betting sheets found on June 23, 1951 in room 417 with the name "Abe" above the record of certain wagers referred to bets made by appellant.

Appellant's first point is that when all of the other defendants named in the joint indictment pleaded guilty and the court dismissed the other counts against them the other defendants could no longer be prosecuted on the conspiracy charge (Count 1), and that Count 1 should for that reason have been dismissed as to appellant. This is so, appellant says, because it requires at least two persons to constitute a conspiracy and the legal effect of the dismissal of the indictment as to the other defendants operated as a bar to their further prosecution on the conspiracy charge.

Section 1385 of the Penal Code provides: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. *The reasons of the dismissal must be set forth in an order entered upon the minutes.*" (Emphasis ours.)

[1] The court in entering the dismissals here in question did not set forth any reason for the dismissal. Appellant argues that the language in section 1385 which we have emphasized is mandatory and that the failure to comply with it makes the dismissal operate as a bar to future prosecution of those defendants on the charge embraced in the indictment so dismissed. In this he is supported by People v. Disperati, 11 Cal. App. 469, 476–477, 105 P. 617. However in People v. Romero, 13 Cal.App.2d 667, 57 P.2d 557, the court refused to follow the holding of the Disperati case and after reviewing the reasons for the legislative requirement that the reasons for the dismissal shall be entered in the minutes concluded that the requirement was one made in the public interest and not for the protection of the defendant. The court said, 13 Cal.App. 2d at page 671, 57 P.2d at page 559: "The section has nothing whatsoever to do with the rights of the defendant. For the court to fail to perform its duty, therefore, is not a matter about which a defendant can be heard to complain. The order of the court, under section 1385 of the Penal Code, in dismissing a felony action may be a matter of public concern, but in no way * * * can it be seized upon by a defendant as the technical means to a coveted end. Section 1387 of the Penal Code definitely and unequivocally provides that such a dismissal is not a bar if the offense is a felony." We are satisfied of the correctness of this conclusion. This conclusion disposes as well of the contentions that the rights of appellant were prejudiced by the retention of the conspiracy count in the indictment and that the court erred in refusing to submit to the jury appellant's pleas of once in jeopardy and former acquittal.

[2, 3] Appellant argues the insufficiency of the evidence to support his conviction of the substantive offenses charged in the joint indictment. We find it unnecessary to go into this question because we have concluded that the court's order denying appellant a new trial on Counts 2, 3 and 4 of the joint indictment should be reversed for another reason. As above stated the court did grant a new trial on the count charging conspiracy. The substantive offenses

charged in the joint indictment were based on the activities engaged in in room 417. There was no evidence from which the jury could find that appellant was personally present in room 417. As a conspirator with the persons who were present in room 417, however, he would be criminally responsible for the substantive offenses committed by his coconspirators in furtherance of the conspiracy, and therefore equally guilty with them of such substantive offenses. People v. Harper, 25 Cal.2d 862, 870, 156 P.2d 249; People v. Kauffman, 152 Cal. 331, 334, 92 P. 861; Anderson v. Superior Court, 78 Cal.App.2d 22, 25, 177 P.2d 315. The jury was so instructed: "the act of one in pursuance of the common design is the act of all, and each is legally responsible for any act of a confederate that follows incidentally in the execution of the common design." Having been so instructed the jury once it found appellant guilty of the conspiracy would have no choice but to convict him of the substantive offenses in room 417 committed by those who were found to be his coconspirators. The court in granting a new trial on the conspiracy charge has held that appellant was not properly found guilty of the conspiracy. It follows that the basis for holding him liable *as a conspirator* for the substantive offenses of the occupants of room 417 has been removed. If not properly convicted of being a conspirator how can he be held liable for the acts of others performed as a part of the alleged conspiracy? We conclude that the order denying appellant a new trial on Counts 2, 3 and 4 of the joint indictment should be reversed.

Appellant argues that the evidence is not sufficient to support his convictions of the offenses charged in the separate indictment. What is set out above is sufficient to support the jury's finding that appellant was the occupant of rooms 306–307. Miller's testimony that he collected the rent from appellant, that he never collected it from any one else, that appellant directed Miller to remove a partition and where the telephones should be placed, the fact that all persons calling on the telephone asked for "Abe" except one, whom appellant identified as his wife when she asked for "Curley Top", not to mention other details of evidence recited above, are ample to support such a finding. The fact that the tenant was listed as Roger Hill was only one fact to be considered by the jury in weighing this evidence and would not compel the jury to find that appellant was not the occupant or an occupant of these rooms.

[4, 5] The records found in these rooms were all in appellant's handwriting and they were the sort of records commonly kept of bets by bookmakers. Appellant points out that the expert on cross-examination admitted that because they did not show the names of bettors, they might be records of appellant's own bets, and that the large sheet which had been totaled might be a record of some other debits and credits than those of bettors. He also points out that not one of the persons who called these rooms on the telephone offered to place a bet or spoke of betting. The records and paraphernalia in room 307 however were of the kind commonly found in betting establishments, some of them were identified as records of bets on horse races and they were all in appellant's handwriting. This was certainly sufficient foundation to admit evidence of appellant's admissions, in view of the rule that slight or prima facie proof of the corpus delicti furnishes a sufficient basis for the introduction of evidence of such admissions. People v. Corrales, 34 Cal.2d 426, 429, 210 P.2d 843; People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12. The defendant admitted to the officers that the rooms were used for bookmaking, although he claimed that they were so used only by one Hill. He admitted specifically: "and I said, well, Fox, this is a bookmaking operation, isn't it—and I said this particular writing on this pad is a losing bet on a horse race, is it not; and he said yes, this is a bookmaking operation, and he said that is a losing bet on a horse race, but he said I didn't record it * * * I didn't record any of the bets."

[6, 7] These admissions coupled with the proof that all of the records of bets found in room 307 were in appellant's handwriting, taken with the other evidence fully

support the jury's verdicts on the separate indictment. It was not necessary to show that appellant was informed of his constitutional rights before he made the admissions. People v. Landry, 106 Cal.App.2d 8, 11, 234 P.2d 736.

[8] Appellant complains of the court allowing Inspector Overstreet to testify, over objection, to having arrested appellant in 1946 in a bookmaking establishment at which time appellant made the same explanation, that he was only a bettor and not the bookmaker. This was admitted under the rule that former crimes may be proved to show common plan or design. People v. Moorhead, 104 Cal.App.2d 688, 695, 232 P. 2d 268; People v. Henderson, 79 Cal.App. 2d 94, 119, 179 P.2d 406. It was stipulated that the charge following this previous arrest was dismissed. However it has been held that if the evidence is otherwise admissible the fact that the defendant has been acquitted of the previous charge, People v. Lachuk, 5 Cal.App.2d 729, 731–732, 43 P.2d 579; People v. Spahn, 28 Cal. App.2d 294, 297, 82 P.2d 474, or the previous charge dismissed, People v. Raleigh, 83 Cal.App.2d 435, 442–443, 189 P.2d 70, does not require its exclusion, " 'although the force of the evidence may be thereby weakened' ", People v. Follette, 74 Cal.App. 178, 212, 240 P. 502, 516.

[9] A stenographer who took down a statement made by appellant was permitted to testify from her stenographic notes that appellant to a question: "Did you make any bets today?" answered: "No", and further stated in answer to questions that he said he had answered two phone calls, that the persons calling asked for Hill, that they wanted to make bets and that appellant refused to record them. It developed that Miss Saline had transcribed her notes and appellant's counsel demanded to see the transcription. The trial court refused to compel this. If this was error (see Code Civ.Proc. § 2047) the statements read were only cumulative of previous testimony and added little to the evidence, and no prejudice appears. Appellant also makes certain claims of error in connection with the testimony of Peruzzo. Since Peruzzo's testimony was directed to the charges made in the joint indictment and since we are reversing as to those these points need not be discussed. This is equally true of the complaints about the witness Wenberg.

[10, 11] It was not prejudicial error for the court to fail to give, on its own motion, an instruction that appellant's admissions should not be considered without first finding from other evidence the existence of the corpus delicti. People v. Simon, 107 Cal.App.2d 105, 122–123, 236 P.2d 855. The failure to give an instruction in the language of Penal Code section 20 was not prejudicial error. No such instruction was requested and the court in several instructions stressed the necessity of intent as an element of the crimes charged.

[12, 13] The appellant with justice complains of the misconduct of the prosecuting attorney. He insinuated by questions that appellant had connections with Artie Samish and his lieutenant, Frank X. (Porky) Flynn; that appellant had refused to testify before the Kefauver Committee and the State Crime Commission and that one witness knew from his connection with this State Commission that appellant was connected with bookmaking at Olmo Stables in San Mateo County. He also referred in argument to telephone records which had not been introduced into evidence and suggested that the "X" on a betting record might well refer to Frank X. Flynn. This conduct was inexcusable and indefensible and in a close case would justify a reversal, but appellate courts are required to leave to censure alone such conduct, however flagrant, where it does not appear to have resulted in a miscarriage of justice. Unfortunately such censure without reversal seems to be regarded by prosecutors who do not seriously enough regard their duties as invitation to repeat the same sort of conduct in later cases. Such excesses are to be deplored and prosecutors should not wilfully compel courts to resort to Art. VI, § 4½ of the Constitution to save them from the consequences of their reckless disregard of the fundamental rights of defendants. However on this record we can find no prejudice.

The order denying motion for new trial on Counts 2, 3 and 4 of Indictment No. 46,039 is reversed with directions to the trial court to grant such motion. The judgments and order denying new trial on Indictment No. 46,042 are affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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126 Cal.App.2d 394

PEOPLE v. HOOKER.

PEOPLE v. LEIMAS.

PEOPLE v. THOMPSON

PEOPLE v. BURSON.

Cr. 967.

District Court of Appeal, Fourth District, California.

July 2, 1954.

Hearing Denied July 28, 1954.

Defendants, in actions consolidated for purposes of trial, were convicted of grand theft of automobile. The Superior Court, San Bernardino County, Carl B. Hilliard, J., entered judgments and orders, and all but one defendant appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to corroborate accomplices' testimony and to sustain conviction for grand theft of an automobile.

Judgments and orders affirmed.

1. Criminal Law 🔑508(9), 512

Testimony of an accomplice is not to be rejected merely because he is an accomplice, but jury may consider circumstance that witness is an accomplice in passing upon his credibility as witness, and, if there is other evidence tending to connect defendant with commission of crime charged, accomplice's testimony is to be considered by jury just as any other testimony and must be given weight to which jurors may conclude that it is entitled. Pen.Code, §§ 31, 1111.

2. Criminal Law 🔑511(7)

Defendant's own statements and admissions, made in connection with other testimony, afford corroboratory proof sufficient to sustain a verdict of guilty. Pen.Code, §§ 31, 1111.

3. Criminal Law 🔑511(2)

Corroborating evidence must raise more than a conjecture or suspicion of guilt to sustain accomplice's testimony, but it is sufficient if it connects defendant with commission of crime in such way as to reasonably satisfy fact-finding body that accomplice is telling the truth. Pen.Code, §§ 31, 1111.

4. Criminal Law 🔑511(1)

Evidence was sufficient to corroborate accomplices' testimony and to sustain conviction for grand theft of an automobile. Pen.Code, §§ 31, 487, 499b, 1111.

5. Criminal Law 🔑316

Where, in prosecution for grand theft of an automobile, accomplices' testimony was sufficiently corroborated to allow question of defendants' guilt to become question for court as trier of facts, court could then consider defendants' failure to deny or explain such evidence in determining weight such evidence was to be given.

◆

G. Keith Sprague, of Chapman & Sprague, San Bernardino, for appellants Hooker and Leimas.

C. A. Broderick, Victorville, for appellant Thompson.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Separate Grand Jury indictments were returned against defendants and appellants Lowell Dwayne Hooker, Jack Lee Thompson, and Jack Leimas, charging in count one that each conspired with the other named appellants and defendant Richard

Earl Burson to steal a Lincoln automobile. In a second count each was charged with grand theft of the same car. Pleas of not guilty were entered and by stipulation the actions were consolidated for the purposes of trial. A jury was waived. Appellants did not testify at the trial. Judgment of not guilty was rendered on the first count, and guilty on the second count as to each defendant. Defendant Burson did not appeal.

The only contentions are: (1) that the evidence is insufficient as a matter of law to show grand theft; and (2) that the testimony of two accomplices given on behalf of the prosecution was not, as a matter of law, sufficiently corroborated.

One Tedrick, owner of a 1953 Lincoln automobile, parked his car on October 6, 1953, in front of his home in Wrightwood. It was locked at the time. At 6 o'clock the next morning he discovered it was gone, and testified that he gave no one permission to take it. He saw the car two days later in Victorville. At that time the trunk on the back of the back seat had been torn open and the arm rest and partition into the trunk had also been torn out. The right front wind wing had been broken and pried open. Several items had been removed from the trunk, namely, a rubber boot, dust mop, case for a fishing pole, a lantern, and a jack handle.

An accomplice, Jerry Roland Ferritor, testified that on October 6, 1953, he drove to Victorville in his 1946 white Ford, where he picked up appellants Thompson, Hooker and Leimas; that they drove around for a while and bought some liquor and later went to a little hill called the "Narrows", located about a half mile from Victorville; that they followed a car of defendant Burson there; that seated in Burson's car were one Henley, Dietta Burson (Burson's sister), one Poindexter, and one DeMarias; that when both cars arrived there Ferritor, together with appellants Thompson, Hooker and Leimas, emerged from Ferritor's car, while Henley and defendant Burson stepped out of Burson's car; that Burson and Leimas had an argument, followed by a fight between DeMarias and Poindexter; that Burson armed himself with a chain; that Ferritor had a .38 pistol and defendant Leimas had a .22 gun that would only fire blanks; that Thompson had a .44 pistol; that following this encounter all parties went back to their respective cars and drove away; that they bought some beer and returned to the "Narrows" and at that time a discussion was held between the three appellants herein and defendant Burson to the effect that they were low on money and wanted to obtain some; that in substance it was said: "Let's go and get some money somewhere", and the cars left the hill with the respective parties in them; that subsequently Burson parked his car near a cafe in Victorville, and he and Henley then entered Ferritor's car; that all six people, including these appellants, drove in Ferritor's car to "pull a robbery" somewhere; that the party of six stopped in front of a restaurant near Desert Springs and that Ferritor went into the restaurant to see what it looked like; that he returned to the car saying he knew some people inside and that he was opposed to going through with it; that he drove the car into a position where the occupants could look into the front door of the restaurant; that appellant Thompson saw someone he knew inside, so the occupants of the car decided to try the Blue Ridge Inn, at Wrightwood, a few miles from there; that after they arrived in Wrightwood Ferritor decided not to use his car in a holdup since it was registered in his name, so someone in the group suggested that they pick up a car; that they drove around Wrightwood until they saw a 1953 Lincoln parked on a side street next to a house; that Ferritor's car was left about 1½ blocks from the Lincoln; that all six men walked back to the Lincoln automobile; that Henley pried open the right wind wing and the door was then unlocked; that Thompson and Hooker, together with Henley, entered the car while the remaining three men, including Leimas, pushed the car for a ways down the hill; that they then entered Ferritor's car and drove to the Lincoln; that at that time Hooker "hot wired the car" by placing a tinfoil from a cigarette package behind the dash; that both cars were then driven up into the mountains, about three miles from the highway; that Ferritor's car was left there and all six men returned to the Blue Ridge Inn in Wrightwood in the Lincoln; that they found the Blue Ridge Inn closed and a discussion followed in which they could not agree upon any other place to break into or rob; that at this time they were interrupted by an approaching vehicle which seemed to be following them so they left Wrightwood; that they returned to the Ford and Ferritor and Hooker left in it, with the other men following behind it in the Lincoln; that they went to a deserted house near Phelan and parked the Lincoln in a garage; that Burson and Henley then broke into the trunk through the back seat and removed a dust mop, a lantern, and a rubber boot; that subsequently the six men returned to Victorville in the Ford and proceeded back to the place where they left Burson's car; that Burson and Henley left the Ford and returned to Burson's car; that Dietta Burson and the two men were in Burson's car; that Ferritor then drove Leimas and Hooker to Leimas' automobile and he subsequently took Thompson home.

He then testified that following this evening, he again saw Hooker, Leimas and Thompson and that the four of them drove to where the Lincoln had been parked; that Thompson and Hooker got into the Lincoln and Ferritor and Leimas returned to Victorville; and that was the last time he saw the Lincoln automobile.

It was stipulated that the testimony of the witness Henley, an accomplice, would be the same as the testimony of Ferritor.

By way of corroboration, the owner of the Yucca Inn, near Desert Springs, testified that between midnight and 2:30 a.m. on the night of October 6, 1953, she noticed a car approach and park in front of her place of business for a few minutes; that there were five or six persons in the car; that three men emerged and went through to the patio and looked into the cafe; that they went around the cafe out of sight and subsequently returned to the car and drove off; that later, the car again approached the Yucca Inn and Ferritor emerged from the car and came into the cafe; that he remained in there for a moment and then returned to the car which was driven off as far as the highway and it remained on the highway for 15 or 20 minutes. She identified this car as a grey sedan.

Dietta Burson testified that she went with her brother and Henley and two others to the "Narrows"; that in Ferritor's car, described as a white Ford sedan, were Leimas, Hooker, Thompson, and Ferritor; that while they were there an argument ensued; that the boys went back in their respective cars to Victorville and purchased some liquor and returned to the "Narrows"; that another discussion ensued and they all returned in their respective cars to Victorville; that about 11 p. m., Burson, Henley, Ferritor, Leimas, Thompson and Hooker all left in Ferritor's car and two or three hours later the "same six people" returned. (On cross-examination, however, she testified she knew Burson and Henley got out and came to their car but did not count the heads of the remaining occupants in Ferritor's car on their return, and did not know whether it was three or five or six in number, and did not exactly recognize either the number or identity of those remaining); that on the way home Henley told her the boys had been to Wrightwood at the Blue Ridge Inn. The admission of this conversation was limited to the conspiracy count.

She further testified that several days later, she, Burson and Henley were driving in the vicinity of Phelan, near some old buildings, and Henley said that the Lincoln "car was gone * * * Doggone it, it is gone, the so and sos took the car"; that Henley said he intended to strip the Lincoln and sell the parts and that all of the fellows who were in Ferritor's car the night they left her in Victorville, had gone to Wrightwood and stolen a Lincoln.

She testified that several days later she had a conversation with appellant Thompson about this and asked him if he had had fun at Wrightwood; that he asked her what she meant by that and she replied that she knew all about "what the guys did up there", and he asked her who had told her; that she replied "Henley"; and that defendant Thompson said: "Oh, is that so?"

One DeMarias, who was with Dietta Burson at the "Narrows" testified that someone of the group of fellows said "something about pulling a job"; that after they were gone for about two or three hours they returned; that the next evening he met Thompson and Hooker on the street and they inquired whether Henley and Burton had told him (DeMarias) what they did last night and he told them that they had not and that they said "O.K."

A deputy sheriff testified he found Hooker, Thompson and Leimas and Ferritor on October 9, about 1 p. m. parked in a white 1946 Ford sedan on Highway 66, near Palmdale, not too far from the Phelan ranch where the Lincoln had been left; that in this car was the "fake .22 pistol" which Leimas admitted was his gun. The lantern, which was removed from the Lincoln, was identified as having been recovered from Burson's house. The rubber boot and fishing case were found at the abandoned ranch in Phelan, in the garage.

It is clear from this testimony that the named defendants decided to use another car in their holdup activities; that they broke into and took the Lincoln car; that they drove it away 30 miles from the place where they stole it and parked it in an abandoned garage where they apparently intended to store it for their future use; that they tore out the back seat and rifled the trunk and appropriated some of the objects found therein to their own use; that they returned to the secret hiding place where the car had been parked with the intent to strip it or to use it in furtherance of their activities. The evidence fully supports the finding that the car was stolen and that the defendants intended to permanently deprive the owner of its possession, in violation of section 487 of the Penal Code, as distinguished from section 499b of the Penal Code. People v. Orona, 72 Cal.App.2d 478, 164 P.2d 769; People v. Renteria, 60 Cal.App. 2d 463, 141 P.8d 37; People v. Stanley, 92 Cal.App. 778, 269 P. 465.

The testimony of the two accomplices sufficiently shows the commission of the crime charged and that the appellants herein aided and abetted in the commission thereof. Section 31, Penal Code. The judge apparently believed their testimony. The only question is whether it was sufficiently corroborated under section 1111 of the Penal Code.

Historically speaking, under the common law, the uncorroborated testimony of an accomplice was sufficient to sustain a conviction. People v. Clough, 73 Cal. 348, 15 P. 5. Section 1111, supra, provides that "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

Some earlier cases, in applying the test, have remarked that to determine the sufficiency of the corroboration we must " 'eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him' "; that corroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice to give it value; that such evidence " 'must tend directly and immediately to connect the defendant with the commission of the offense.' " People v. Morton, 139 Cal. 719, 73 P. 609, 611, quoting with approval from Welden v.

State, 10 Tex.App. 400, and Simms v. State, 8 Tex.App. 230; see also People v. Sciaroni, 4 Cal.App. 698, 89 P. 133; People v. Reingold, 87 Cal.App.2d 382, 197 P.2d 175.

[1-3] A later expression of the rule is in People v. Negra, 208 Cal. 64, at page 69, 280 P. 354, at page 356, where it is said:

> "While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness * * * his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the Code * * *, tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. * * * The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. * * * The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. * * * The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. * * * It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged."

See also People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681; People v. Griffin, 98 Cal.App. 2d 1, 219 P.2d 519; People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29, commenting on the Morton case; and People v. Henderson, 34 Cal.2d 340, at pages 342-343, 209 P.2d 785, at page 786, where it is said:

> "Although the corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connect the defendant with the commission of the crime in such a way as reasonably to satisfy the fact finding body that the accomplice is telling the truth. * * * The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. * * *
>
> "The relationship of the men and all of their acts and conduct may be considered in determining whether there are corroborating circumstances."

Applying these rules the accomplices gave a full account of what happened on the night in question and named the parties who participated therein. These appealing defendants were in the party at the "Narrows". Their actions and conduct there and their intended plans after leaving there were shown by independent evidence. The fact that these appealing defendants left in the car with the admitted accomplices is also shown. The time they were gone is indicated, and the fact that they returned together in the car is sufficiently established and fully corroborates the testimony of the accomplices in this respect. Parts belonging in the car were found at the deserted garage where the accomplices said the defendants parked the car, as well as in the home of one of the accomplices. These same persons returned to the abandoned garage where the car was originally parked and they were later apprehended in that vicinity while seated in the car belonging to the accomplice, in which a gun, previously described by a witness not an accomplice, was found. The conduct of these appealing defendants, both before and after the crime was committed, certainly tends, since it was not explained away, to indicate evidence of appellants' consciousness of guilt, and tended to show some connection with the crime that was committed.

It has been held in People v. Sawaya, 46 Cal.App.2d 466, 115 P.2d 1001, that the failure of the defendant to take the witness stand does not of itself directly and immediately tend to connect him with the crime charged, and is not to be considered in connection with corroborative evidence not measuring up to the requirements of Penal Code section 1111.

In People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271, 285, however, where the people made the contention that defendant's failure to testify may be considered corroborative, our Supreme Court said:

> "A defendant's failure to take the stand 'to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9. But the failure to testify will not supply a lacuna in the prosecution's proof. (Citing cases.) * * * In criminal cases, after the prosecution has made a prima facie case, the failure of the defendant to testify is not affirmative evidence of any fact, and any inference that can, in the circumstance, be justly drawn therefrom is persuasive rather than probative, lending weight to the evidence presented by the prosecution."

[4, 5] In the instant case we conclude that the corroborative evidence adduced by the State was sufficient to allow the case to go to the court for its decision, and it could then consider the defendant's failure to deny or explain that evidence in determining the weight it was to be given.

Judgments and orders affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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126 Cal.App.2d 370

HOCHFELDER et ux.

v.

LOS ANGELES COUNTY.

Civ. 20008.

District Court of Appeal, Second District, Division 2, California.

June 30, 1954.

Hearing Denied Aug. 26, 1954.

Personal injury action against county involving question whether action, having been brought within six months after County Board of Supervisors' denial of claim but more than six months subsequent to 90th day following filing of claim, was timely. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Fox, J., held, inter alia, that plaintiffs, who had filed claim against county, had six months from time Board denied claim to file action thereon, under statute requiring action to be brought within six months after first rejection of claim, though action could have been brought at any time after Board had refused for 90 days to act on the claim.

Reversed with directions.

1. Statutes ⚿184

A statutory provision under consideration by courts should, whenever possible, be given such construction as will reasonably achieve its object and purpose within context of legislative scheme.

2. Counties ⚿213

One purpose of statute requiring presentation to County Board of Supervisors of claim against county as condition precedent to suit is to prevent public funds from being consumed in needless litigation by affording county opportunity for amicable adjustment. Government Code, § 29704.

3. Counties ⚿213

One purpose of statute requiring claim against county to be presented to County Board of Supervisors as condition precedent to maintenance of suit against county is to provide public body responsible for making preparations for fiscal year with opportunity to be informed in advance as to indebtedness or liability that it may be expected to meet. Government Code, § 29704.

4. Counties 🔑**213**

One purpose of statute requiring claim against county to be filed with County Board of Supervisors as condition precedent to maintenance of suit against county is to give county prompt notice of claim in order to enable Board to investigate and inform themselves of merits or demerits of the claim while evidence is still fresh and witnesses available. Government Code, § 29704.

5. Counties 🔑**216**

Under statute providing that claimant who has filed claim against county may treat County Board of Supervisors' refusal or neglect to act on such claim as final action and rejection on 90th day after filing of claim, such claimant has privilege or option to treat claim as denied, but he need not do so and may elect to wait until Board discharges its responsibility by acting upon the claim in due course. Government Code, §§ 29704, 29713.

6. Counties 🔑**216**

Claimants, who had filed claim against county, had six months from time County Board of Supervisors denied claim to file action thereon, under statute requiring action to be brought within six months after first rejection of claim, though action could have been brought at any time after Board had refused for 90 days to act on the claim. Government Code, §§ 29714, 29715; Code Civ.Proc. § 342.

S. V. O. Prichard, Beverly Hills, for appellants.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

FOX, Justice.

Plaintiffs take this appeal from a judgment of dismissal entered upon demurrer sustained without leave to amend.

Only very few facts need be stated in order to present the question to be determined. The action is one against the County of Los Angeles. The complaint alleges that on Feb. 26, 1952, plaintiff Anna W. Hochfelder, a county employee, was injured while engaged in her official duties by reason of a dangerous and defective condition maintained by defendant county. On May 16, 1952 (which was within 90 days of the occurrence of the injury), Anna filed with the Board of Supervisors of the County of Los Angeles (hereinafter referred to as the Board), a claim for damages. The Board did not act upon the claim until April 7, 1953, at which time it formally adopted an order denying the claim. The present action was commenced May 5, 1953, which is more than six months subsequent to the ninetieth day following the filing of the claim but less than six months after the actual denial of the claim.

Defendant's demurrer was based upon general and special grounds, as well as upon the more specific grounds that plaintiffs' action was barred by certain designated statutes of limitation. It is conceded by both sides that the sole question to be decided is whether or not this action is barred by the provisions of section 342 of the Code of Civil Procedure and sections 29714 and 29715 of the Government Code.

Section 342 of the Code of Civil Procedure reads as follows: "Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board." Section 29715 of the Government Code states: "A claimant dissatisfied with the rejection of his claim or with the amount allowed him may sue the county on the claim at any time within six months after the final action of the board." The chronology of events as disclosed by the record is that the claim, which was filed on May 16, 1952, was rejected by the Board on April 7, 1953; the present complaint was filed on May 5, 1953. There would thus appear to be compliance with the requirement of section 342, that an action against the county upon a claim rejected by the Board of Supervisors, "must be commenced within six months after the *first rejection* thereof by such board." Similarly, it would seem that the provision of Government Code section 29715, limiting the time for institution of a suit upon a rejected claim, to "within six months after the *final action* of the board" was likewise satisfied. (Italics added.)

In support of the trial court's judgment of dismissal, the county argues that plaintiffs' action is barred because the period prescribed by section 342 of the Code of Civil Procedure and section 29715 of the Government Code had already terminated at the time plaintiffs' action was commenced. The county relies on section 29714 of the Government Code which provides: "If the board refuses or neglects to allow or reject a claim for 90 days after it is filed with the clerk, the claimant may treat the refusal or neglect as final action and rejection on the ninetieth day." It is the county's position that under the wording of this section, a claim against a county is denied by operation of law on the ninetieth day after it is filed, and that the six months' statutes of limitations previously quoted commenced to run immediately upon such constructive rejection of the claim. Relating this to the sequence of events before us, the ninetieth day after filing fell on August 14, 1952, without any affirmative action having been taken by the Board. According to the county, this amounted to a constructive rejection and set in motion the six months' limitation period of section 342, Code of Civil Procedure, and section 29715 of the Government Code, which expired on February 14, 1953.

Hence, it is argued by the county that the formal rejection of the claim by the Board on April 7, 1953, was, in effect, a nugatory act, since the claim was already barred; and the present action, which was not commenced until May 5, 1953, falls under the ban of the same statutes of limitations. We are unable to agree with these contentions.

It may be of some benefit to scan briefly the legislative history of the provisions here under scrutiny. Sections 29714 and 29715 of the Government Code appear to have had their prototype in the County Government Act of 1897, Stats.1897, ch. 277, p. 471, at which time they were coalesced as an integrated entity in section 43 thereof. In 1907, the precise language of section 43 was reenacted as section 4078 of the Political Code, Stats.1907, ch. 282, § 1, p. 381. So far as is here pertinent, section 4078 provided: "If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, *such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day,* and a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board * * *." (Italics added.) This phraseology remained unchanged until 1947, when section 4078 of the Political Code was repealed, and the Legislature enacted the chapter of the Government Code which now includes sections 29714 and 29715, Stats.1947, ch. 424, § 1, p. 1236. The language of Political Code section 4078 was simplified, severed, and enacted into separate sections of the Government Code. The first part of Political Code section 4078 above quoted was, with a slight change of language, embodied in section 29714 of the Government Code. This change consisted of the omission of the clause above italicized and the insertion in its stead of the words presently appearing: "the claimant may treat the refusal or neglect as final action and rejection on the ninetieth day." The balance of former section 4078 of the Political Code set forth above is now incorporated into section 29715 of the Government Code.

By way of orientation, it is to be observed that sections 29714 and 29715 are contained in Title 3, Div. 3, ch. 4 of the Government Code, which relates to claims against a county. Article 1 of chapter 4, covering sections 29700 to 29721, embraces the filing and approval of claims and prescribes in detail the manner and procedure by which specified types of claims must be presented to the Board before a suit may be initiated by a claimant. Section 29704 states in part: "Any claim against the county * * * shall be presented to the board before any suit may be brought thereon. No suit shall be brought on any claim until it has been rejected in whole or in part." Section

29713, which immediately precedes the two sections here under review, provides in part: "If the board finds any claim is not a proper county charge, it shall be rejected. The rejection shall be plainly endorsed on the claim." While section 29704, supra, provides that no suit shall be brought on any claim against a county until such claim has been presented as therein provided and rejected in whole or in part and while section 29713, supra, enjoins the Board to reject all improper claims and to place thereon a plain endorsement of such rejection, it is significant that nowhere is there placed upon the Board any *specific* limitation of time within which it *must* act in either allowing or rejecting the claim.

[1–4] It is a fundamental rule of statutory construction that a provision under consideration by the courts should, whereever possible, be given such construction as will reasonably achieve its object and purpose within the context of the legislative scheme. Section 29714 of the Government Code constitutes a part of the machinery therein established requiring the presentation of claims to the Board as a condition precedent to the maintenance of a suit. One of the reasons for this type of legislation, requiring claims against a county to be first presented to the legislative body before suit is commenced, is to prevent public funds from being consumed in needless litigation by affording the county an opportunity for amicable adjustment before it could be charged with the cost of a suit and incur other expenses. Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 437, 278 P. 1028; Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345. Another reason is that it provides the public body responsible for making preparations for the fiscal year with an opportunity to be informed in advance as to the indebtedness or liability that it may be expected to meet. Crescent Wharf, etc., Co. v. City of Los Angeles, supra; Arbios v. County of San Bernardino, 110 Cal. 553, 555, 42 P. 1080. A third reason, of course, is to give the county prompt notice of a claim in order to enable the Board to investigate and inform themselves of the merits or demerits of a claim while the evidence is still fresh and the witnesses available. See David, California Municipal Tort Liability, 7 So. Cal.L.Rev. 373, 402–405.

[5, 6] Since one of the principal objectives of this species of legislation is to facilitate adjustment of claims without suit and assure adequate time for consideration and investigation of the particulars of the alleged claim by the public authority, the Legislature has seen fit to abstain from fixing any period of time within which such claims must be allowed or rejected. This was undoubtedly a recognition of the fact that while simple claims could be expeditiously processed, other claims involving complex questions of law or fact or entailing comprehensive investigation or extensive negotiation would require more prolonged attention. It is presumed, of course, that official duty will be diligently pursued and that claims would not be held up or postponed beyond the time reasonably necessary to pass upon them. But this may not in every instance be so. Thus, the object and purpose of section 29714 of the Government Code (and that of its precursor, section 4078 of the Political Code) was to obviate a situation in which the Board, by its own nonaction, could defer indefinitely a claimant's right to bring an action. The clearly intended import of that section is that a claimant *may* treat the failure of the Board to act as tantamount to a final action and rejection of the claim on the ninetieth day. It accords solely to the claimant the privilege of "treating" the claim as denied. This privilege or option he "may" but is not required to exercise. He may elect to wait until the Board discharges its responsibility by acting upon his claim in due course. Government Code, § 29713. As is alleged in the complaint, this is precisely what the Board did on April 7, 1953, when the claim was rejected. By the clear terms of section 29715 of the Government Code and section 342 of the Code of Civil Procedure, plaintiffs had six months from that date in which to file the present action.

It is thus apparent from the choice of language used in section 29714, its legislative history, its place in the statutory framework and the purpose to be accomplished, that it does not operate as an automatic rejection after 90 days have passed without positive action on the claim by the Board. Had the Legislature intended a rejection to result by operation of law on the ninetieth day, it could scarcely have used language more circuitous, equivocal and diffuse to effectuate its purpose. But "the draftsmen of legislation as a rule employ language notable for its precise and definitive character * * *." In re Estate of Burnison, 33 Cal.2d 638, 641, 204 P.2d 330, 332. Section 29714 does not state that the refusal or neglect of the Board *shall* be treated as final action and rejection on the ninetieth day. What it does state, however, is that the *claimant* "may treat" the Board's refusal or neglect as final action. Section 14 of the Government Code expressly declares that the word "shall" is mandatory and that "may" is permissive. It is true, of course, that the word "may" in a statute may be interpreted in a mandatory sense when such construction is necessary to give effect to the legislative intent, Garrison v. Rourke, 32 Cal.2d 430, 437, 196 P.2d 884, or where the provision or the context so requires, Government Code, § 5. But the legislative purpose in the present case can best be realized by construing the words "the claimant may treat the refusal or neglect as final action on the ninetieth day" in its ordinary signification of conferring permission or discretion upon the claimant to deem the claim rejected if he so chooses. It cannot be served by giving these words an imperative construction, so that a claimant "must" treat the claim as rejected on the ninetieth day. Such a construction would engender some of the very evils this body of legislation was designed to suppress. It would not facilitate the adjustment of claims without suit, where a claimant "must" treat the claim as rejected on the ninetieth day. It would not spare the county the harassment, burden and expense of useless litigation if, in all cases, a claimant "must" treat the claim as rejected by operation of law on the ninetieth day. It would hamper extended investigation of claims, where needed, if a claimant "must" treat the claim as rejected on the ninetieth day, especially where it would be to the public interest to have longer than ninety days for this purpose and the claimant was willing to abide by the Board's action. It would, in effect, withdraw from the Board the power to consider and act on the claim as such after the ninetieth day and invite the claimant to resort to the courts for his remedy even though the claimant and the Board might be actively engaged in negotiations for a settlement at that very time. In short, not only is the construction of section 29714 advocated by the county out of harmony with the letter, spirit, history and object of that statute, but its adoption might well open a Pandora's box of ills that could plague the county in its handling of claims.

But clearly no such results were inherent in, or contemplated by, the simple and direct language of section 29714, which under the special circumstances there prescribed, permits a claimant to avail himself of judicial remedies in advance of ultimate action by the Board, but does not obligate him to do so.

There is little merit in the suggestion that unless the claim is deemed rejected on the ninetieth day after filing by operation of law, a claimant would be in a position to delay indefinitely the running of the statute of limitations. All that is required to start the running of the statute is for the Board to pass upon the claim, as it was intended by the Legislature that it should do. The Board has full control and mastery over the course of events. On the other hand, it is conceivable that a claimant may be thwarted by the neglect or refusal of the Board to take any action on the claim he has presented. The law has provided the claimant with a remedy against the possible hardship of such inaction. He may, if he so elects, exercise his right to proceed under section 29714 to prosecute his claim in the courts by treating the Board's inaction as a final rejection on the ninetieth day.

The county cites State Department of Public Health v. Imperial County, 67 Cal.App.2d 244, 153 P.2d 957. That case is not germane. It is neither determinative of the issue here presented nor is it authority for the county's bald proposition that "A claim filed against a county is denied by operation of law on the minetieth day after filing and the claim is barred six months after the ninetieth day." In the Imperial case, successive claims were filed against the county between 1930 and 1932. The Board never took *any* action; the claims were neither allowed nor rejected. In 1941, more than eleven years after the first of these claims was presented and nearly 10 years after the last one, the plaintiff exercised the option given him in former Political Code section 4078 to deem the claims rejected and filed suit for the amounts claimed. A demurrer on the ground that the action was barred by the various statutes of limitation was sustained. The question presented was whether, under the circumstances there existing, the six months' period began to run from the ninetieth day after filing or at the time the claimant exercises his option to consider the claim as having been rejected. The court held that once a claimant invokes the option given him under section 4078 and elects to deem his claim rejected, such *deemed rejection* operated as of the ninetieth day to set in motion the six months' statute of limitations. All the court decided in that case was that a claimant who elects to deem his claim rejected was bound by the statutory language of section 4078 on which he relies to make such *deemed rejection* operative as of the ninetieth day after filing. The court did not construe section 4078 as being mandatory. On the contrary, it fully recognized its permissive nature when it stated, 67 Cal.App.2d at page 247, 153 P.2d at page 959: "The claimant is given a clear-cut option which he may but does not have to exercise. That option is definitely defined as a right to consider and treat the claim as having been rejected on the ninetieth day, *if he so desires.*" (Italics added.) It is at once apparent that the facts of the Imperial case do not parallel those of the instant action, and that its holding has no pertinency here. The complaint in the case at bar discloses that plaintiffs have had no occasion to invoke Government Code section 29714. The Board *did* pass on the claim in due course by formally rejecting it, and the suit was instituted within six months after such rejection.

The judgment is reversed with directions to the trial court to overrule the demurrer and to allow the defendant a responsible time within which to file its answer.

MOORE, P. J., and McCOMB, J., concur.

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126 Cal.App.2d 386

CARBINE v. MEYER.

Civ. 8410.

District Court of Appeal, Third District,
California.
July 2, 1954.

Action to restrain use of roadway and for damages for alleged trespass. Defendant filed cross-complaint seeking to quiet title to alleged easement, the Superior Court, El Dorado County, Maul J., ordered judgment in favor of plaintiff but did not award damages, and defendant appealed. The District Court of Appeal, Schottky, J., held, inter alia, that where defendant used roadway over lands of adjoining landowner four days in 1946, three days in 1947 and made no further use of the roadway until 1951, such circumstances of nonuser for long periods of time negatived any intention that the trespass was to be permanent, and action filed in August 1951 by adjoining landowner was not barred by three-year statute of limitations.

Judgment affirmed.

1. Limitation of Actions 🔑55(5)

Where a trespass consists of a physical entry upon the land of another and taking possession thereof under such circumstances as to indicate an intention that the trespass shall be permanent, the law may regard the wrong done in such case as complete at time of original entry, and statute of limitations runs from that time. Code Civ.Proc. §§ 338, subd. 2, 343.

2. Limitation of Actions ⇨55(6)

Where from the character of a trespass upon the lands of another it may not be presumed that the wrongful conduct will be continued, successive trepasses give rise to successive causes of action, and an action may be brought at any time to recover damages which have accrued within the statutory period, although the original trespass occurred before that period, provided landowner has not permitted such time to elapse as will vest in alleged trespasser a right by prescription. Code Civ. Proc. §§ 338, subd. 2, 343.

3. Limitation of Actions ⇨55(6)

In cases of doubt as to whether a trespass is permanent, the courts are inclined to favor the right to successive actions. Code Civ.Proc. §§ 338, subd. 2, 343.

4. Limitation of Actions ⇨55(6)

Where defendant used roadway over lands of adjoining landowner four days in 1946, three days in 1947 and made no further use of the roadway until 1951, such circumstances of nonuser for long periods of time negatived any intention that the trespass was to be permanent, and action filed in August, 1951, by adjoining landowner for an injunction and for damages was not barred by three-year statute of limitations. Code Civ.Proc. §§ 338, subd. 2, 343.

5. Trial ⇨395(2)

Where the only allegation in what defendant entitled an amendment to the second amended answer was allegation setting out statute of limitations, finding that none of the material allegations of amendment to the second amended answer were true was not insufficient as constituting an uncertain reference.

6. Appeal and Error ⇨169

Questions not raised in a lower court will not be considered on appeal.

7. Appeal and Error ⇨171(1)

Where a case has been tried on one theory, that theory must be adhered to on appeal.

8. Joint Tenancy ⇨13

Joint tenant was not bound by act of other joint tenant in purporting to grant an easement over the lands held in joint tenancy.

9. Joint Tenancy ⇨12

One joint tenant or tenant in common cannot bind his cotenant by any contract which he may make relating to the common property.

10. Joint Tenancy ⇨13

One cotenant cannot bind his cotenants by the grant of an easement over the common property, although he may by lease or license grant to another the right to enjoy the common property in his stead to the same extent that he is entitled to enjoy it by reason of his cotenancy.

11. Joint Tenancy ⇨13

A joint tenant may convey his interest to a stranger and the stranger becomes a tenant in common with other joint tenants.

12. Appeal and Error ⇨989

Issues of fact must be determined by trial court and a reviewing court is bound by rule that its power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

Busick & Busick, Sacramento, for appellant.

Emmett J. Foley, Placerville, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant to restrain defendant from using a road on the land owned by plaintiff and her husband as joint tenants, and for damages for alleged trespass by defendant. Defendant filed an answer claiming that she owned an easement over plaintiff's land and also filed a cross-complaint seeking to quiet title to the claimed easement. At the conclusion of the trial before the court defendant was granted leave to file an amendment to her answer adding the defense of the statute of limitations. Subd. 2 of section 338, and section 343 of the Code of Civil Procedure. The court ordered judgment in favor of plaintiff but did not award any damages. Findings of fact and conclusions of law were filed, and in accordance therewith judgment was entered "That the plaintiff and cross defendant, Elsie C. L. Carbine, is entitled to and is hereby granted a judgment quieting her title to the land in question as against defendant and cross complainant Dora Loraine Meyer's claim for this particular easement, and restraining the defendant and cross-complainant from use of the same, and that said judgment decree that the purported agreement signed by the plaintiff and cross defendant's husband, John Edward Carbine, is not binding upon the plaintiff and cross defendant Elsie C. L. Carbine."

Defendant has appealed from the judgment and makes a number of contentions for the reversal thereof. Before discussing these we shall summarize the rather unusual factual situation as shown by the record.

Respondent and her husband, John Edward Carbine, and appellant are the respective owners of adjoining parcels of land situated in El Dorado County. The land of respondent and her husband (hereinafter called the "Carbine land") lies between appellant's parcel (hereinafter called the "Meyerland") and a county road.

In April of 1946, plaintiff's husband and a Mr. Reynolds, the then owner of the land now owned by defendant, entered into an agreement whereby plaintiff's husband gave Mr. Reynolds the right to use the road running from the county road to the defendant's land, over plaintiff's land.

At the time the easement was granted, Mr. Reynolds was appellant's former husband and it is not clear whether he was the sole owner of the Meyer land, or whether appellant had an interest in it. Appellant testified that Mr. Reynolds and she had acquired the property in 1942, during their marriage, and that in 1945, after their divorce, she invested some money in the property and the two of them then owned it in joint tenancy. In any event, Mr. Reynolds conveyed his interest in the Meyer land to appellant in 1950, and thereafter she was the sole owner.

In April, 1946, when the easement was granted, respondent and her husband had not yet obtained complete title to the Carbine land, but were purchasing it, under contract, and it was not until 1949, after the conclusion of certain other litigation (in which appellant was not involved), that respondent and her husband received a deed to the land from the executrix of the estate of Mary J. Wentz, deceased. Respondent and her husband were named as joint tenants, both in the contract of purchase from the Brays and in the deed from the executrix. It does not appear from the record that respondent ever joined in or consented to the grant or use of the easement. She testified that she never had done so, and appellant's answer admits that respondent never consented to the use of the easement by appellant.

The record does not show what use Mr. Reynolds made of the road, and the testimony is conflicting as to the use made by appellant. The latter testified that she used the road for six months, right after it was put in, and was then told by Mr. Carbine that the road had been closed. Barbed wire had been strung on posts across the road; appellant took this wire down, but four days later it was restrung. At one point in her testimony she stated that these barricades were erected in December, 1946, and at another time she said that the first barricade was erected in March, 1946 —she later corrected this to July, 1946— and that the second barricade was put up about two weeks later. In any event her testimony shows that after the road was closed for the second time she did not use it again until November or December, 1947, when she had the obstruction removed and put cattle guards in. After this second opening of the road, appellant used it for three days when it was again closed, this time by trees being felled across it, and the road remained closed until the summer of 1951, when appellant had the county road department remove the obstructions and regrade the road. This regrading was done on July 25, 1951, but it appears that the road was again closed later that summer, by chains and a felled tree. In October or November of that year respondent also had a ditch cut through the road for drainage purposes, and thereafter the road was impassable. Appellant was not living on the property at this time, but she had a tenant there. She testified that she (appellant) did use the road after the regrading, but that the tenant used it only once or twice, using another road instead. This other road also crossed the Carbine land, but it is not in issue in this appeal. Respondent denied that appellant used the road here involved for six months after it was put in, and testified, instead, that it had not been used "a month altogether" since it was built.

In December, 1947, apparently after appellant had opened the road for a second time and it had again been closed, appellant brought an action in the Superior Court in and for El Dorado County to quiet title to the easement and for injunctive relief. This action was brought against Mr. Carbine and others who were alleged to be the owners of the Carbine land, but no mention was made of respondent's interest in the land and she was not made a party to the action. The file in the action shows that on June 4, 1948, appellant obtained a decree quieting her title to the easement, enjoining interference with her use thereof, and requiring removal of the obstructions. About two months later, upon the application of appellant, the defendants in that action were ordered to show cause why they should not be punished for contempt for failure to remove the obstructions. Respondent's joint tenancy interest in the Carbine land and her objections to the easement were brought out at the hearing, apparently for the first time, and the court discharged the order to show cause, on the ground that the forced removal of the obstructions would be prejudicial to respondent's apparent rights.

Appellant testified to substantial expenses incurred by her in improving the road and clearing away the obstructions. Among the improvements were the installation and reinstallation of cattle guards and culverts, as well as the regrading of the road in July, 1951. However, it does not appear that any of these expenditures were made prior to the second reopening of the road in November or December, 1947, at which time the road had already been closed twice and posted with "no trespassing" signs.

Appellant first contends that the instant action, which was filed on August 3, 1951, was barred by the provisions of subdivision 2 of section 338 of the Code of Civil Procedure and section 343 of the same code. It is clear that the action is one for trespass upon real property and that subdivision 2 of section 338 providing that such actions shall be commenced within three years is the applicable statute.

[1–4] As hereinbefore noted, there is evidence that appellant started to use the road in 1946, although the extent of her use that year is in dispute. It appears, however, that after the initial barricade was put up, appellant used the road for only four days in 1946, for three days in 1947, and made no further use of it until July, 1951, when the acts of trespass, of which respondent complains, occurred. The original complaint herein was filed in August, 1951. Where a trespass consists of a physical entry upon the lands of another and taking possession thereof under such circumstances as to indicate an intention that the trespass shall be permanent, the law may regard the wrong done in such case as complete at the time of the original entry, and the statute of limitations runs from that time. Kafka v. Bozio, 191 Cal. 746, 750, 218 P. 753, 29 A.L.R. 833. Where, however, from the character of the trespass it is not to be presumed that the wrongful conduct will be continued, successive trespasses give rise to successive causes of action, and an action may be brought at any time to recover the damages which have accrued within the statutory period, although the original trespass occurred before that period, provided that the plaintiff has not permitted such time to elapse as will vest in the defendant a right by prescription. Williams v. Southern Pacific R. Co., 150 Cal. 624, 625–626, 89 P. 599.

In all cases of doubt respecting the permanency of the injury, the courts are inclined to favor the right to successive actions. Kafka v. Bozio, supra, 191 Cal. at page 752, 218 P. at page 756. The circumstances attending appellant's nonuser of the road for long periods of time would seem to negative any intention that the trespass was to be permanent. Neither she nor Mr. Reynolds built the road, and although she did install cattle guards late in 1947, they were, according to her own testimony, permitted to fall into a state of disrepair through neglect and nonuser of the road. The evidence would not support a finding that she gained an easement by prescription, and we are satisfied that the trial court correctly concluded that respondent's action was not barred by the statute.

[5] Appellant next contends that there was no finding on the issue of the statute of limitations. As hereinbefore pointed out, appellant was granted leave to file an amendment to her answer to the second amended complaint setting up the statute of limitations, and she did so, numbering the only paragraph in said amendment as "X". She also entitled this amended pleading (no doubt, inadvertently) as "Amendment to Second Amended Answer" although it states that it is an amendment to the answer to respondent's second amended complaint.

Paragraph IX of the findings of fact reads: "Except as otherwise herein*able* specifically found, all of the allegation of the complaint and answer to the cross complaint are true and none of the material allegation ~~or denials of the answer and~~ cross complaint and amendment to the Second Amended Answer is true."

Appellant argues that there was no finding that the allegations of Paragraph X of the Amendment to Defendant's Answer to Plaintiff's Second Amended Complaint are untrue, and cites a number of authorities holding that the finding by a court that all the material allegations of a pleading are true or untrue is insufficient because it is uncertain as to which of the allegations the court deems material.

This contention is entirely devoid of merit because the only allegation in what appellant entitled the amendment to the second amended answer is the one setting up the statute of limitations, and the reference thereto as a material allegation is therefore of no importance. Any apparent confusion in the findings was no doubt caused by appellant erroneously entitling the amendment to the answer to the second amended complaint as "amendment to second amended answer."

Appellant contends also that she has a license to use the roadway, which license became irrevocable by virtue of her expenditures for installation of a road. It is apparent from the pleadings in this action and from the remarks and stipulations of counsel at the trial, that the parties proceeded under the theory that an easement, only, was claimed by appellant over the Carbine land. In paragraph III of appellant's answer she alleged that "said right of way and easement was granted to this defendant by said John Edward Carbine and established by said judgment entered in the action of Dora Loraine Meyer, Plaintiff v. Edward Carbine, John Carbine, Mike Carbine, * * *."

[6] As stated by this court in MacKenzie v. Angle, 82 Cal.App.2d 254, at page 263, 186 P.2d 30, at page 35: "A rule, early established and long adhered to in the courts of this state, is that questions not raised in a lower court will not be considered on appeal. (Citing cases.)"

As stated in 3 California Jurisprudence 2d, Appeal and Error, section 140: "The rule is founded upon considerations of practical necessity in the orderly administration of the law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel."

[7] And as this court said in Munfrey v. Cleary, 75 Cal.App.2d 779, at page 785, 171 P.2d 750, at page 753: "Also as a general rule where a case has been tried upon one theory that theory must be adhered to on appeal, and a party who has tried his case wholly or in part on a certain

theory, which theory was acted upon by the trial court, cannot, on appeal, change his position and adopt a different theory, since to do so would be unfair to the trial court and to opposing counsel. (Citing cases.)"

[8–11] But even if appellant's contention that she has a license to use said roadway which became irrevocable by reason of her expenditures in the installation of a road could be considered on this appeal, we are convinced that this contention could not be sustained. The record shows that neither appellant nor Mr. Reynolds built the road, and although she did install cattle guards late in 1947 they were permitted to fall into a state of disrepair through neglect and nonuse of the road. Furthermore, it is clear that respondent never at any time consented to or acquiesced in the use of said road by appellant, and she is not bound by the act of her joint tenant in purporting to grant an easement to Albert G. Reynolds, appellant's predecessor in interest. As stated in Oberwise v. Poulos, 124 Cal.App. 247, at page 251, 12 P.2d 156, at page 158:

> "One joint tenant or tenant in common cannot bind his cotenant by any contract which he may make relating to the common property. Sarina v. Pedrotti, 103 Cal.App. 203, 284 P. 472; 7 Cal.Jur., p. 358; 33 C.J., p. 913. So one cotenant cannot bind his cotenants by the grant of an easement over the common property (Pfeiffer v. Regents of University of California, 74 Cal. 156, 15 P. 622; East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999; Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal.App. 213, 194 P. 757; 7 R.C.L., p. 884), although he may by lease or license grant to another the right to enjoy the common property in his stead to the same extent that he is entitled to enjoy it by reason of his cotenancy. (Waterford Irr. Dist. v. Turlock Irr. Dist., supra; Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 P. 45.) A joint tenant may likewise convey his interest to a stranger, in which event the grantee becomes a tenant in common with the other owner. Tilden v. Tilden, 81 Cal.App. 535, 254 P. 310; Green v. Skinner, 185 Cal. 435, 197 P. 60; Pepin v. Stricklin [114 Cal.App. 32], 299 P. 557."

And as stated in Stark v. Coker, 20 Cal. 2d 839, 844, 129 P.2d 390, 393:

> "Plaintiff had no knowledge of the purported accord and satisfaction and did not authorize it. The status of the owners of the note being joint tenancy, it is no more than proper under the circumstances that the rules with respect to joint tenancy be applied. One of the characteristics of joint tenancy is the equality of the interest held by the respective tenants; Civ.Code, § 683, and defendants by giving the note and trust deed were advised of that rule. It has been consistently held that one joint tenant has not by reason of the relationship any authority to bind his cotenant with respect to the latter's interest in the common property. See Oberwise v. Poulos, 124 Cal.App. 247, 12 P.2d 156; Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531; Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 54 P.2d 73."

[12] We are satisfied that the record supports the findings and judgment. Issues of fact must be determined by the trial court and an appellate tribunal is bound by the familiar rule that its power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. Appellant's argument in the main has been an argument as to the weight of conflicting evidence, and if the judgment had been in her favor it would be very helpful in pointing out evidence tending to support such a judgment, but in view of the judgment adverse to appellant the testimony pointed out and relied upon by her merely accentuates the conflict in the testimony.

The judgment is affirmed.

VAN DYKE, P. J., concurs.

126 Cal.App.2d 442

VERHAEGEN
v.
GUY F. ATKINSON CO.
Civ. 19909.

District Court of Appeal, Second District,
Division 2, California.
July 7, 1954.

Action against contractor for personal injuries sustained by city inspector on public works project. The Superior Court, Los Angeles County, Raymond McIntosh, J., entered judgment for inspector. Contractor appealed. The District Court of Appeal, Fox, J., held that erroneously given charge to jury that each party was entitled to presumption that every person takes ordinary care of his own concerns and that he obeys law coupled with (res ipsa loquitur) charge that happening of accident raised inference that proximate cause was some negligent conduct of defendant, was prejudicial to defendant.

Judgment reversed.

1. Negligence ⚿138(2)

Where plaintiff in action for personal injuries testified fully as to his acts and conduct immediately prior to and at time of accident, instruction on presumption of due care was error.

2. Appeal and Error ⚿1064(1)

Whether instruction that each party is entitled to presumption of law that every person takes ordinary care of his own concerns and that he obeys law constitutes prejudicial error depends on facts of particular case.

3. Appeal and Error ⚿1064(1)
Negligence ⚿138(2)

Where erroneous instruction that both parties were entitled to presumption of due care was effectively neutralized as to defendant by (res ipsa loquitur) instruction that happening of accident raised inference that proximate cause was some negligent conduct of defendant, and no instruction was given affecting continued application of presumption in favor of plaintiff, and finding of contributory negligence would have defeated plaintiff's claim, error in giving instruction was prejudicial to defendant.

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Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for appellant.

Kenneth J. Murphy and Henry E. Kappler, Los Angeles, for respondent.

FOX, Justice.

This is an action for damages for personal injuries sustained by plaintiff while performing his duties as a city inspector on a public works project. Defendant contractor appeals from an adverse judgment.

The structure being built was the Anaheim Street Bridge in Long Beach, which spans the channel of the Los Angeles County Flood Control District, which at that point is the Los Angeles River. The channel has two levees or embankments to contain the water therein. There was a temporary construction road, some 15 feet wide, running east and west. It was just north of a row of concrete piers which were to support the bridge. This road led over the levee on the west. The approach to the levee was about a 20% grade. The southerly side of the road sloped down to a low point in the vicinity of the base of the piers. This dirt road was full of holes and depressions.

At the time of the accident defendant's employees were moving two sheet pilings, 40 feet in length and weighing between 3,000 and 3,500 pounds, by means of a large crane mounted on a truck. The boom of the crane was 60 feet long and extended to the rear. Suspended from the end of the boom were two strands of wire leading to a hook. The sheet pilings were tied with slings about 20 feet apart and then attached to the hook, something like an inverted "Y" according to the man who prepared the load. There is, however, testimony indicating that only one wire was used to tie the load. After the load was hooked on, the operator of the truck drove west on the construction road and up the grade of the levee very slowly—at somewhere from 1 to 5 miles per hour. Due to the roughness of the road, the boom moved up and down as the truck chugged along. The road was wet and somewhat muddy from a rain of the night before thus causing the wheels to slide and the load to swing sideways. It was variously estimated that the load was suspended from 3 to 4 feet to as much as 8 to 10 feet above the road.

In going about his inspection duties, plaintiff testified he approached the construction area parallel to and approximately 75 feet south of the center of the temporary road. It was while he was in this locality, according to plaintiff, that the crane lost its load and he was hit. He was aware of the crane-vehicle as one of the pieces of equipment being used in the area but was not "paying particular attention to it." He testified fully as to his acts immediately preceding and at the time of the accident. Witnesses for defendant, however, testified that plaintiff was on the edge of the construction road, looked in the direction of the load, ran underneath it, and as he did so the piling came down and hit him. Based on this testimony, defendant asserts plaintiff was guilty of contributory negligence.

Defendant seeks a reversal upon the ground that the court prejudicially instructed the jury. Its position must be sustained.

The court gave the following instruction on the presumption of due care: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of *prima facie* evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption *and* any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof." (Italics added.)

Plaintiff concedes that "[n]either side was entitled to the benefit of this presumption of law." He says, however, that defendant received just as much benefit from the instruction as did the plaintiff. Consequently, he concludes, defendant suffered no prejudice from this erroneous advice to the jury.

[1, 2] Whether the error in giving the instruction is prejudicial depends on the facts of the particular case, Ford v. Chesley Transportation Co., 101 Cal.App.2d 548, 552, 225 P.2d 997; Cole v. Ridings, 95 Cal. App.2d 136, 140, 212 P.2d 597. It is therefore necessary to analyze the quoted instruction, and relate it to the evidence and certain other instructions that were given.

This instruction was given verbatim in Rozzen v. Blumenfeld, 117 Cal.App.2d 285, 255 P.2d 850 [hearing denied] and was held to be prejudicial. It was there pointed out, 117 Cal.App.2d at page 288, 255 P.2d at page 852, that in determining whether prejudice resulted in a particular case, the vice of the instruction must be kept in mind, viz., that "The party against whom the presumption is invoked must not only overcome by a preponderance of the evidence the case presented by the opposing party, but must also overcome the presumption, for in the language of the instruction, conflicting evidence must be weighed 'against the presumption, *and* any evidence that supports the presumption, to determine which, if either preponderates.'" (Italics added.) Since plaintiff testified fully as to his acts and conduct immediately prior to and at the time of the accident there was no room for the presumption of due care. Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P.2d 65. The effect, however, of the instruction was to add strength to plaintiff's claim that he was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that plaintiff was not negligent. Ford v. Chesley Transportation Co., supra, which dealt with this identical instruction. It is thus clear that plaintiff received substantial benefit from this portion of the court's charge.

[3] The situation, however, is quite different as to the defendant. The court instructed on the doctrine of *res ipsa loquitur*[1] (the propriety of which defendant challenges). In that instruction the jury was told that "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant" and that it was incumbent on defendant to rebut that inference by showing due care or lack of proximate cause. The net result of these instructions was to tell the jury that an inference of negligence and proximate cause arose from the happening of the accident and that defendant was required to meet this with proof. The presumption of due care was thus effectively neutralized or attenuated as to defendant. On the other hand, no instruction affected in the slightest its continued application and potency in favor of plaintiff. Where, as here, contributory negligence of plaintiff would have defeated his claim for damages the advantage flowing to the plaintiff from giving these instructions clearly operated to defendant's serious prejudice. Rozzen v. Blumenfeld, supra; Cole v. Ridings, supra; Wertheim v. Mears, 104 Cal.App.2d 120, 123, 231 P.2d 89; Tice v. Kaiser Co., 102 Cal.App.2d 44, 51–52, 226 P.2d 624. See Paulsen v. McDuffie, 4 Cal.2d 111, 119, 47 P.2d 709; 4 The Hastings Law Journal (1953) 124.

In further analyzing this specific instruction on the presumption of due care the court, in the Rozzen case, supra, pointed out, 117 Cal.App.2d at page 289, 255 P.2d at page 853, that "A second vice of the instruction is that it is bound to produce doubt or confusion in the mind of a conscientious juror, when he considers it in the light of other instructions given. In the present case, for example, in explaining the meaning of 'burden of proof' and 'preponderance of the evidence', the jury was told that 'should the conflicting evidence be evenly balanced in your minds, * * * then your finding must be against the party carrying the burden of proof.' The juror is further advised that 'A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but *unless so controverted, the jury is bound to find in accordance with the presumption.*' Further, the juror is told to decide the case 'solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and *such presumptions* as the law deduces therefrom, * * *.' Again, the juror is instructed: 'You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number *or a presumption or other evidence, which appeals to your mind with more convincing force.*'" (Emphasis added by the court.) The precise language of the various instructions, noted by the court in the above quotation, likewise appears in the instructions given by the trial court in this case. "Manifestly," said the court, "the instruction given here * * * could serve only to confuse the jury. While the meaning of 'a preponderance of the evidence' is correctly set forth, the jury nevertheless was confronted with another instruction that there is a presumption of due care which continues throughout the trial and that if it satisfies the mind of the juror he may rely on the presumption. The question naturally rises in the minds of the jurors whether to resolve the issues on the basis of the evidence or on the basis of the presumption of due care." Obviously, the additional direction to infer negligence and proximate cause from the happening of the accident could not be calculated to lessen the jury's confusion.

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[1] That instruction was as follows: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he (~~it~~) did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his (~~its~~) part".

Plaintiff relies on Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16, and Beck v. Sirota, 42 Cal.App.2d 551, 109 P.2d 419. The instruction on the presumption of due care in those cases was substantially different from that given in this case. The jury was not advised in either of them that the party against whom the presumption of due care was invoked was required to overcome both the presumption and the evidence in support thereof.

In view of our conclusions it becomes unnecessary to consider other questions that defendant has raised.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

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126 Cal.App.2d 776

CARVEL v. ARENTS et al.

Civ. 20017.

District Court of Appeal, Second District,
Division 3, California.
July 28, 1954.

Action was brought for alleged fraud in sale of realty. The Superior Court of Los Angeles County, C. E. Johns, J. pro tem., entered judgment dismissing the action without prejudice, and certain of the defendants appealed. The District Court of Appeal, Shinn, P. J., held that the filing of a request by plaintiff for dismissal of the action, without any showing of good cause for dismissal, after trial had commenced, and the granting by the Superior Court of a request to dismiss the action by filing a direction with the clerk, should be deemed an abandonment of the case by the plaintiff, even though plaintiff stated that the dismissal should be without prejudice, and judgment, insofar as it purported to be a dismissal without prejudice, was void.

Judgment modified by striking therefrom the words "without prejudice" and, as modified, affirmed.

1. Dismissal and Nonsuit 🔑5

The beginning of an opening statement, or, if there is no opening statement, the administering of the oath of affirmation to the first witness, or the introduction of any evidence, is the "commencement of trial" within statutory provision allowing a dismissal by plaintiff by written request to the clerk at any time before the actual "commencement of trial". Code Civ.Proc. § 581, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Commencement of Trial".

2. Dismissal and Nonsuit 🔑6

Where witnesses were sworn and testified before plaintiff made known her desire to dismiss the action, there was a "commencement of trial" within statutory provision allowing a dismissal by plaintiff by written request to the clerk at any time before the actual "commencement of trial". Code Civ.Proc. § 581, subd. 1.

3. Action 🔑70

If, after trial has commenced, court, on motion of plaintiff for a dismissal without prejudice, enters a dismissal or a dismissal with prejudice, plaintiff's motion will be deemed an abandonment of the case. Code Civ.Proc. § 581, subds. 1, 4, 5.

4. Dismissal and Nonsuit 🔑42

Filing of request by plaintiff for dismissal of action, without any showing of good cause for dismissal, after trial had commenced, and granting by court of request to dismiss action by filing direction with clerk, should be deemed an abandonment of case by plaintiff, even though plaintiff stated that dismissal should be without prejudice, and judgment, insofar as it purported to be a dismissal without prejudice, was void, and would be modified by striking therefrom the words "without prejudice". Code Civ.Proc. § 581.

5. Dismissal and Nonsuit ⚿14

If plaintiff desires to have action dismissed by court without prejudice, after trial has commenced, it is necessary that plaintiff show good cause for dismissal. Code Civ.Proc. § 581.

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Lehman & Van Buskirk, Los Angeles, for appellants.

Nathan Goller, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff brought this action seeking damages for alleged fraud in the sale of a parcel of real estate to her by Bess Tate Ayres. In addition to defendant Ayres several others alleged to have acted as brokers for the seller were named as defendants. In substance the alleged fraud consisted of representations that the property was worth much more than plaintiff paid for it, was actually worth considerably less and the further representation that it could be resold within a month at a profit to plaintiff. Defendants answered.

When the case came on for trial plaintiff was granted leave to file a fourth amended complaint by the addition of several allegations contained in a former pleading. It was stipulated that defendants would be deemed to have denied the allegations of the amended pleading. The so-called fourth amended complaint was not filed. Plaintiff called to the stand Bess Tate Ayres and Lucille Kasnick under section 2055, Code of Civil Procedure. The record shows these witnesses were questioned but does not contain their testimony. Court was adjourned to the afternoon session. When court reconvened plaintiff, by her attorney, (other than her present attorney), addressed the court as follows: "Your Honor, the plaintiff will at this time desire to file a request for entry of dismissal without prejudice as to all defendants." Defendants objected that the action could not be dismissed without prejudice, the trial having commenced. The court stated: "The motion will be granted, without prejudice." There was brief discussion thereafter; defendants continued to object, plaintiff's counsel said his authority was a certain law professor, although the professor was not quoted, and it does not appear that anyone looked at section 581 of the Code of Civil Procedure before the court announced its ruling, and later said the ruling would stand. The record shows that on the same day plaintiff's attorney also filed with the clerk a request for a dismissal without prejudice as to all defendants and that a dismissal was thereafter entered by the clerk. Defendants appeal.

Section 581, subdivision 1, Code of Civil Procedure, allows a dismissal by plaintiff by written request to the clerk at any time before the actual commencement of the trial. Subdivision 5 of the section allows a party to dismiss his action with prejudice at any time before decision is rendered by the court. Also dismissal without prejudice may be had after actual commencement of the trial "either by consent of all of the parties to the trial or by order of court on showing of just cause therefor."

[1] Plaintiff relies upon the authority of the court to grant a dismissal without prejudice "on showing of just cause therefor", and she says that it must be presumed that just cause existed for the order. It appears in the reporter's transcript that plaintiff's attorney introduced the matter of a dismissal by the statement above quoted. No reason for his action was stated at any time. He took the position that he had a right to dismiss without prejudice at any time before the submission of the cause. This was the procedure in justices' courts under original code section 890 but with relation to dismissals in the superior court it has always been the law as stated in section 581, Code of Civil Procedure, that the plaintiff could dismiss by written request to the clerk at any time before "trial" or "actual commencement of the trial". At present the beginning of an opening statement, or if there be none, the administering of the oath or affirmation to the first witness, or the introduction of any evidence is the commencement of the

trial. As we have seen, witnesses were sworn and testified before plaintiff made known her desire to dismiss. A dismissal was not requested on the basis of the existence of just cause. The court did not order a dismissal. The record shows that the clerk noted on plaintiff's request for a dismissal without prejudice "Dismissal entered this 17 day of Apr., 1953" but it does not show any order by the court, or any entry of an order of dismissal by the court.

[2] The action was not dismissed without prejudice. As a dismissal without prejudice under section 581, subdivision 1, Code of Civil Procedure, the request to the clerk was not timely. Plaintiff did not move for an order of dismissal, but only stated a desire to file a request for entry of a dismissal without prejudice. The contention that the court ordered a dismissal for good cause is refuted by the record.

Section 581 states the conditions in which a dismissal without prejudice can be entered at the request of the plaintiff or upon order of the court. Amestoy Estate Co. v. City of Los Angeles, 5 Cal.App. 273, 90 P. 42; Townsend v. Driver, 5 Cal.App. 581, 90 P. 1071; Fisher v. Eckert, 94 Cal.App. 2d 890, 212 P.2d 64.

A dismissal with prejudice may be ordered by the court "when upon the trial and before the final submission of the case, the plaintiff abandons it." Code Civ.Proc. § 581, subd. 4.

[3] If, after the trial has commenced, the court on motion of plaintiff for a dismissal, without prejudice, orders a dismissal, opinion of Supreme Court in denying a hearing in Menotti v. Marchesi, 63 Cal. App. 49, 53, 218 P. 439, or a dismissal with prejudice, Burnett v. Burnett, 88 Cal.App. 2d 805, 199 P.2d 685, plaintiff's motion will be deemed an abandonment of the case.

[4, 5] The filing of a request for dismissal after the trial has commenced and the granting by the court of a request to dismiss the action by filing a direction with the clerk should also be deemed an abandonment, even though plaintiff states that the dismissal is without prejudice. If the plaintiff desires to have the action dismissed by the court without prejudice, after trial has commenced, it is necessary that he show good cause for dismissal.

The entry by the clerk of the dismissal is a judgment, Code Civ.Proc. § 581. Insofar as the judgment purports to be a dismissal without prejudice it is void. Riley v. Superior Court, 111 Cal.App.2d 365, 244 P.2d 474.

The judgment is modified by striking therefrom the words "without prejudice" and as modified is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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126 Cal.App.2d 706

CANEPA v. SUN PACIFIC, Inc.

Civ. 4826.

District Court of Appeal, Fourth District, California.

July 26, 1954.

Rehearing Denied Aug. 18, 1954.

Assumpsit action by purchaser of interest in fishing vessel against vendor for return of entire amount paid by purchaser. The Superior Court, San Diego County, John A. Hewicker, J., after trial by court, entered judgment for purchaser, and purchaser appealed on judgment roll alone, contending that he was entitled to greater recovery. The District Court of Appeal, Griffin, J., held that recovery could be had, if at all, only on theory that vendor was in possession of money belonging to purchaser as result of breach of purchase contract, which did not make any provision as to amount of recovery under such circumstances, and that vendor, in good conscience, ought to pay purchaser such money, and, therefore, tort measure of damages, which is value of property at time of conversion, was erroneously applied as measure of damages.

Judgment reversed.

1. Damages ⇨117

Generally, measure of damage for breach of contract is amount which will compensate aggrieved party for all detriment proximately caused thereby. Civ. Code, § 3300.

2. Action ⇨28

Person having action in tort against a wrongdoer may elect to waive the tort and proceed upon an implied contract.

3. Action ⇨28

Where person derives benefit from commission of tort against property of another, the law, will, at injured person's election, imply contract on part of tort-feasor to pay just remuneration for damage sustained as consequence of the wrong, and, upon such contract, general assumpsit lies.

4. Money Received ⇨19(4)

Where a wrongdoer has sold plaintiff's property, and action is in form of one for money had and received, recovery is limited to proceeds of sale. Civ.Code, § 3336.

5. Assumpsit, Action of ⇨26

Money Received ⇨19(4)

Upon waiver of conversion and suit in assumpsit, value of property may be recovered if plaintiff proceeds on theory of a sale to wrongdoer, but, where wrongdoer has sold converted property, and plaintiff adopts count for money had and received, recovery is limited to the proceeds, and, if such amount is not ascertainable, such form of action cannot be maintained. Civ.Code, § 3336.

6. Money Received ⇨3

Generally, action for money had and received lies where one has in his possession money which in equity and good conscience he ought to pay over to another, but action may lie also as to some specific article of property agreed to be treated as money or which has been actually or presumably converted into money.

7. Assumpsit, Action of ⇨5

Generally, where action is based upon a special contract, common count will not support the action, but plaintiff must declare specially on the contract.

8. Shipping ⇨27

In assumpsit action by purchaser of interest in fishing vessel against vendor for return of entire amount paid by purchaser, who did not attempt to rescind, recovery could be had, if at all, only on theory that vendor was in possession of money belonging to purchaser as result of breach of purchase contract, which did not make any provision as to amount of recovery under such circumstances, and that vendor, in good conscience, ought to pay purchaser such money, and, therefore, tort measure of damages, which is value of property at time of conversion, was erroneously applied as measure of damages. Civ.Code, §§ 1691, 3300, 3336.

9. Sales ⇨131

Generally, where there is a rescission, rescinding party cannot keep profits received from property which he is returning to vendor.

10. Appeal and Error ⇨533(1)

In appeal upon judgment roll alone, trial court's written opinion does not constitute part of judgment roll and does not serve function of finding, but, if any possible doubt exists, such written opinion may be referred to to obtain an explanation of judge's decision.

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Holt & Macomber, Jack L. Oatman, San Diego, for plaintiff.

Luce, Forward, Kunzel & Scripps, San Diego, for defendant.

GRIFFIN, Justice.

Plaintiff's complaint entitled "Action in Assumpsit" alleges that on February 20, 1952, defendant was indebted to plaintiff in the sum of $20,235.84, for monies received by defendant for use of plaintiff, and that defendant promised plaintiff to pay him said sum of money on request. Defendant denied generally the allegations of the complaint. After trial by the court judgment was entered for plaintiff for $10,479.80 and costs, plus interest from December 24, 1951, amounting to $882.31.

Plaintiff appealed on the judgment roll alone from that portion of the judgment allowing him only $10,479.80, contending that from the pleadings and from the facts found it must be held that plaintiff was entitled to the return of the entire amount paid on a 35 per cent interest in a certain fishing vessel owned by defendant and being purchased by plaintiff under a written agreement.

Defendant's contentions on appeal from the judgment are (1) that the evidence is not sufficient to show a breach of contract by the defendant nor to support a judgment for damages based thereon; nor (2) to support a finding of rescission of the agreement or conversion which would support a judgment based upon those theories and upon the pleadings indicated.

The evidence shows that in August, 1943, defendant purchased a fishing vessel for $132,852.20. On September 30, 1943, plaintiff, an experienced skipper, entered into a written agreement with defendant to purchase a 25 per cent interest therein for one-fourth or its cost, payable $6,000 down and the balance payable from a one-half share of plaintiff's earnings as master, and 25 per cent "of the owner's share of the earnings of the vessel". On November 23, 1945, for $100, plaintiff purchased an additional 10 per cent interest therein, and thereafter he was credited upon the purchase price with 35 per cent of the net earnings of the vessel. The agreement also provided that the obligation of the defendant to complete the sale was contingent upon plaintiff remaining on the vessel as a master thereof, and devoting his best skill and efforts toward fishing for said vessel; that if, through willful incapacity on the part of the buyer or his voluntary withdrawal from such position, he shall not remain as master of said vessel until such purchase price is fully paid, the seller may, at its option, cancel the agreement by refunding to the buyer the payments which were received, together with the proceeds from his half share as master, but that in that event any sums which have been credited out of the boat's earnings would revert to the owner of the vessel; that owner should demand and receive for fish caught, the ceiling price, or in the absence of a ceiling, the prevailing market price.

By agreement on September 30, 1943, plaintiff paid only $3,000 on the original purchase price instead of $6,000. From 1943 through November, 1951, the vessel operated out of San Diego in Lower California waters with plaintiff as skipper. Money was made during certain seasons and losses occurred in others. There was paid on the purchase price of plaintiff's interest $2,911.42, during this period and there was credited to plaintiff on account on the purchase price, from plaintiff's share of the 35 per cent of the earnings of the vessel, $13,324.42. As of January 23, 1952, there was a balance due defendant of $16,079.87. During the last three years of operation out of San Diego the vessel suffered a total net loss, excluding depreciation, of $16,120.39. During these years plaintiff advanced no money for its operation. The catch was sold to defendant at the prevailing price of about $320 per ton.

In November, 1951, because of these losses, defendant suggested to plaintiff that the vessel be sent to Peru and there fish for a company in which defendant was interested. Plaintiff refused to go unless some definite agreement was made in reference to the price of fish and other satisfactory arrangements made with plaintiff. None were made. Plaintiff suggested they sell the vessel and it was offered for sale by plaintiff for $75,000, but no buyers were obtained. In that same month plaintiff left on a sea voyage on another vessel and remained away until April, 1952. The vessel here in question was at all times registered in the name of defendant and plaintiff's interest therein was not to be registered until his contract was paid in full. On December 24, 1951, defendant entered into an agreement to lease the vessel for three years, and to deliver the catch of the vessel to a subsidiary corporation of defendant in Peru, and the vessel departed on January 23, 1952, for those waters without plaintiff or his apparent consent or knowledge. There was no prevailing fixed ceiling price of fish in those waters, but the price obtained averaged about $70 per ton. The vessel operated there and after several months it was badly damaged and was left there. From November 30, 1951, to November 30, 1952, the net loss, excluding depreciation, was $4,833.53.

Plaintiff, on July 9, 1952, filed this action. The court found generally in accordance with the facts related, and particularly found that plaintiff had fully performed his part of the agreement and that defendant, on December 24, 1951, materially and substantially breached its agreement with plaintiff when it contracted to lease the vessel to its subsidiary in Peru without plaintiff's knowledge and consent, and that such breach constituted a "conversion of the vessel by defendant" and defendant "breached its agreement" with plaintiff on January 23, 1952, when it took the vessel to Peru; that the books of defendant company show a total credit payment of $20,235.84 on December 24, 1951, to plaintiff's account as being applied on his contract of purchase.

It then found that as of January 23, 1952, the day the vessel left San Diego for Peru, its fair market value was $87,500; that it had certain prepaid insurance and other assets amounting to $5,021.50, and liabilities or debts owing against it for $16,636.74; that plaintiff is chargeable with 35 per cent thereof or $5,822.86; and that the balance due on the contract owing by plaintiff was $16,079.87; that the market value of plaintiff's 35 per cent interest in the vessel on December 24, 1951, after deducting and adding these items was $10,479.80. Judgment was entered accordingly.

The complaint alleges a money had and received cause of action. Upon what theory the case was tried is problematical. Apparently, one theory was that there had been a conversion of plaintiff's interest in the vessel and accordingly the trial judge applied section 3336 of the Civil Code (the value of the property at the time of the conversion) as the true measure of damages. In portions of the trial judge's written opinion filed herein, it is stated that plaintiff "filed this action in assumpsit on the theory that the defendant had *breached the contract* between the parties and had *converted* said vessel to its own use"; that the contract between plaintiff and defendant "has been *breached* by act of the defendant in taking said boat to Peru"; that the act of defendant "in leasing the *entire* vessel to a subsidiary for three years, in my opinion, shows an absolute conversion of said vessel by the defendant"; (Italics ours) that "having dealt with the" vessel "and disregarding the rights and interests of Canepa * * * would be a conversion"; and "that some jurisdictions hold that assumpsit does not lie against the defendant unless a sale of the chattel has been made by the defendant. This is not the rule in California. See 98 A.L.R. 261 under heading 'Doctrine Permitting Recovery', and cases therein cited"; that "the contract was completely breached by the defendant by its taking the boat and dealing with it as its own, and defendant now has it in a foreign jurisdiction beyond the reach of the plaintiff"; that "plaintiff has nothing in his possession to give back. Defendant has it, is using it, and has leased it out under its own terms and conditions and for its own benefit without counseling with the plaintiff"; that "having held that the contract between plaintiff and defendant has been breached by defendant and that defendant has converted the boat to its own use against the wishes of the plaintiff, it then becomes necessary to determine plaintiff's damage". He then applied section 3336 of the Civil Code and fixed the damage as indicated.

Plaintiff concedes that if there was no contractual relationship between the parties and the defendant converted the vessel, then the court might have been correct in applying the tort measure of damages if the pleadings permitted, but since there was a contractual relationship between them which involved the property in question, and since the case was tried upon the theory of breach of contract, no conversion was established and the court was bound, under the holding in Anderson v. Van Camp Sea Food Co., Inc., 98 Cal.App. 787, 277 P. 1099, to return the entire purchase money to the plaintiff upon the finding that the defendant breached the contract. It is further argued that the mere fact that the act which constituted the breached of contract also constituted a conversion of the vessel did not justify the court in applying a tort measure of damage. The Anderson case was an action to recover the money paid on the purchase price.

[1] Generally, the measure of damage for breach of contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby. Sec. 3300, Civil Code. If the pleadings permitted and the case was tried on the theory of recovery of damages for breach of contract the amount found due might be supported by the evidence.

[2, 3] It is an established principle of law that under certain circumstances, a person having an action in tort against a wrongdoer may elect to waive the tort and proceed instead upon an implied contract, and where one person derives a benefit from the commission of a tort against the property of another, the law will, at the election of the person injured, imply a contract on the part of the tort-feasor to pay a just remuneration for the damage sustained as a consequence of the wrong, and on this contract general assumpsit lies. 5 Cal.Jur. 2d p. 532, sec. 6; Fratt v. Clark, 12 Cal. 89; 2 Greenleaf on Evidence, sec. 108.

It was stated on Philpott v. Superior Court, 1 Cal.2d 512, 525, 36 P.2d 635, 95 A.L.R. 990, that a plaintiff may not only waive the tort and sue in *indebitatus assumpsit* for the money consideration parted with but, where personal goods have been converted, he may also have the common-law writ (*quantum valebat*) for the value of the goods so converted. See also McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019.

[4, 5] In Glantz v. Freedman, 100 Cal. App. 611, 280 P. 704, it was held that a principal's remedies against a factor for unauthorized dealing with fruits include an action for damages for breach of contract or in tort for conversion, or, by waiving the tort, assumpsit for *goods sold and delivered,* in which case his action is on a contract implied by law arising upon a waiver of tort, citing 3 Cal.Jur. 377, 380. In that case it was said, 100 Cal.App. at page 614, 280 P. at page 705:

> " 'In many jurisdictions this doctrine is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. 4 Cyc. 332. In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in *assumpsit* for their value as for *goods sold and delivered.*' " (Italics ours), quoting from Bechtel v. Chase, 156 Cal. 707, 711, 106 P. 81, 83, where the rule is reiterated with the added statement: "The very basis of the 'waiver of tort' is that plaintiff consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and recovers the value, due him under an implied contract of sale."

Where the wrongdoer has sold the property and the action is in the form of *money had and received,* recovery is limited to the proceeds of the sale. French v. Robbins, 172 Cal. 670, 158 P. 188; 5 Cal.Jur.2d 534, sec. 7. It is further held that the measure of the plaintiff's recovery upon waiver of conversion and suit in assumpsit depends upon the count upon which he relies. If he proceeds on the theory of a *sale* to the wrongdoer the value of the property may be recovered. On the other hand, where the defendant has sold the converted property and the plaintiff adopts the count for *money had and received* the amount of recovery is limited to the proceeds. If that amount is not ascertainable this form of an action cannot be maintained. French v. Robbins, supra; 5 Cal.Jur.2d 535, sec. 8, and cases cited.

[6] It therefore becomes apparent that the proper choice of counts has a bearing on the amount of recovery in a given situation. Here, plaintiff did not plead the common count of *goods sold and delivered* but relied solely upon the common count of *money had and received* which contemplates that defendant had money in his possession which rightfully belonged to plaintiff.

Plaintiff's interest in the boat in question was not sold and there were no proceeds of any sale in the hands of defendant which plaintiff could possibly recover. The general rule is that the action for money had and received lies in all cases where one person has in his possession *money* which in equity and good conscience he ought to pay over to another. 5 Cal.Jur.2d p. 548, sec. 16; Kreutz v. Livingston, 15 Cal. 344; Mains v. City Title Ins. Co., 34 Cal.2d 580, 212 P.2d 873. The action for *money had and received* lies only as to money or as to some specific article of property agreed to be treated as money or which has been actually or presumably converted into money. Ehrman v. Rosenthal, 117 Cal. 491, 49 P. 460; 5 Cal.Jur.2d 551, sec. 18.

[7] For the reason that parties are bound by their agreement and there is therefore no ground for implying a promise when there is an express contract, the general rule is that where an action is based upon a special contract, a common count will not support the action, but the plaintiff must declare specially on the contract. O'Connor v. Dingley, 26 Cal. 11; Roche v. Baldwin, 135 Cal. 522, 65 P. 459, 67 P. 903; 5 Cal.Jur.2d 537, sec. 9.

Looking to the contract which plaintiff claims defendant breached, we find it provides that in case of plaintiff's voluntary withdrawal as master of the vessel before the purchase price is paid, the seller may, at its option, cancel the agreement by refunding to the buyer each of the $2,000 payments received plus the proceeds from his one-half share as master, but such sums as were created out of the boat's earnings should revert to the owner of the vessel and the obligation of the seller to complete the sale is contingent upon plaintiff remaining on the vessel as master thereof and devoting his best skill and efforts to fishing for said vessel. Apparently it contains no provision respecting the rights of the parties if defendant breached its part of the contract. There is no finding of mutual rescission of the contract or such other exception to the general rule which would support a cause of action on a common count of *money had and received.* These exceptions are noted in Lubeck's Investment Co. v. Voris, 68 Cal.App. 652, 229 P. 1025; Fontaine v. Lacassie, 36 Cal.App. 175, 171 P. 812; and in 5 Cal.Jur.2d 556, sec. 22, et seq., as well as in Kreutz v. Livingston, 15 Cal. 344; Philpott v. Superior Court, 1 Cal.2d 512, 36 P. 2d 635, 95 A.L.R. 990; San Diego Construction Co. v. Mannix, 175 Cal. 548, 553, 166 P. 325; and 5 Cal.Jur.2d 548, sec. 16.

Apparently no effort was made by plaintiff to effect a rescission under section 1691 of the Civil Code. Gates v. McLean, 70 Cal. 42, 50, 11 P. 489; Dunger v. Whitney, 92 Cal.App. 216, 223, 267 P. 933.

[8–10] Accordingly, *under the pleadings,* the application of section 3336 of the Civil Code, supra, in respect to *damages for conversion* was erroneous and plaintiff must recover, if at all, from the facts found, on the theory that defendant is in possession of *money* belonging to plaintiff as the result of a breach of contract which makes no provision as to the amount of recovery under such circumstances, and which sum defendant in good conscience ought to pay to plaintiff. Willett & Burr v. Alpert, 181 Cal. 652, 661, 185 P. 976; Phelps v. Brown, 95 Cal. 572, 576, 30 P. 774; Bray v. Lowery, 163 Cal. 256, 124 P. 1004; Joshua Tree Townsite Co. v. Joshua Tree L. Co., 100 Cal.App.2d 590, 596, 224 P.2d 85.

It is a general principle of law that where there is a rescission the party rescinding cannot keep the profits received from the property he is returning to the vendor. 25 Cal.Jur. 723, sec. 194; Dunger v. Whitney, 92 Cal.App. 216, 223, 267 P. 933; Gates v. McLean, 70 Cal. 42, 50; 36 Cal.Law Review 607; Murdock v. Fisher Finance Corp., 79 Cal.App. 787, 791, 251 P. 319.

While it is true that the trial court's written opinion constitutes no part of the judgment roll and does not serve the function of finding, yet where any possible doubt exists it may be referred to for explaining the judge's decision. Vol. 3 Am.Jur. p. 462, sec. 897. When the court's memorandum opinion is referred to in the instant case there is no doubt that the court erroneously applied a tort measure of damages under section 3336 of the Civil Code.

The action should be retried with the issues clarified, and with findings responsive to the issues actually presented.

Judgment reversed. Each party to bear own costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

126 Cal.App.2d 759

In re BLAIR'S ESTATE.

BLAIR et al. v. BONNEN et al.

Civ. 20193.

District Court of Appeal, Second District, Division 1, California.

July 28, 1954.

Hearing Denied Sept. 16, 1954.

Proceeding to determine heirship brought by children of intestate's predeceased husband. The Superior Court, Los Angeles County, Victor R. Hansen, J., held that all property in wife's estate was her separate property and should go to her next of kin. Petitioners appealed. The District Court of Appeal, Drapeau, J., held that finding was supported by substantial evidence.

Judgment affirmed.

See, also, 269 P.2d 612.

1. Evidence 🔑265(18)

In proceeding to determine heirship, oral declarations ascribed to predeceased husband regarding use of wife's money for purchase of property held in joint tenancy was evidence as to such matter though it was weakest kind of evidence known to the law. Code Civ.Proc. §§ 1853, 1870.

2. Descent and Distribution 🔑71(7)

In proceeding to determine heirship, it was for trier of fact to give evidence of predeceased husband's oral declarations as to use of wife's money to purchase property held in joint tenancy the weight and effect to which he concluded it was entitled.

3. Appeal and Error 🔑989

In reviewing attack upon a judgment, the District Court of Appeal may consider only whether there is substantial evidence to support finding upon which judgment was based.

4. Descent and Distribution 🔑71(6)

In proceeding to determine heirship, wherein testimony was introduced as to oral declarations ascribed to predeceased husband regarding use of wife's money to purchase property held in joint tenancy, finding that all property in wife's estate was her separate property and should go to her next of kin was supported by substantial evidence. Probate Code, §§ 225, 228.

Louis Thomsen, Los Angeles, for appellants.

Roy B. Woolsey, Los Angeles, for respondents.

DRAPEAU, Justice.

Alfred G. Blair and Susan Ann Blair were married June 30, 1915. Each of them had been married before, their first spouses having died. And each of them owned separate property at the time of their marriage.

The husband and wife lived in California until Mr. Blair died in 1950, and Mrs. Blair in 1951. She left no will. And it may fairly be inferred from the record that from the time of her husband's death she was incompetent to make a will.

Mrs. Blair's estate was appraised at $255,857.90. All of her estate came from property that had been vested in joint tenancy in her and her husband.

Mr. Blair's estate, not including the joint tenancy property, was appraised at $70,074.63. Mrs. Blair was the residuary beneficiary under Mr. Blair's will.

Mr. Blair was an insurance broker. He also bought, subdivided, and sold real property. He managed extensive property affairs; his wife signed with him all notes, mortgages, and deeds in financing, refinancing, and selling their many properties.

Some of Mr. Blair's investments were good, some were not so good, and some were bad. Their financial bark almost capsized in the stresses of the depression of 1929 and in litigation involving one of their properties. But the value of property in joint tenancy when Mr. Blair died would indicate that, over all, his transactions resulted in considerable profit.

After Susan Ann's death two children by Mr. Blair's first wife petitioned to determine heirship.

Their petition was heard by the Superior Court. The judge found that all of the property in Susan Ann's estate was her separate property, and adjudged that it should go to her next of kin,—sisters, nephews, and nieces. Petitioners appeal from the judgment.

Testimony was taken in the trial court for several days. Many exhibits were received in evidence. On appeal the case has been extensively briefed and argued.

The issues are important to Mr. Blair's two children, for under the provisions of Section 228 of the Probate Code they are entitled to inherit from Susan Ann Blair all of her estate which had its origin in community property. On the other hand, of the estate was Mrs. Blair's separate property then under Section 225 her collateral heirs are entitled to it. Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918; and see 34 Cal.L.Rev. 766.

Petitioners contend that there is no evidence in the record to support the finding; that the whole estate was in its origin community property of the spouses.

After the marriage Mrs. Blair sent her husband to New Jersey to liquidate all of her property there. This was done, and the proceeds were deposited in a joint bank account of Mr. and Mrs. Blair here in California. Community funds were also deposited in the same account. Money was drawn from the account to finance investments in property by Mr. Blair.

As stated, following the depression of 1929 the Blairs' financial affairs came to a low ebb. Practically everything they owned was in property near Carlsbad, California, called the Red Apple Inn, and in subdivision property in the arroyo seco district near Pasadena.

Title to these properties was in joint tenancy. And from these properties may be traced the joint tenancy property owned by husband and wife at the time of Mr. Blair's death.

One of the witnesses for the collateral heirs of Mrs. Blair testified that Mr. Blair said he purchased the Red Apple Inn with Mrs. Blair's money. In trying to borrow money from this witness' husband, Mr. Blair said, "* * * you know, Susie may lose all of her property. She may lose the Red Apple Inn, and she may lose her Pasadena property."

Another witness, a former attorney, testified that Mr. Blair said he had taken all of Mrs. Blair's money and put it into the Red Apple Inn, and properties elsewhere.

Another witness testified that, when additional capital was needed for the Red Apple Inn, Mr. Blair said, "I haven't any money. Mrs. Blair has put an awful lot in it, and whether I can get her to put in any more or not, I don't know."

Another witness testified that Mrs. Blair, in the presence of Mr. Blair, said she had put her money into the Red Apple Inn.

Three of Mrs. Blair's sisters testified.

One sister said that, back in the twenties, in the presence of Mr. Blair, Mrs. Blair said she wished she had some of her money to spend; that her husband had it all, around $50,000, invested.

Another sister testified that Mr. Blair told her he had invested some of Mrs. Blair's money in Pasadena acreage in the arroyo.

Another sister testified that in 1928 Mr. Blair showed her the arroyo property, and said, "I have invested Susie's money here, some of Susie's money here."

Finally, after Susan Ann had had her first stroke, Mr. Blair said to her that he had made his will. She said to him that she thought she ought to make a will too. He said to her, "You don't need to make a will, because, if anything happens to you, *your* property will go to me." (Emphasis added.)

Petitioners argue that the substance of all of the testimony is that Susan Ann Blair put some or all of her money into some of the properties held in joint tenancy; that there is nothing in the record to show how much money or other separate property she put into any of the properties, nor when she may have done so; that the evidence does not show that specific property was acquired with identified separate property funds; that there is nothing in the testimony to show the total cost of the properties; hence it is impossible to determine what proportionate, or any, separate property interest she may have had in any of the properties.

[1, 2] This argument, however, goes to the weight, value, and effect of the evidence, and to the inferences to be deduced therefrom. There is no doubt, as petitioners argue that the oral declarations ascribed to Mr. Blair come within the category of "the weakest kind of evidence known to the law". Herbert v. Lankershim, 9 Cal.2d 409, 472, 71 P.2d 220, 251. But such declarations were evidence. Sections 1853 and 1870, Code Civ.Proc.; 31 C.J.S., Evidence, § 327, p. 1105; Estate of Hill, 167 Cal. 59, 138 P. 690; Moore v. Spremo, 72 Cal.App.2d 324, 164 P.2d 540. And it was for the trier of fact to give to that evidence the weight and effect which he concluded it entitled to.

[3, 4] It needs no extensive citation of authority to the effect that in reviewing an attack upon a judgment, this Court may consider only whether there is substantial evidence to support the finding upon which it is based. Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. From a review of the voluminous record in this case, this Court is required to find that the finding of the trial court is supported by substantial evidence.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

126 Cal.App.2d 684

BERSET v. BERSET.

Civ. 19735.

District Court of Appeal, Second District.
Division 3, California.
July 26, 1954.

Hearing Denied Sept. 16, 1954.

Divorce proceeding by wife. Husband was personally served with summons but, allegedly prior to such service, had petitioned the Children's Court of Conciliation for hearing in attempt to save the marriage. The Superior Court, Los Angeles County, Clarence L. Kincaid and Ellsworth Mayer, JJ., entered default judgment against husband and denied motion to vacate husband's default, and husband appealed. The District Court of Appeal, Shinn, P. J., held that record was not sufficient to establish abuse of discretion in refusal to vacate default.

Order denying motion to vacate default, and judgment, as modified, affirmed.

1. Divorce ⚷161

Ends of justice are better served when court has an opportunity to hear both sides of the controversy, especially in divorce cases, but it does not follow that every failure of a defendant to answer a complaint in a divorce case is legally excusable.

2. Divorce ⚷161

The court should be more willing to vacate a default in the divorce case where defendant manifests a bona fide desire to have the marriage preserved than where he merely wishes to be the prevailing party and there is little else in the controversy.

3. Divorce ⚷161

In divorce proceeding brought by wife, evidence was not sufficient to make substantial showing of husband's excusable neglect to make an appearance in the action.

4. Judgment ⚷143(16)

Defendant, who knows that he should consult a lawyer after having been served with summons and who has default judgment entered against him after he neglects to do so, cannot plead ignorance of contents of summons as basis for having default vacated.

5. Appeal and Error ⇨957(1)
Judgment ⇨139

Question whether default should be vacated is matter discretionary with the trial court, and trial court's ruling must stand in absence of an abuse of discretion.

6. Divorce ⇨161

In divorce proceeding by wife, wherein husband was personally served with summons but had, allegedly prior to such service, petitioned Children's Court of Conciliation for a hearing in an attempt to save the marriage, refusal to vacate default entered against husband in the divorce proceeding was not an abuse of discretion.

7. Divorce ⇨165(3)

That part of divorce judgment which exceeded relief prayed for was in excess of trial court's jurisdiction and would be stricken.

◆

James S. Duberg, Los Angeles, for appellant.

Krag & Sweet and David T. Sweet, Alhambra, for respondent.

SHINN, Presiding Justice.

Defendant appeals from a default judgment which awarded plaintiff a divorce, custody of a five months old child, $75 per month for support of the child, $1 per month for her own support, attorneys' fees and costs, and the community property, consisting of $350 worth of furniture and a life insurance policy for $1,700. He also appeals from an order denying his motion to vacate his default.

As concerns the judgment respondent concedes that a certain provision, to be mentioned later, granted relief in excess of the demands of the complaint, and should be stricken.

Summons was issued October 24, 1952; personal service was made on defendant and summons was returned November 17, 1952. Default was entered November 20, 1952. On January 16th notice was given of a motion to be heard January 23rd to vacate the default. The matter was heard on defendant's affidavit. It was averred that prior to service of summons and complaint defendant had petitioned the Children's Court of Conciliation for a hearing "in an attempt to save the marriage of the parties to the within action." A hearing was had November 24th; the result of the hearing was not stated; defendant understood that it was not necessary to answer the complaint; he was upset and nervous; "[t]hat in addition thereto defendant had no confidence in his ability to decipher legal jargon and believed that the summons contained same and that he would not understand same even if it were read by him; * * * [t]hat affiant is informed and believes that he has good and meritorious defense to the above entitled action after being so informed by his attorneys, Guerin & Guerin, after having related the facts concerning same to said attorneys, and said defendant is informed and believes that he has a good and meritorious cross-complaint in said action, based upon the foregoing relation by him of the facts of the instant action to his attorneys and their advising him thereof." With the motion defendant tendered a proposed answer and a cross complaint. In both he accused plaintiff of cruelty and desertion and by the cross complaint he sought a divorce, custody of the child and an award of the community property.

[1] Although it is our opinion that the ends of justice are better served when the court has an opportunity to hear both sides of the controversy, especially in divorce cases, it does not follow that every failure of a defendant to answer the complaint in a divorce case is legally excusable.

Defendant did not state in his affidavit the time when he petitioned the Children's Court of Conciliation but it may be assumed that it was after plaintiff had filed suit. It does appear, however, that he knew his default had been taken before the hearing of November 24th, which is the only one mentioned in the affidavit. Defendant says he understood from what occurred before the commissioner that it was unnecessary for him to answer the complaint but he stated no facts or reason for such belief. Since he refrained from any mention of what took place at the hearing, the court, on his motion to vacate the default, could properly have assumed that nothing took place which deceived him or excused his failure to answer. The affidavit did not state that he was not represented by counsel in the Conciliation Court, nor when he first consulted counsel. There was no suggestion in the affidavit that defendant believed his wife would abandon or delay prosecution of her action. Moreover, defendant was not seeking the right to be heard at the time of trial in resistance of his wife's prayer for a divorce, and in order to preserve the marriage, but by his cross complaint he would have pressed his own claim for a divorce, the custody of an infant child and an award to himself of the household furniture.

[2] We think the court should be more willing to vacate a default in a divorce case where the defendant manifests a bona fide desire to have the marriage preserved than where he merely wishes to be the prevailing party, and there is little else in controversy. The matter of the child's custody, of course, was highly important but if defendant had doubted his wife's fitness to have custody he would naturally have been diligent to assert that he had a better right. In his proposed cross complaint he did not allege his wife's unfitness to have custody of the infant. There was a minimum of community property involved.

[3, 4] There was no substantial showing of excusable neglect to make an appearance in the action. A defendant who has "no confidence in his ability to decipher legal jargon" in a summons, even "if it were read by him", knows that he should consult a lawyer. If he neglects to do so he cannot plead ignorance of the contents of the summons.

Defendant says the decision in Karlein v. Karlein, 103 Cal.App.2d 496, 229 P.2d 831, is controlling. We readily agree that the facts of that case made it the duty of the trial court to vacate the default and judgment but they were quite different facts, as were those in DeMello v. DeMello, 124 Cal.App.2d 135, 268 P.2d 26.

[5, 6] In order to hold the order in question to be an abuse of discretion we would have to say, in effect, that a defendant in a divorce case has a right, as of course, to have a default vacated at any time before trial. If this would be good law it is for the Legislature to declare it. It has always been a discretionary matter with the trial court and its ruling must stand in the absence of an abuse of discretion. Although we believe that the trial courts should show the greatest liberality in actions for divorce we conclude that no abuse of discretion has been shown in the present case.

[7] The provision of the judgment which is conceded to be in excess of the court's jurisdiction because it exceeded the relief prayed for ordered defendant to pay Bank of America, $538; Security-First National Bank, approximately $106; Home Furniture Company, approximately $63; Equitable Life Assurance Society, $485 and A. B. Chubbic, $145.

The judgment is modified by striking out the provision last referred to.

The order denying motion to vacate defendant's default, and the judgment as modified, are affirmed.

WOOD and VALLÉE, JJ., concur.

126 Cal.App.2d 501

MITCHELL v. A. J. BAYER CO. et al.

Civ. 20009.

District Court of Appeal, Second District,
Division 3, California.
July 13, 1954.

Action by ironworker against general contractor and another for injuries sustained when ironworker fell down a flight of stairs after stepping into darkness through a hole in a partition in a hotel under construction. From judgment of nonsuit, entered by Superior Court, Los Angeles County, Walter R. Evans, J., the ironworker appealed. The District Court of Appeal, Shinn, P. J., held that in view of evidence on the issues of defendant's negligence and the ironworker's contributory negligence nonsuit was proper.

Affirmed.

1. Appeal and Error ⚷105

Order for nonsuit is a "judgment" from which appeal may be taken.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment".

2. Negligence ⚷50

Where there was no cause for defendants to anticipate that ironworker would be entering stairway area of building under construction in course of work upon windows elsewhere defendants were not negligent in failing to protect upper landing and stair treads involved and to provide lighting on the stairway.

3. Negligence ⚷32(1)

Invitee to incompleted building in process of construction is invited to use such building in its then condition.

4. Negligence ⚷66(2)

Ironworker who was working on windows in hotel under construction, on a Sunday, and who fell down flight of stairs after stepping into darkness through a hole in partition while following an electric wire, was contributorily negligent.

5. Negligence ⚷66(2), 80

Where invitee on premises, being unfamiliar therewith, proceeds into place of impenetrable darkness and falls into aperture and is injured, as a matter of law he does not exercise ordinary care for his own safety and hence any injury he receives is result of his own contributory negligence for which he may not recover.

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Arthur Garrett and Lewis Garrett, Los Angeles, for appellant.

Belcher, Kearney & Fargo, by Wm. F. Clements, Los Angeles, for respondents.

SHINN, Presiding Justice.

[1] Plaintiff brought this action for damages occasioned by a fall he sustained while employed as an iron worker on the Statler Hotel building in Los Angeles. Defendants were A. J. Bayer Company and Robert E. McKee, the general contractor. A judgment of nonsuit was entered upon defendants' motion. Plaintiff appeals from the order, which is a judgment. Costa v. Regents of University of Cal., 103 Cal.App. 2d 491, 229 P.2d 867.

Plaintiff fell down a stairway and sustained serious injuries. In his complaint he alleged he was working on the premises at the invitation of the defendants and that he suffered his fall as a result of the negligence of the defendants in the construction and maintenance of a hall and stairway. The following is a summary of Mr. Mitchell's testimony, taken from the briefs.

Plaintiff had been an iron worker in construction work since 1916. He had worked for 5 or 6 months on the new Statler building in Los Angeles installing windows on all the floors. On Sunday, February 17th, he was sent from the 13th floor to the ballroom floor to work on windows; in looking for an outlet in which to plug in his electric drill he found some that were not "live"; he saw a black wire on the hall ceiling and followed it; he came to a partition, saw a hole in the partition high enough to walk through and 3 or 4 feet wide; there was no artificial light; there was light for work on the windows; he could see the wire going through the partition; he came to a stop near the hole, he could see nothing inside; it was pitch dark; he could not see the surface of the floor inside the hole, or any walls, and did not know what was inside; he walked through the hole without using any artificial light and fell down a stairway which led from the ballroom floor to the 7th floor, but he did not see the stairway or anything else as he fell and did not fall over anything as far as he could remember.

Previous to his fall plaintiff had not been in that particular part of the hotel nor had he used the stairway. There was evidence that inside the opening through which plaintiff passed the platform was visible, from which it could be inferred that plaintiff did not look before entering. Further testimony was elicited from witnesses Gray and Davis called by plaintiff under section

2055, Code of Civil Procedure. Gray was a safety inspector for McKee. His duties were to take protective measures at open holes, elevators, stairways, and other hazardous locations to guard against accidents. This had been his work for 10 years for McKee Company. Lighting was maintained on all working days. On the stairway in question there was a pipe handrail. There was a metal strip on the edge of each step, it being the intention to cover the step with a layer of cement to the top of the strip. Boards were laid on the steps to level them off and to prevent catching a toe on the metal strip. Mr. Gray had used the stairway every working day. Planks were on the steps the Friday before the accident. On Monday Mr. Davis found that the top plank had been removed.

[2] We do not believe the court erred in granting judgment of nonsuit. Plaintiff says defendants were negligent in failing to "protect the upper landing and stair treads involved and provide lighting suitable for all the workmen in their work." He does not state how the stairway should have been protected. They were all barricaded until metal steps had been installed; thereafter they were in general use. Defendants had no duty to keep them barricaded. Plaintiff says further that defendants were negligent in removing or permitting the removal of the board on the top step. The evidence was that the board was in place on Friday, two days before the accident and also testimony that it was in place on Saturday afternoon. There was no evidence that defendants removed it or caused or permitted it to be removed. Mr. Davis, a guard, testified that an employee of the city sewer department asked for a board on Saturday and that he referred him to the sawmill. Plaintiff says it could have been inferred that Mr. Davis permitted removal of the board. We think not. There was no evidence that the city employee made his request in the vicinity of the stairway or that he took the board or that Mr. Davis had any reason to believe that it would be removed. Plaintiff was working on windows, under safe conditions. There were no circumstances which would have caused defendants to anticipate that plaintiff would be entering the stairway area.

Plaintiff contends the hall and stairway should have been lighted. All areas were lighted for workmen as they had occasion to use them. There was, as we say, no reason to anticipate that on the Sunday in question, the men working on the windows on other floors would have reason to use the hall and stairway.

[3] The duties of the defendants respecting the condition of the premises were to be judged in the light of the rule stated in Kolburn v. P. J. Walker Co., 38 Cal.App.2d 545, 549, 101 P.2d 747, 749: "The rule is established in California that an invitee to an incompleted building in process of construction is invited to use such building in its then condition." Other cases which state the rule are Irvine v. J. F. Shea Co., Inc., 41 Cal.App.2d 458, 460, 107 P.2d 80; Nagle v. City of Long Beach, 113 Cal.App.2d 669, 671, 248 P.2d 799 and Ambrose v. Allen, 113 Cal.App. 107, 113, 298 P. 169. Inasmuch as plaintiff does not question the rule or its applicability in the present case further discussion of defendants' claimed breach of duty is unnecessary. There was insufficient evidence to prove negligence of the defendants.

[4, 5] We are also of the opinion that plaintiff was shown to have been guilty of negligence as a matter of law. He stepped into an area with which he was unfamiliar; it was "pitch dark" and he took no precautions for his safety. His own testimony failed to disclose any reason for his falling. He did not trip on anything or stub his toe against the metal strip which was exposed because of the absence of a board upon the step. He had been engaged on construction jobs for some 37 years. In his briefs he has stated no reason for his conduct except that he was following the lead of a wire he was tracing. This may account for his falling as he passed through the opening into utter darkness but it does not acquit him of negligence. We, of course, agree that the question of contributory negligence is seldom presented as one of law, but we cannot agree that the conduct of

plaintiff, as related by him, was reasonably consonant with the exercise of ordinary care. The facts of the present case bring it within the rule stated in Robinson v. King, 113 Cal.App.2d 455, 248 P.2d 477, 478: "Where an invitee on premises, being unfamiliar therewith, proceeds into a place of impenetrable darkness and falls into an aperture and is injured, as a matter of law he does not exercise ordinary care for his own safety and hence any injury he receives is the result of his own contributory negligence for which he may not recover."

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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126 Cal.App.2d 410

PEOPLE
v.
ONE 1949 CADILLAC 4-DOOR SEDAN et al.

Civ. 20062.

District Court of Appeal, Second District, Division 1, California.

July 6, 1954.

Proceeding by state to forfeit automobile used in transporting narcotics wherein used automobile dealer appeared as lien claimant. The Superior Court, Los Angeles County, Philbrook McCoy, J., entered judgment forfeiting title. Dealer appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained finding that driver of automobile was in possession with consent of dealer at time automobile was seized.

Judgment affirmed.

1. Forfeitures 🔑5

In proceeding by state to forfeit automobile used in transporting narcotics wherein used automobile dealer appeared as claimant and testimony conflicted as to whether sale of automobile had been consummated and whether buyer was to have returned automobile to dealer on day after she obtained possession, evidence sustained finding that buyer was in possession of automobile with consent of dealer at time it was seized. Pen.Code, § 484.

2. Appeal and Error 🔑1071(4)

On appeal from judgment forfeiting to state automobile used in transporting narcotics, it was immaterial that trial court's finding that automobile was in possession of buyer with consent of seller at time it was seized was denominated as conclusion of law.

3. Forfeitures 🔑5

Where owner of automobile entrusts possession to another, owner surrenders control at his peril, and when possessor uses automobile for illegal transporting of narcotics, neither limited nor qualified consent nor fact that limitations of permission granted were exceeded is sufficient to support defense of lack of consent in forfeiture proceeding.

4. Forfeitures 🔑3

Where used automobile dealer, without investigating buyer, delivered possession of automobile to buyer who paid less than full down payment and signed conditional sales contract, and automobile was seized for being used in transporting narcotics, automobile was forfeited to state.

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Ralph Sadler Rosen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

On August 5, 1952, Jewell Chambers appeared at the used car lot of California Car Company. She said she wanted to buy an automobile. She looked over the cars on the lot, and decided she would buy a 1949 Cadillac sedan. California Car Company was the registered and legal owner of the car.

The purchase price and monthly payments were agreed upon. The down payment was to be $800. Jewell Chambers said she had only $600 with her. California Car Company prepared a conditional sales contract, which was signed by both parties.

But Jewell Chambers did not give or use her right name. She said her name was Jackie Scott, and she signed that name as purchaser in the contract. She paid California Car Company $600, and was permitted to drive the automobile away. In the evening of that day a man who said he was her husband appeared at California Car Company's lot, and signed the contract, using the name Henry Scott.

On August 7th one of California Car Company's employees started looking for the Cadillac. He went to the address given by Jewell Chambers, but was told that Jackie Scott didn't live there. Then he tried to find the Imperial Rubber Company at the address where Jewell Chambers said her husband worked. But there was no such company and no such place.

On the same day, August 7th, Jewell Chambers was arrested, transporting ten bindles of heroin in the Cadillac.

In accordance with the provisions of the Health and Safety Code, the attorney general began proceedings to forfeit the automobile to the state. California Car Company appeared as claimant, contested the proceedings, and now appeals from a judgment of the Superior Court forfeiting title.

California Car Company make no defense that a reasonable, or any investigation of the purchaser was made. They base their defense solely upon the assertion that Jewell Chambers was not driving the automobile with their express or implied knowledge, permission, or consent. They say that it was agreed that the buyer could have the car to try it out, provided she returned it the next morning, and that it was the understanding of the parties that the sale would not be consummated until the balance of $200 was paid.

California Car Company argue, (a) that Jewell Chambers obtained possession of the car under false pretenses, and in violation of Penal Code Section 484; that, as a matter of law, she never was in lawful possession of the car; (b) assuming that she gained possession of the car lawfully, her possession became unlawful when she did not return it the following day; and (c) that the trial court failed to find on the issues raised by their defense.

On the trial Jewell Chambers testified that she signed the name Jackie Scott, (who was her mother) "so in case we were arrested for narcotics, I might not lose the car."

The evidence is in conflict as to when the $200 was to be paid. It was testified that Jewell Chambers was to pay the money the next day, and, to the contrary, that she was to pay it at $50 per week.

The evidence is also in conflict as to whether or not Jewell Chambers was to bring the car back the next day. She testified that she was not told to bring it back the next day; but that she did bring it back the next morning because she was having difficulty in starting it; and that she was then told to keep on driving it so that the battery would recharge itself.

[1, 2] The facts stated support the finding that Jewell Chambers was in possession of the vehicle with the consent of California Car Company. And there is a specific finding to that effect. It makes no difference that that finding is denominated a conclusion of law. Maskuns v. Maskuns, 93 Cal.App. 27, 268 P. 1093; Gossman v. Gossman, 52 Cal.App.2d 184, 126 P.2d 178. Thus every contention and argument of California Car Company is refuted.

[3, 4] The law of California emphasizes the fact that forfeiture must result when there is an entrustment of a vehicle by an owner to another who uses it for the illegal purpose of transporting narcotics. In such cases the owner surrenders his control of his vehicle at his peril. And neither a limited nor a qualified consent, nor the fact that the limitations of the permission granted were exceeded, is sufficient to support the defense of lack of consent. People v. One 1951 Ford Sedan, 122 Cal.App.2d 680, 265 P.2d 176, and cases there cited. The owner of a vehicle thus unlawfully

used loses it just as surely, just as irrevocably as did the owner of a personal chattel that had been instrumental in causing the death of a person, under the old English law of deodands.

In the case of One 1951 Ford Sedan, supra, the owner rented an automobile. The rentee loaned it to a third person. The third person was caught transporting narcotics in the car, which was then forfeited to the state.

In that case, 122 Cal.App.2d 680, 687, 265 P.2d 176, 180, the District Court of Appeal says:

"By parting with possession voluntarily [the owner] has placed the automobile in circulation and made it possible for it to be used to transport narcotics. As was said in People v. One 1937 Buick Coupe, 89 Cal. App.2d 556, at page 561, 201 P.2d 402, at page 404: 'The owner parts with *possession* at his peril.' Where the owner has parted with possession voluntarily the Legislature has seen fit to provide that if the car is used illegally the interest of the owner shall be forfeited. The Legislature has determined that the use of a motor vehicle to transport narcotics is such an evil, and is so socially undesirable, that an owner surrenders possession at his peril. It has provided that if the *taking* is with the owner's consent, his interest will be forfeited if the car is *used* illegally regardless of whether the owner consents to such *use* or even directs that it not be so *used*. It is not for the courts to revise this statute by creating exceptions not provided by the Legislature or compelled by constitutional restraints." (Emphasis included.)

In the never-ending struggle to control the unauthorized use of narcotics it is the relentless policy of our law to forfeit vehicles used in transportation of these deadly drugs. If California Car Company had made the investigation beforehand that they made after they turned the Cadillac over to Jewell Chambers she would not have had a vehicle in which to transport narcotics, and they would not have lost it.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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126 Cal.App.2d 414

ENGLISH et al.
v.
CITY OF LONG BEACH et al.
Civ. 20020.

District Court of Appeal, Second District, Division 3, California.
July 6, 1954.

Hearing Denied Sept. 2, 1954.

Proceeding in mandate to compel city to make payment of certain sum to petitioners as the surviving wife and minor daughter of a deceased city patrolman. The Superior Court, Los Angeles County, Paul Nourse, J., rendered judgment for petitioners and city appealed. The District Court of Appeal, Shinn, P. J., held that petitioners' rights became vested upon death of the patrolman, and where the then current pension rights entitled them to fifty percent of the patrolman's salary, the amount varying with the changes that might be made in the salary attached to the rank of patrolman, amendment to charter, fixing pension at fifty percent of salary payable at effective date of amendment, was ineffective to impair petitioners' rights.

Judgment affirmed.

1. Municipal Corporations ⚿187(7)

Under the City of Long Beach policemen's pension program effective prior to June 5, 1951, the dependents of a deceased patrolman were entitled to fifty percent of the patrolman's salary, dependent upon the salary, currently attached to the rank. St. 1931, p. 2785, § 187.

2. Courts ⚿89

That the Supreme Court of the United States had refused to review certain decisions of the Appellate Department of the Superior Court did not render these decisions controlling over a conflicting decision of the California Supreme Court.

3. Pensions ⚿1

Pension laws will be construed liberally and in a manner to give effect to their beneficent purpose.

4. Municipal Corporations ⚿187(6)

Under City of Long Beach pension program applicable to policemen, minor children of a deceased policeman are entitled to receive pension upon death or remarriage of their mother, who is policeman's widow. St.1931, p. 2785, § 187.

5. Municipal Corporations ⚷187(7)

Where, at time of patrolman's death, City of Long Beach pension program provided that deceased patrolman's dependents should be entitled to one-half of a patrolman's salary, dependent upon salary currently attached to the rank, deceased patrolman's dependents had a right to pension in such amount, and subsequent charter amendment, fixing pension at one-half of patrolman's salary at effective date of amendment, was ineffective to change amount of pension. St.1931, p. 2785, § 187; St.1951, p. 4635, § 187.2.

6. Constitutional Law ⚷102(2)
Municipal Corporations ⚷187(7)

Where City of Long Beach pension program provided that widow of a deceased patrolman should be entitled to pension until death or remarriage, and that his minor children should be entitled to the pension after the death or remarriage of their mother, minor child of a deceased patrolman acquired vested interest in pension at death of her father, and her rights were not affected by amendment to city charter reducing amount currently payable, even though the amendment was effective prior to date upon which child became entitled to payment. St.1931, p. 2785, § 187; St.1951, p. 4635, § 187.2.

7. Municipal Corporations ⚷187(6)

City which sought to avoid payment of pension to dependents of deceased patrolman by decree cancelling contract of patrolman's employment on ground that he had obtained employment by concealment of facts could not prevail without showing that city had discovered facts that had been concealed or misrepresented and the circumstances of the discovery. St.1931, p. 2785, § 187; St.1951, p. 4635, § 187.2.

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Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondents.

SHINN, Presiding Justice.

In this proceeding in mandate the judgment directs the City of Long Beach and certain individuals in their respective capacities to take the necessary action for and to make payment of certain sums accrued and to accrue under the pension rights of petitioners as the surviving wife and minor daughter of Henry W. English, deceased, who was a patrolman in the Police Department of the city. Stats.1931, p. 2785, § 187. The litigation has a history, Cal.App., 209 P.2d 403; 35 Cal.2d 155, 217 P.2d 22, 18 A.L.R.2d 547; 114 Cal.App.2d 311, 250 P.2d 298. In the present proceeding it was stipulated that the death of Mr. English resulted from injuries received in the course of his employment as a member of the Long Beach Police Department. By stipulation the cause was submitted on petitioners' motion for judgment on the pleadings and upon the questions of law which we shall presently discuss. The judgment followed an order granting the motion.

Mr. English ceased active service April 5, 1950 because of service connected disability. He did not apply for a disability pension. He died April 11, 1950. At that time a pension was granted by the City Charter in the amount of 50 per cent of the salary attached to the rank or position held by the employee at the time of death. Nelda D. English was entitled to the pension from the time of the death of Mr. English until she remarried, September 6, 1951; thereafter the daughter, Susan Cheryl, was entitled to receive the pension until she became 18 years of age. City Charter, sec. 187(4).

[1] Petitioners' right to a pension which vested in them upon the death of Mr. English was not limited to 50 per cent of the amount of salary as of the time of death but followed any changes that might be made in the salary attached to the rank of patrolman. Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237; Terry v. City of Berkeley, 41 Cal.2d 698, 263 P.2d 833. The salary of a patrolman which was $305 per month from

April 11, 1950 to July 1, 1951, was increased to $335 per month from July 1, 1951 to July 18, 1951, $355 per month from July 18, 1951 to July 1, 1952, and, from July 1, 1952 to date, to $370 per month.

Mrs. English applied to the city for a widow's pension February 14, 1951 and thereafter, effective June 5, 1951, a Charter Amendment, section 187.2 was adopted. St. 1951, p. 4635. The substance of the amendment to be considered is that it altered the basis for determining the amount of the pension. Instead of a pension of 50 per cent of the salary attached to the rank or position of the employee from time to time it was fixed by the amendment at 50 per cent of the salary payable at the effective date of the amendment, and the amendment purported to apply to all pensions theretofore granted under section 187.

The questions are the following: (1) Was the amendment effective to change the pension from a fluctuating amount to a fixed amount as to both petitioners; (2) was it effective as to Cheryl; (3) did the court err in striking the cross complaint of the city by which it was sought to cancel the contract of employment of Mr. English upon the ground that he had obtained employment with the city through fraud.

The city contends that the charter amendment is valid if it left petitioners with a reasonable and substantial pension. This has frequently been held to be a proper test of the validity of changes in pension plans made before the pension has been fully earned and become payable. Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799; Packer v. Board of Retirement, 35 Cal.2d 212, 217 P.2d 660; Palaske v. City of Long Beach, 93 Cal.App.2d 120, 208 P. 2d 764; Allen v. City of Long Beach, 101 Cal.App.2d 15, 224 P.2d 792; Sweesy v. Los Angeles etc. Retirement Bd., 17 Cal. 2d 356, 110 P.2d 37; Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939; McCarthy v. City of Oakland, 60 Cal.App.2d 546, 141 P.2d 4; Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956. It was adopted in two unreported decisions of the Appellate Department of the Superior Court of Los Angeles County, cited by the city, which sustained the validity of the charter amendment here in question. Larson v. City of Long Beach, Superior Court Civil No. A-8063 and Thompson v. City of Long Beach, Superior Court Civil No. A-8064. The Appellate Department decisions were stated by the court to be based upon the reasoning in the Kern, Packer, Palaske and Allen cases. Shortly thereafter the Supreme Court decided Terry v. City of Berkeley, 41 Cal.2d 698, 263 P.2d 833, supra. In that case Terry had retired with a right to a pension the amount of which, the court held, would fluctuate with any increase or decrease of salary attached to the position held at the time of retirement. Thereafter the pension ordinance was amended to provide a pension based upon the salary at the time of retirement and which would not increase or decrease with any change of salary. After Terry had retired several salary increases were granted but the city, relying on the amendment of the ordinance, refused to pay him more than the initial amount of his pension. He sued and recovered judgment for the accumulated amounts based upon the increases of salary attached to the position. The judgment was affirmed. The city contended, as it contends here, that the change in the petitioner's pension rights was valid if it left Terry a reasonable and substantial pension. Reliance was placed upon the decisions listed above. As to those it was said that the court had not had before it, 41 Cal.2d a pages 702, 703, 263 P.2d at page 836: "* * * the question of the obligation due a pensioner after his status had become fixed by the happening of the contingency which made the pension due and payable. The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency. * * * In the present case the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension and all conditions precedent to the obligation of the city were fulfilled upon the determination that he be retired as a result of his service-connected disability. The pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment. State of Mississippi, for Use of Robertson v. Miller, 276 U.S. 174, 48 S.Ct. 266, 72 L.Ed. 517; Kern v. City of Long Beach, supra, 29 Cal.2d 848, 179 P.2d 799; Kavanagh v. Board of Police Pension Fund Com'rs, 134 Cal. 50, 66 P. 36; Vero v. Sacramento City E. R. System, 41 Cal. App.2d 482, 107 P.2d 82; 20 Cal.Jur. 998. * * * [T]he amended section did not affect the plaintiff's retirement benefits."

[2] In the case of Mr. English, as in the case of Terry, the attempted change was from a fluctuating amount to a fixed amount and the effect of the attempted change was to deprive the beneficiary of the benefit due to the increases in salary. The city refuses to recognize the authority of the decision in the Terry case by insisting that the decisions of the Appellate Department of the Superior Court are controlling, for the reason that the Supreme Court of the United States refused to review them. The contention is obviously without merit.

In Wallace v. City of Fresno, 42 Cal.2d 180, 265 P.2d 884, a retired member of the Police Department had been convicted of a felony, which fact, under the pension ordinance in effect at the time he entered the service of the city, would not have given the city the right to terminate his pension. Later ordinances, adopted before his retirement, purported to give the city that right. In holding these provisions to be unreasonable and unenforceable as to Wallace the court said, 42 Cal.2d at page 185, 265 P.2d at page 887: "A city has no more right to adopt an amendment which does not come within the purposes of the rule permitting modifications than a private insurance carrier would have to change an annuity policy by making a unilateral amendment under which the insured's interest might be terminated upon his conviction of a felony."

We find no merit in the argument of the city that if in the future salaries are reduced below the June 5, 1951 level pensioners will then receive more than they would be entitled to under the fluctuating scale, and in the long run may suffer no loss. Pensioners need their money as it falls due and cannot be required to exchange it for the promise that if they live long enough they may possibly get it back.

We conclude that section 187.2 of the charter may not be given effect to impair petitioners' pension rights as they originally existed.

[3–6] Petitioner Susan Cheryl English at the time she became a petitioner through her guardian ad litem was 7 years of age. Nelda, her mother, remarried September 6, 1951. Thereupon, pursuant to section 187(4) of the charter Nelda's pension right terminated and Cheryl became entitled to draw a dependent's pension until she attains the age of 18 years or marries. The city contends that since section 187.2 became effective prior to the marriage of her mother Cheryl has no rights except those provided by that section, citing Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973; Packer v. Board of Retirement, 35 Cal.2d 212, 217 P.2d 660, supra; Sweesy v. Los Angeles etc. Retirement Bd., 17 Cal.2d 356, 110 P.2d 37, supra, and Rustad v. City of Long Beach, 122 Cal.App.2d 106, 264 P.2d 955. None of these cases is in point. Each one involved some change in the claimant's pension rights made before the right had vested, that is to say, before the claimant became entitled to receive a pension through the happening of some contingency which would fasten upon the public employer an obligation to pay a pension in a definite amount. The changes were held valid for the reason that at the time they were made the services of the employee had not been fully rendered and the employer's obligation had not become absolute. This is not our case. Cheryl's right vested at the time the city's obligation became a fixed liability, namely, upon the death of her father under circumstances which entitled her mother and herself to a pension. It could not be taken from her by subsequent action of the city, nor be modified in a manner that would substantially reduce the amount of the city's obligation. It is axiomatic that pension laws will be construed liberally and in a manner to give effect to their beneficent purpose. The children of the employee and his surviving wife become entitled to receive the pension from the City of Long Beach upon their mother's death, or upon her remarriage. Filian v. City of Long Beach, 109 Cal.App.2d 611, 241 P.2d 56. The pension has been fully earned, the obligation of the city is no longer conditional. It is a contract protected by constitutional guaranties; the first beneficiary is the mother, the second the child or children, and the latter's rights are vested and entitled to protection although the time of enjoyment is deferred. Any other construction would concede to the city the right to drastically reduce its obligation to the child at any time before the death or remarriage of the mother. There would be little appeal to the employee and little value in a pension plan under which the employer could at will reduce the amount of the pension after it had become fully earned and payable. The trial court correctly held that the city must keep its contract by paying the pension which accrued to September 6, 1951 to Nelda D. Wentworth and thereafter to Susan Cheryl English until she attains the age of 18.

[7] The final contention is that the court erred in striking out the cross complaint of the city by which it sought a decree cancelling the contract of employment of Mr. English upon the ground that he had obtained employment by the concealment of facts concerning his physical condition. It was alleged on information and belief that when he took his physical examination on July 13, 1942, two days before he entered the service of the city, he falsely and fraudulently failed to disclose the fact that he had had rheumatic fever, and denied that he had suffered from heart disease, and that but for his concealment and false statements he would not have been employed. It was also alleged that there was the same concealment in 1945 when he was given another physical examination. It appears to be the theory that the court should order rescission of the contract of employment although nothing remains to be done under it other than to make payment of the pension. There are several reasons for holding that the allegations of the cross complaint were were insufficient. We shall mention only one of them. It was alleged that the city did not ascertain that Mr. English had suffered from rheumatic fever and that his heart had been damaged thereby until a hearing before the Industrial Accident Commission subsequent to the filing of the application of Mrs. English for a widow's pension on February 14, 1951. This was not an allegation that the city discovered anything, or how any facts were discovered. The allegations would be literally true if the city had discovered nothing. It made its charges of fraud on information and belief. Mr. English is not here to deny them. Some 9 years elapsed between the commission of the alleged fraud and its alleged discovery. The city cites no authority for its contention and it is unnecessary to delve into the question whether the remedy of rescission for such alleged fraud would be available to defeat a pension right that had been fully earned.

The cross complaint was patently defective in failing to allege that the city ever discovered any facts that had been concealed or misrepresented and the circumstances of the discovery. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Denike v. Santa Clara Valley Agr. Soc., 9 Cal.App. 228, 98 P. 687; Brown v. Butler, 3 Cal.App. 2d 11, 39 P.2d 244. There is a wealth of authority which supports the statement in Watson v. Santa Carmelita etc. Co., 58 Cal. App.2d 709, 716, 137 P.2d 757, 760: "In order to avoid the bar of the statute the plaintiff must plead the time when the fraud was discovered and of what the discovery consisted that the court may clearly see whether by reasonable diligence the discovery might not have been made before. He must fully state the circumstances under which the discovery was made and must show that the delay in filing the action is consistent with the requisite diligence. Phelps v. Grady, 168 Cal. 73, 141 P. 926." The city did not seek nor indicate a desire to amend. The cross complaint was properly stricken. No other points are discussed in the briefs.

The purported appeal from the order striking out the cross complaint is dismissed.

The judgment is affirmed.

PARKER WOOD, Justice.

I concur.

126 Cal.App.2d 841

Elsie N. COMBS et al., plaintiffs and respondents,

v.

CITY OF LONG BEACH, a municipal corporation, defendant and appellant.

Civ. 20337.

District Court of Appeal, Second District, Division 3, California.

July 6, 1954.

Appeal from judgment of the Superior Court of Los Angeles County. Paul Nourse, Judge. Affirmed.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellant.

Kenneth Sperry, Long Beach, for respondents.

SHINN, Presiding Justice.

The questions involved on the appeal are the same as those decided in our opinion in English v. City of Long Beach, Cal.App., 272 P.2d 875.

Plaintiffs, 22 in number, are either widows or children of deceased members of the Police or Fire Departments of the City of Long Beach. Each of them has been granted a pension pursuant to section 187, subdivision 4 of the City Charter. Statutes 1931, p. 2785. Originally the amount of the pensions fluctuated with the salaries attached to the several ranks or positions as they might be fixed from time to time. Although such salaries have been increased several times since June 5, 1951, the city contends, as it did in the English case, that the amounts of plaintiffs' pensions were fixed at a percentage of the salaries being paid June 5, 1951, as declared by Charter Amendment section 187.2, St.1951, p. 4635, which became effective on that date.

The action was commenced in the municipal court; the city filed a cross complaint seeking a determination that section 187.2 was valid and binding upon plaintiffs and that their pensions are to be paid in accordance with its terms. The action was transferred to the superior court and on motion of plaintiffs judgment on the pleadings was entered declaring that the provisions of subdivision (a) of section 187.2 of the Charter are void and of no effect insofar as they purport to change, alter or otherwise modify the respective rights of plaintiffs and cross-defendants to receive pension payments provided for in section 187 of the Charter. The judgment was for the several amounts due and to become due plaintiffs under their pension rights as originally established.

For the reasons stated in our opinion in English v. City of Long Beach, the judgment is affirmed.

PARKER WOOD, Justice.

I concur.

126 Cal.App.2d 795

DARVEAU
v.
KVVC THE VOICE OF VENTURA COUNTY.

Civ. 20027.

District Court of Appeal, Second District, Division 3, California.

July 29, 1954.

Action by landowner against broadcasting company, which leased rights in land, for destruction of bean crop. The Superior Court, Ventura County, Charles E. Blackstock, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Parker Wood, J., held where lease between landowner and agricultural tenant provided that tenant should deliver ⅖th of bean crop to landowner and tenant, in previous action against broadcasting company, had recovered ⅗th of the physical damage to the crop, landowner was entitled to maintain action for ⅖th of the damage.

Judgment affirmed.

Vallée, J., dissented.

1. Bankruptcy 🔑685

Bankruptcy court order granting landowner permission to bring an action against debtor in corporate reorganization proceeding for purpose of liquidating landowner's claim for crop damage authorized the adjudication of issues of existence and amount of damage.

2. Judgment 🔑956(5)

In action by landowner against broadcasting company, which had leased certain rights in land, for two-fifths of physical damage to crops on land, evidence supported finding that prior action which had been brought by agricultural tenant, whose lease required him to deliver to landowner two-fifths of the crop, had been for only tenant's share, or three-fifths, of the damage.

3. Landlord and Tenant 🔑330(1)

Where lease provided that agricultural tenant should deliver to landlord two-fifths of the bean crop, and tenant had, in action against third party, recovered three-fifths of physical damage to bean crop, landlord was entitled to sue the third party for two-fifths of the damage.

4. Landlord and Tenant 🔑55(3)

In action by landowner against broadcasting company which leased rights in land for damage to bean crop resulting from broadcasting company's operation on land, evidence on issue of the extent of area damaged, the loss of crop in the area, and the value of the crop lost supported award of damages.

5. Appeal and Error 🔑1060(1, 2)

Actions of plaintiff's counsel in action, which was tried on stipulation of evidence and testimony received in a previous action, in respect to submitting a complete record of the previous action to the trial court, and in allegedly making statements regarding matters not included in the transcript and exhibits upon which action was to be tried, did not constitute prejudicial misconduct.

◆

William H. Haupt, Inglewood, for appellant.

Harry C. Wesley, Santa Paula, for respondent.

PARKER WOOD, Justice.

Action for damages allegedly resulting from destruction of part of a bean crop on land owned by plaintiff and leased by her to William Yearout on a crop-sharing basis. Defendant appeals from judgment in favor of plaintiff.

Plaintiff owned about 61 acres of land in Ventura County. Since 1939 Mr. Yearout, as farm tenant on a year to year basis, had raised beans on 27 acres of the land. About May 1, 1947, plaintiff and defendant entered into a written lease whereby plaintiff leased to defendant a portion of the 61 acres, which portion included part of the 27 acres on which beans had been raised. The land was leased for 20 years to be used by defendant for the purpose of construction, operating and maintaining a radio station thereon. Under the terms of the lease, defendant had the exclusive right to use a certain part of the land so leased, and plaintiff reserved the right to farm the remaining part of the land so leased to defendant; defendant had the right to construct and maintain such underground wires as may be required—the wires to be buried at least 15 inches below the surface, and to construct and maintain a water pipeline across the land of plaintiff; and defendant had the right of ingress and egress for the purpose of maintaining its antenna and ground system, "provided, however, that in the event the exercise of such right shall cause damage to any crops planted or growing on said lands, Lessee [defendant] shall pay such damages to the Lessor, or to any tenant holding under said Lessor." On June 26, 1947, plaintiff and Mr. Yearout executed a written lease, which was dated November 15, 1946, whereby plaintiff leased the 61 acres of land to Mr. Yearout for a period of three years, subject to the terms and conditions of the lease to defendant. The lease to Yearout provided further that Yearout would deliver to lessor (plaintiff), sacked and cleaned, "two-fifths of all beans and bean straw produced on said premises" as rental under the lease.

On May 11, 1947, Yearout planted lima beans on the same 27 acres of land he had previously used for raising lima beans. In June, while the beans were growing but before the vines had bloomed, defendant laid a water pipeline across 1,566 feet of the land which was planted in beans, and in laying that pipeline defendant destroyed the bean plants in an area that was 1,566 feet long and 13 feet wide. During the latter part of June, defendant began installing underground wires and completed the installation in August, 1947. In the process of installing the wires, defendant caused damage to other bean plants. The wires were not installed deep enough, and in September after some of the vines were cut but before the beans were harvested, a second installation of wire was made which resulted in further damage to the bean crop. Mr. Yearout filed an action against defendant for damages to the bean crop. In a trial by jury, in January, 1949, Yearout recovered judgment for $2,666.

In 1950, defendant was a debtor corporation in proceedings instituted by it for its reorganization under laws relating to bankruptcy, which proceedings were pending in the United States District Court at Los Angeles. On November 21, 1950, plaintiff filed a claim in said proceedings which claim stated that defendant was indebted to plaintiff in the amount of $1,777.33 for "Damage by Debtor to bean crop planted and growing on said leased premises at the time of the replacing of the underground wires around the Antenna Towers placed upon said leased premises all as provided in the terms of the written lease dated the 1st day of May, 1947, wherein claimant was Lessor and the Ojai Broadcasting Company, now known as KVVC The Voice of Ventura County, debtor above named, was the Lessee; * * *." On December 15, 1950, the federal court made an order which stated, in the recital portion thereof, that the claim "is unliquidated as to amount, and is a claim for damages." In the order part thereof, it was stated that the claim, "asserting and claiming damages in the sum of $1,777.33 be, and the same is hereby disallowed, unless within ten days from and after the 5th day of December 1950 the claimant shall have filed an action in the appropriate court of the State of California for the purpose of liquidating said claim, * * *. The claimant Cora L. Darveau is granted permission to commence and prosecute an action in the appropriate court of the State of California, against the above named debtor, for the purpose of liquidating the claim aforesaid, and for no other purpose, * * *."

On December 11, 1950, plaintiff filed the present action in the Superior Court of Ventura County. In the first cause of action of the complaint it was alleged that she filed her claim for $1,777.33 in the reorganization proceedings; the federal court made an order granting her permission to prosecute the action; the parties made the lease; before the beginning of construction of the broadcasting station, the president of defendant corporation orally stated to plaintiff that defendant would compensate her for damage to plaintiff's bean crop growing on the premises which might result by the erection of the station; about July, 1947, defendant began the construction of the station on the premises which were at said time planted to lima beans; defendant completed installation of the ground wires, the laying of the water pipeline, and erection of the towers and buildings while plaintiff's beans were growing on the premises and while the beans were being harvested, and "did run over and trample said beans and destroy same to plaintiff's damage in the sum of $1,777.33." It was alleged in the second cause of action (after incorporating therein the allegations of the first cause of action regarding the claim and order of court) that about July, 1947, defendant began construction of the water pipeline, two towers, a building, and the installation of ground wires on the premises which were at that time planted to lima beans which were then growing thereon, and did run over, trample, and destroy the beans to plaintiff's damage in the sum of $1,777.33.

Defendant denied the allegations of the complaint regarding the claim and order, and alleged that a copy of the order was attached to the answer; denied that the president of defendant stated that defendant would compensate plaintiff for damage to her bean crop; and denied that plaintiff had been damaged in any amount.

The parties stipulated that the cause be tried upon a transcript of the evidence in the action by Yearout against defendant; upon some of the exhibits received in that action; upon a copy of the claim (filed by plaintiff) upon which this action is based; and that the transcript, and the exhibits (received in the present trial), should contain no reference to an offer of compromise, or argument of counsel. They also stipulated that witnesses for Yearout in the former action should be deemed witnesses for plaintiff in the present action, and witnesses for defendant in the former action should be deemed witnesses for defendant in the present action. The case was submitted for decision, and a few days thereafter the court found that all the allegations of the complaint were true. Judgment was for plaintiff for $1,777.33.

[1] Appellant contends that the trial court exceeded its jurisdiction. It argues that the court tried damage issues which were beyond the scope of the order of the federal court granting respondent permission to prosecute an action upon her claim; that her claim was for damages to the bean crop at the time of replacing the underground wires, and the order of the federal court granted her permission to prosecute an action for the purpose of liquidating "the claim aforesaid"; that, in view of such statements in the claim and order, the court was not authorized to try an issue as to damage to the plants or crop caused at the time of the construction of the radio station. The order of the federal court did not grant jurisdiction to the state court—it granted permission to respondent to prosecute an action upon her claim in the state court. The claim was for damage to the bean crop. The claim states that appellant was indebted to respondent for damage "to bean crop planted and growing on said leased premises at the time of the replacing of the underground wires." The words "at the time of the replacing of the underground wires" could have reference only to the crop "growing" at the time of replacing the wires,—those words would not also refer to a bean crop that was "planted" at that time. The beans were planted on May 11, before the construction of the radio station was started. When the water pipeline was installed in June, and when the underground wires were first installed in July and August, some of the plants were damaged. When the underground wires were replaced in September, the beans, which were then growing or being harvested, were also damaged. In view of the fact that there was damage to the plants (before beans grew on them) and there was damage to the beans (while growing or being harvested), a reasonable interpretation of the claim is it was a claim for all damage to plaintiff's interest in the bean crop, whether it was damage to the plants or to the beans. It is reasonable to conclude that the order of the federal court was intended as permission for respondent to sue for all her damage resulting

from injury to the bean crop, not exceeding $1,777.33. The action commenced by respondent was for said amount as damages to the bean crop, resulting from the construction of the radio station, the water pipeline, and the installation of underground wires. The allegations of the complaint were within the scope of the order of the federal court.

[2, 3] Appellant also contends that respondent had no title to, or lien on, the bean crop and she could not maintain an action for damage to the crop. It argues that the relationship of landlord and tenant existed between respondent and Mr. Yearout, and that his rent was to be paid by delivering, after harvest, a part of the crop to her or to a warehouse for her benefit; and that the tenant had the sole right of action. Mr. Yearout, the tenant, obtained judgment for damages to the bean crop in the amount of $2,666. Respondent asserts that Mr. Yearout's action was to recover three-fifths of the damage to the crop, and that the judgment was for that part of the damage. The appellant asserts in effect that the judgment was for all the damage. It appears that the action by Mr. Yearout was tried on the theory that he was seeking three-fifths of the damage. During that trial, Mr. Yearout testified that three-fifths of the total amount of beans damaged belonged to him. Mr. Haupt, who is counsel for defendant corporation herein, was president of said corporation at the time of the trial of the Yearout action. In that trial Mr. Haupt, who was called as a witness by defendant, was asked the following questions and he gave the following answers:

"Q. And you knew that you had damaged his beans, didn't you? A. Yes.

"Q. How much did you damage them? A. Not over 50 percent at the very most.

"Q. You admit now that you damaged between 65 and 70 sacks of beans belonging to Mr. Yearout, is that correct? A. No, not belonging to Mr. Yearout. A total of 65 to 70 sacks of beans is what I said.

"Q. All told, which Mr. Yearout would be entitled to three-fifths of them, is that correct? A. Yes.

"Q. You admit that much, don't you? A. That is right."

It thus appears that Mr. Yearout (the tenant and plaintiff) and Mr. Haupt (president of defendant) made statements during the former trial which were sufficient to establish that the case was tried on the theory that Mr. Yearout was seeking three-fifths of the total damage. It seems that during the trial of the Yearout case Mr. Haupt was of the opinion that the damages should be paid to the landowner. He testified during that trial that, prior to beginning the construction of the station, he explained to Mr. Yearout that defendant would pay the landowner for damage to the bean crop. A provision of the lease is "Lessee shall at all times have the right of ingress and egress in, to and over said lands for the purpose of maintaining its antenna and ground systems, provided however, that in the event the exercise of such right shall cause damage to any crops planted or growing on said lands, Lessee shall pay such damages to the Lessor, or to any tenant holding under said Lessor * * *." Respondent was entitled to maintain the present action for two-fifths of the damage to the bean crop.

[4] Appellant also contends that the damages awarded were excessive. Mr. Yearout testified that in laying the water pipe, defendant destroyed all the bean plants in an area 1,566 feet long and 13 feet wide, consisting of 5 rows; that a 90 per cent loss was sustained in the area over which defendant traveled in making the second installation of ground wire; he sold his 1947 crop of beans for $22 per sack of 100 pounds each; he lost about 19 sacks of beans per acre in the damaged area, which area was about 11 acres (a total amount of $4,598). The evidence supports the award of damages.

[5] Appellant contends that counsel for plaintiff was guilty of prejudicial misconduct, in that, (1) he obtained the file in the Yearout action, and presented it, without the knowledge of counsel for appellant, to the trial judge in chambers; and, (2) he stated to the judge that Yearout recovered

a judgment in the amount of $2,666, that said judgment represented three-fifths of the total damage done to the crops, and that the Yearout action was tried upon the theory that Yearout could recover only three-fifths of the total value of the crops damaged. Appellant asserts that the file in the Yearout action contained numerous documents, including instructions and exhibits concerning an effort to compromise which, under the stipulation herein, were not to be presented to the trial court. That same assertion was made to the trial court upon the hearing of the motion for a new trial. In plaintiff's affidavit in opposition to the motion he stated that at the time the Yearout case was submitted upon the stipulation, the exhibits in the Yearout case (which were to be used in the present case) were segregated by counsel for the parties and were handed to the clerk for delivery to the judge; that after the cause was submitted he (counsel for plaintiff) asked the judge if he could make a decision "before the time as fixed by the Federal Court expires," and the judge stated that he would endeavor to read the transcript and make a decision within the time allowed; counsel then asked the judge if he (counsel) could be of assistance in getting the transcript and the files delivered to the judge; counsel went to the office of the clerk, and he found that the transcript and exhibits in the former action had been restored to the files and the exhibits had been placed in an envelope; counsel asked the clerk if the transcript and exhibits could be separated from the file and the clerk said that only the judge had authority to separate the files; the file in the present action and the file in the former action, containing the transcript and the exhibits, were then delivered to counsel for plaintiff who visited the judge in chambers, laid the files on his desk, and said, "Here is the file in the present action and the file in the former action, which contain the transcript and the exhibits in an envelope, which are to be used in the present action." The settled statement on appeal shows that during argument on the motion for a new trial counsel for plaintiff made substantially the same statements which were in his affidavit, and that counsel for appellant stated, "The file contained instructions and exhibits regarding a proposed compromise." The judge then stated, "I paid no attention to that." An affidavit of the trial judge, which is attached to the clerk's transcript on appeal, recites that he did not read the Yearout file and that, in deciding the cause, he considered only the evidence in the transcript of the Yearout cause and the exhibits mentioned in the stipulation of the parties; and it recites further that the facts relative to delivery of the file to the court are correctly set forth in the affidavit of plaintiff's counsel. Appellant asserts further that, upon the trial of this action, counsel for plaintiff made oral statements regarding matters which were not included in the transcript and exhibits upon which the action was to be tried. As above shown, he argues that plaintiff's counsel stated to the court that Yearout recovered judgment in the amount of $2,666, and that said judgment represented three-fifths of the total damage done to the crops, and that the Yearout action was tried upon the theory that Yearout could recover only three-fifths of the total value of the crops shown to have been damaged. During the argument prior to submitting the present case for decision, counsel for appellant argued that "plaintiff could not recover in this action for the reason that, in the former action wherein William M. Yearout was the plaintiff, Yearout recovered judgment for all the damages and that the judgment was paid * * *." Said counsel then asked if counsel for plaintiff would stipulate that the judgment was paid. Plaintiff's counsel stated that the judgment was paid "but the former action was tried and submitted to the jury" on the theory that Yearout could recover only three-fifths of the actual damage to the crops. Counsel for appellant then stated that the Yearout action "was not tried and submitted on that theory." It thus appears that counsel for appellant was the one who first raised the question as to whether all the damage was included in the former action—he argued that Yearout recovered judgment for all the damage. The reply of counsel for plaintiff, regarding the theory upon which the former action was tried, was responsive to that question. The contention that counsel for plaintiff was guilty of prejudicial misconduct is not sustained.

By reason of the above conclusions, it is not necessary to discuss other contentions on appeal.

The judgment is affirmed.

SHINN, P. J., concurs.

VALLÉE, J., dissents.

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126 Cal.App.2d 664

ROBERTS DISTRIBUTING CO.

v.

KAYE–HALBERT CORP. et al.

Civ. 19942.

District Court of Appeal, Second District,
Division 3, California.

July 23, 1954.

Action by television set distributor against manufacturer for agreed price of set distributor shipped to consignee designated by manufacturer under agreement distributor would be given credit on open account, wherein manufacturer counterclaimed for amount based on offset for damages resulting from breach of warranties by distributor causing consignee to reroute sets to manufacturer because of arrival in damaged condition, and requiring manufacturer to recondition and resell sets. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding distributor expressly warranted sets to be new and in original cartons and to be in good and in marketable condition.

Reversed.

1. Sales 🔑261(3)

No technical or particular words are necessary to create express warranty, and whether word "warrant" was used in parties' dealings is immaterial. Civ.Code, § 1732.

2. Sales 🔑262

Existence of warranty may be inferred from affirmation of a fact which has induced purchase and on which purchaser was intended to and did rely. Civ.Code, § 1732.

3. Sales 🔑445(2)

If facts or affirmation relied on to prove express warranty rest wholly or partly in parol, it is province of trier of fact to determine whether they amount to express warranty. Civ.Code, § 1732.

4. Sales 🔑260, 267

A provision that buyer takes article in condition in which it is, or "as is," prevents representations of seller, though relied on by buyer, from constituting express or implied warranties. Civ.Code, § 1732.

5. Sales 🔑260, 267

Disclaimers of express and implied warranties are construed strictly against seller. Civ.Code, § 1732.

6. Sales 🔑441(2)

In action by television set distributor against manufacturer for agreed price of sets distributor shipped to a consignee under agreement for credit on open account, wherein manufacturer counterclaimed for amount based on offsets for damages resulting from breach of warranties by distributor causing consignee to reroute sets to manufacturer, and requiring manufacturer to recondition and resell sets, evidence sustained finding distributor expressly warranted sets to be in new and original cartons and to be in good and marketable condition. Civ.Code, § 1732.

7. Sales 🔑442(6)

In action against seller for breach of warranty of quality, buyer may recover damages for money and time spent in reasonable effort to make goods conform to warranty under which sold.

8. Evidence 🔑187

Court in exercise of discretion may accept best evidence case affords.

9. Evidence 🔑177

Generally when question is to be determined from prepared data, the data to establish fact, if possible, must be laid before court, but if impossible opinions of persons qualified on subject are admissible.

10. Evidence 🔑183(4)

In action by television set distributor against manufacturer for agreed price of set distributor shipped to a consignee under agreement for credit on open account, wherein manufacturer counterclaimed for amount based on offsets for damages resulting from breach of warranties by distributor causing consignee to reroute sets to manufacturer, and requiring manufacturer to recondition and resell sets, conclusion records of cost of repairing and packaging were not available was justified, and "analysis" relating thereto constituting expert's opinion was properly admitted in evidence over objection it was not best evidence. Civ.Code, § 1732.

11. Sales 🔑441(4)

In action by television set distributor against manufacturer for agreed price of set distributor shipped to a consignee under agreement for credit on open account, wherein manufacturer counterclaimed for amount based on offsets for damages resulting from breach of warranties by distributor causing consignee to reroute sets to manufacturer, and requiring manufacturer to recondition and resell sets, evidence did not establish existence of sales or administrative expenses in making resale. Civ.Code, § 1732.

12. Damages 🔑23

Compensatory damages can be allowed for only damage that may reasonably be supposed to have been within contemplation of parties when entering into agreement.

13. Damages 🔑163(1)

To warrant recovery for expenses there must be evidence from which amount to be allowed can be properly determined.

14. Damages 🔑163(1)

For administrative and sales expenses to be recoverable, such damages must be proved as damages actually sustained.

15. Customs and Usages 🔑19(2)

Foundation for production of evidence of custom or usage is showing of series of acts of similar character performed at different times.

16. Evidence 🔑111

Evidence of a habit of doing a thing in course of business is, if clearly shown as a definite course of action, admissible as indicating that, on a particular occasion, the thing was done as usual.

17. Customs and Usages 🔑19(2)

Evidence of doing of act at one time is incompetent to prove custom to do so

18. Customs and Usages 🔑12(1)

A person is not bound by custom or usage unless he had actual knowledge thereof, or it is so general or well-known in community as to give rise to presumption of such knowledge.

19. Sales 🔑441(4)

In action by television set distributor against manufacturer for agreed price of set distributor shipped to consignee under agreement for credit on open account, wherein manufacturer counterclaimed for amount based on offsets for damages resulting from breach of warranties by distributor causing consignee to reroute sets to manufacturer, and requiring manufacturer to recondition and resell sets, evidence did not justify allowance to manufacturer of $1,180.30 for advertising chargeback. Civ.Code, § 1732.

20. Sales 🔑441(4)

In action by television set distributor against manufacturer for agreed price of set distributor shipped to consignee under agreement for credit on open account, wherein manufacturer counterclaimed for amount based on offsets for damages resulting from breach of warranties by distributor causing consignee to reroute sets to manufacturer, and requiring manufacturer to recondition and resell sets, evidence did not justify finding manufacturer realized $16,500.70 from resale. Civ.Code, § 1732.

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David Ziskind and George DeRoy, Los Angeles, for appellant.

Mitchell, Silberberg & Knupp, Chester I. Lappen, and George M. Dell, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action for breach of contract and conversion. The litigation arose out of an accounting for 103 television sets returned by plaintiff to defendant Kaye-Halbert Corporation. The issues are between plaintiff and defendant Kaye-Halbert Corporation, referred to as defendant.

Defendant is a California corporation manufacturing television sets in Los Angeles. Plaintiff is a Missouri corporation which served as a distributor for defendant's television sets in St. Louis. Plaintiff had purchased sets from defendant.

In March 1951, plaintiff was about two months in arrears on its open account with defendant in the stipulated sum of $12,904.92. Defendant also claimed that plaintiff was indebted to it in the amount of $1,872.36 for an advertising charge-back. On April 6 an agreement was entered into between Hausfater, president of plaintiff, and Blackman, acting for defendant, whereby plaintiff was to ship 103 television sets to Guarantee-V-Sales in Los Angeles at an agreed price of $21,169.94 and defendant was to give plaintiff credit on its open account. Defendant was to deduct the amount plaintiff owed it and remit the balance. The next morning, April 7, plaintiff shipped the 103 sets. The sets arrived in badly damaged condition. Guarantee-V-Sales rerouted them to defendant. After repairing and reconditioning the sets, defendant resold them and credited plaintiff with $16,500.70, and offset against plaintiff's account the costs of reconditioning, overhead and sales expenses, an advertising charge-back, and the original indebtedness of $12,904.92. Prior to April 6, under an agreement with defendant, plaintiff had sold back a number of sets by shipping them to Jordan Marsh, a Boston distributor.

Plaintiff commenced this action seeking the agreed price of $21,159.98 for the 103 television sets shipped to Guarantee-V-Sales. Defendant admitted that a credit was due to plaintiff for the return of the sets, but pleaded a counterclaim for a net balance of $5,977.21, based on offsets for damages resulting from breaches of express and implied warranties as to the condition of the 103 sets.[1]

The court found that: the 103 sets were warranted by plaintiff to be new merchandise in the original cartons as originally packed by defendant and were warranted to be in good and marketable condition; they were not sold to defendant "as is"; they were not delivered in the original cartons as originally packed by defendant but had been removed from their original cartons and packing and had been repacked "in a grossly inadequate and improper manner"; they had been used or tampered with and parts had been removed by plaintiff; they were unmerchantable; defendant spent $7,553.89 in placing the sets in salable condition and in selling them; defendant sold them for $16,500.70 and realized $8,946.81, which was their reasonable value at the time of their delivery to defendant;

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[1] Figures used by defendant:

	Credits	Debits
Due from plaintiff on its original indebtedness		$14,924.02
Money from resale of the 103 sets	$16,500.70	
Materials, labor and services in reconditioning the sets		3,902.79
Costs involved in selling the sets		3,651.10
	$16,500.70	$22,477.91
Net balance owing by plaintiff =	$ 5,977.21	

crediting the $8,946.81 to the balance of $14,085.22 owing by plaintiff to defendant there is a balance of $5,138.41 due from plaintiff to defendant. The court also found that: if the sets had been in the original cartons they would have had a fair value of $21,169.94; in their damaged condition they had a fair value of $8,946.81 to defendant's damage in the sum of $12,223.13; adding $12,223.13 to the $14,085.22 which plaintiff owed defendant and crediting the contract price of $21,169.94 to said balance plaintiff owes defendant $5,138.41. Judgment was for defendant for $5,138.41 from which plaintiff appeals.

The questions here center around two points: (1) the terms of the contract to sell back the 103 television sets; and (2) the items and their costs, if any, to be deducted from the credit due plaintiff.

The first specification of error is that there is no evidence to support the finding that the television sets were warranted by plaintiff to be new merchandise in the original cartons as originally packed by defendant.

Section 1732 of the Civil Code defines an express warranty as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. * * *" The statutory definition of an express warranty includes any promise of the seller relating to the goods. (46 Am.Jur. 494, § 313.)

[1-3] No technical or particular words are necessary to create an express warranty, and whether the word "warrant" was used in the parties' dealings is immaterial. Stott v. Johnston, 36 Cal.2d 864, 870, 229 P.2d 348, 28 A.L.R.2d 580. The existence of the warranty may be inferred from the affirmation of a fact which has induced the purchase and on which the purchaser was intended to and did rely. International Shoe Co. v. Lipschitz, Mo.App., 72 S.W.2d 122, 125. If the facts or affirmation relied on to prove an express warranty rest wholly or partly in parol, it is the province of the trier of fact to determine whether they amount to an express warranty. Webster v. Klassen, 109 Cal.App.2d 583, 591, 241 P.2d 302; 46 Am.Jur. 501, § 321.

[4, 5] A provision that the buyer takes the article in the condition in which it is, or "as is," prevents representations of the seller, although relied on by the buyer, from constituting express or implied warranties. (46 Am.Jur. 501, § 319.) But disclaimers of express and implied warranties are construed strictly against the seller. Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162, 165; Deere & Webber Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471, 474, 139 A.L.R. 1270; 77 C.J.S., Sales, §§ 312, 317, pp. 1151, 1166.

In March 1951, Duane Larrabee on behalf of defendant called on Hausfater with respect to the delinquent account. Hausfater testified to the following: Larrabee took an inventory of plaintiff's stock of defendant's sets. All of the sets, except 12 or 13 which were in the showroom, were in their original cartons in the warehouse. When Larrabee took the inventory he looked at the outside of the sealed cartons. The inventory revealed that plaintiff had 244 of defendant's sets.

On April 6, Blackman telephoned Hausfater and arranged to purchase 103 sets. The only direct evidence of the terms of the sell-back contract was the testimony of Hausfater. He testified that Blackman told him defendant was buying from plaintiff 104 television sets[2]; he (Blackman) gave him the model numbers and the style of each set. That night Hausfater took the sets out of stock "which were in the original cartons, with the exception of about five sets or six sets that were in our showroom," packed them and shipped them the following morning. Hausfater testified that the 103 sets were sold "as is" in their "original cartons"; that with the exception of 5 or 6 sets they had never been opened; and that Blackman knew the sets were in their original cartons and had never been opened.

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[2] Plaintiff did not have enough sets of these particular stock models, so he shipped 103. There is no dispute about the number.

[6] Hausfater knew what the phrase "in their original cartons" would connote to defendant. The reasonable and necessary implication and meaning of the term "original cartons" as used by Hausfater was that the sets were new merchandise in their original cartons as originally packed by defendant and that they were in good and marketable condition. The evidence supports the finding of an express warranty.

In view of our conclusion that plaintiff's liability may be sustained by reason of its breach of an express warranty, it is unnecessary to discuss its claim that the finding of an implied warranty is unsupported by the evidence.

Plaintiff contends the court erred in admitting in evidence certain letters sent from defendant to plaintiff. It asserts the letters contained self-serving, hearsay statements of defendant as to warranty, resale, and deductions and that their contents were promptly and emphatically denied by plaintiff. The court stated it was admitting them for the purpose of proving they were sent and received. On April 6, 1951, the same day that Blackman called Hausfater, he wrote him a letter.[3] This letter was acknowledged by plaintiff's office manager on April 18.[4] Blackman wrote to Hausfater again on Auril 20.[5] Hausfater answered this letter on April 24.[6]

From the letters, it may clearly be seen that plaintiff did not deny defendant the right to collect the money from the sales, retain the amount due on plaintiff's open account, and then remit the difference. In Hausfater's letter of April 24, he stated that the sale was effected pursuant to defendant's letter of April 6, "You [Blackman] promised immediately upon collection of the moneys to retain the amount owing to you on open account and to remit the difference to me immediately." This was an admission of acceptance as to the manner of payment: excess moneys received by defendant from the sale of the sets, over and above plaintiff's open account, would be remitted. There was no error in admitting the letters in evidence.

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[3] "Confirming my conversation with you on the telephone today, it is my understanding you are shipping back to Los Angeles, for sale, the following merchandise: [Models and their quantity.] This makes a total of 104 pieces. You will send the invoice to me and after I collect the money from the sale of these pieces the Kaye-Halbert Corporation will retain the amount due on your open account and remit the difference to you immediately."

[4] "It was our understanding that any deal made at the low price quoted was to be for cash, therefore, we believe that the balance due us should be in our hands upon receipt of sets."

[5] "The 104 pieces you sent Guarantee-V-Sales were refused by them because of their arrival in bad condition, due apparently to the fact that many of the sets were not protected by original packing. Guarantee-V-Sales rerouted these sets to our warehouse. This letter is written to advise the course we must pursue in disposing of these sets. We will endeavor to sell as much of this merchandise as we can at the prices outlined in your bill. Proceeds of these sales will be retained by us and credited to your long past due account. Your permission will be requested prior to sale of merchandise at less than prices you outline, where this is necessary. Excess moneys received by us over and above your account with us will be remitted to you immediately. We will charge you back with freight on this shipment and those additional charges we incur in sale of this merchandise as well as any rework expense necessary to bring this merchandise to salable condition. Co-operative advertising expenditures based on original billing on this merchandise, made by us, must also be deducted from your invoice figures."

[6] "This is to answer your letter of April 20, 1951, the contents of which are totally unacceptable to me. The sale and shipment of the 103 television sets, which was effected on April 7, 1951, pursuant to your letter of April 6, 1951, is a closed transaction. I took a terrible loss on these sets just for the purpose of liquidating your indebtedness, and to get ourselves into a more liquid position. I made the sacrifice only at your urgent insistence and on your advice. You assured me that the sale was complete; you instructed me to ship to Guarantee-V-Sales and you asked me to bill your company for the sale; all of which I did in accordance with your implicit instructions. You promised immediately upon collection of the moneys to retain the amount owing to you on open account and to remit the difference to me immediately. Now you come at me with a letter asking me to take an even greater licking; well, I simply cannot afford it."

The court found that defendant was compelled to and did expend $7,553.89 in repairing and packing the sets in salable condition and in selling them. Plaintiff contends the finding is unsupported by the evidence. The $7,553.89 is made up of $3,623.79 for repairs, $279 for repacking, and $3,651.10 for administrative and selling expense.

We shall first consider the items for repairs and repacking. Plaintiff says the finding as to repairs and repacking is erroneous because it is based on opinion evidence rather than actual costs, that the records of actual costs were available and not produced, and that the witness was not properly qualified to testify as an expert.

[7] In an action against a seller for a breach of warranty of quality, the purchaser may recover damages for money and time spent in reasonable efforts to make the goods conform to the warranty under which they were sold. Because it may be assumed that a buyer will spend time and money in reasonable efforts to make defective goods conform to their warranty, the amounts incurred or paid for that purpose should be considered as being within the contemplation of the parties at the time of the original contract of sale. Since such damages proximately result from the breach of warranty and can be ascertained with reasonable certainty, they are allowable. Grupe v. Glick, 26 Cal.2d 680, 689, 690, 160 P.2d 832.

The only evidence as to the cost of repairing and repacking consisted of an "Analysis of 103 Sets Returned from Roberts," prepared by Varten Hachigian, and his opinion testimony. Hachigian, the assistant to the president and plant manager of the service division and supervisor of defendant's traffic department, testified on direct examination that approximately four months before the trial, or nearly 13 months after the sets were repaired, he made a detailed written analysis of the cost of repairing each one of the 103 television sets. He made it from the original inspection reports, the cost of cabinets, the labor cost for repairs, the part costs, and sometimes from the original invoice the cabinet maker charged defendant for the cabinets. Defendant then offered the analysis in evidence, whereupon plaintiff took Hachigian on voir dire. On voir dire examination, he testified:

"Q. Mr. Hachigian, you didn't have any records of time sheets showing exactly how much time was devoted to each one of these sets? A. Yes, I do.

"Q. Where are those records? A. Unfortunately we had a change in personnel and administration, and many of the records were mishandled.

"Q. Then you don't have them now? A. I can't present them all this minute, but I believe they could be presented.

"Q. You think they are available? A. Unfortunately, I didn't consider it important enough to bring them with me.

"Q. But do you think they are available? A. I believe they are."

Plaintiff objected to reception of the analysis in evidence on the ground it was not the best evidence "of any time costs or labor costs." Hachigian then stated the analysis was an expert's opinion as to how much time it would take to repair the sets. Plaintiff again objected to reception of the analysis "as a self-serving statement."

Later Hachigian testified as to the way he prepared the estimate: "I took the inspection report of the sets as they came in, as was prepared by the receiving department, showing the damages and the parts missing. Taking those into consideration, parts—we have known figures for that, so that wasn't estimated. And cabinets that were replaced, we know our cost on those.

So I used those. But, as far as labor is concerned on cabinet repairs, since we have had a lot of experience in time and labor on repairing cabinets, I used that information to determine the cost of repairing cabinets. As far as repairing the chassis of the television sets, we have also been in the repairing and servicing of chassis for a long time and I used known time costs and labor costs for that. I want to mention the fact that on the repair of chassis we used the very same figure of $4.50 a set, which is far below what most of them cost." The analysis was then admitted in evidence over plaintiff's objection that it was self-serving and not the best evidence.

[8–10] It is proper for the court, in the exercise of its discretion, to accept the best evidence which the case affords. (10 Cal. Jur. 851, § 132.) The court was warranted in concluding that the records were not available. The general rule, when a question is to be determined from prepared data, is that where possible the data to establish a fact must be laid before the court. A necessary modification of this rule is that when these data may not thus be presented to the court the opinions of persons qualified on the subject are admissible. (10 Cal. Jur. 964, § 221.) The question of Hachigian's competency was for the trial judge. There was no error in admitting the analysis in evidence.

Plaintiff contends there was no evidence that any administrative or sales expenses were actually incurred by reason of the resale, that there was only Hachigian's statement of how much was charged against plaintiff on the account, and that the court miscalculated that amount in the findings.

[11] Hachigian testified that the reasonable value of the selling and administrative costs on the sale of the 103 sets was "about fifteen percent. * * * Fifteen percent of the sales price." When asked what the cost would be to defendant in dollars and cents, he replied "$3,651.10." He was asked to explain how that was computed and he answered, "On the basis of our known expenses, 15 percent of the $21,000.00 price asked by Roberts was the figure we used in estimating our administrative and sales expense." Plaintiff asserts there is no evidence that it agreed defendant might charge it for administrative and sale expenses. Hausfater testified the agreement was for "no deductions of any kind." It also contends that the 15% formula was improperly applied in that if it were used it should be 15% of $16,500.70 for which the defendant claimed to have resold the 103 sets, or $2,475.11. Defendant argues that the $3,651.10 is to be added to $21,169.94, and the total fair market values in April 1951 would have been $24,821.04. This addition is made on the premise that $21,169.94 was the *net* value of the sets; that defendant could have sold the sets so as to net $21,169.94. However, $3,651.10 is 15% of $24,340.67, which figure is not found anywhere in the record. Hachigian's testimony was not evidence of any expense actually incurred. It was merely an estimate of the percentage of sales price customarily expended on sales and administration and an attempt to arbitrarily apply that percentage to this transaction. When he explained his estimate he indicated that he was not reporting an actual cost but estimating a cost from figures not involved, or found, in the transaction. Defendant was not in the business of taking sets back and reselling them. This was a special situation. There was no showing that there were any sales or administrative expenses in making the special resale.

[12–14] Compensatory damages can be allowed for only the damage that may reasonably be supposed to have been within the contemplation of the parties at the time of entering into the agreement. (14 Cal. Jur.2d 660, § 32.) To warrant a recovery for expenses there must be evidence from which the amount to be allowed can be properly determined. 25 C.J.S., Damages, § 91, p. 634. For administrative and sales expenses to be recoverable, such damages must be proved as damages actually sustained. See Grupe v. Glick, 26 Cal.2d 680, 160 P.2d 832; Civ.Code, § 3358. On the record it was error to award defendant $3,651.10 for administrative and sales expenses.

The court found that at the time of the agreement of April 6, 1951, plaintiff was indebted to defendant in the sum of $14,085.22; while the parties at the commencement of the trial had stipulated plaintiff owed defendant, exclusive of any alleged sum for advertising charge-back, $12,904.92. The parties agree the trial court must have allowed the difference of $1,180.30 for an advertising charge-back. Plaintiff asserts the court erred in admitting evidence of a secondary and self-serving nature as to plaintiff's obligation to pay back an advertising allowance, and that, in any event, the court miscalculated the amount of the allowance.

In the course of defendant's dealings with its distributors, there were a number of agreements or understandings. For each distributor, defendant kept three separate accounts: one for the merchandise, another for advertising, and the third for parts. Defendant issued separate credit memos and separate billings for each account. In the special advertising account, defendant was charged with 4% of the cost of sets and the distributor was charged with 2% of the cost. The distributor paid for advertising defendant's sets in local newspapers and was given credit for such expenditures against the advertising account. Plaintiff had received credit for advertising the 103 sets that were returned. Defendant claimed that since it took back the sets and would have to allow other distributors credit for further advertising, it would charge back the advertising credit allowed plaintiff. It claims such charge-backs were customary. Plaintiff contends there was an express agreement for "no deductions of any kind" and that defendant did not make new advertising allowances to other distributors on these sets.

Over plaintiff's objection, Kaye, defendant's president, was asked whether there is an established practice for an adjustment in the advertising fund when sets are returned by a distributor. He said it is generally the practice to do so, "to give a new advertising allowance to the new purchaser." He said he was only "vaguely familiar" with the earlier Jordan Marsh transaction and could not tell whether Jordan Marsh was given an advertising allowance or whether a charge-back was made to plaintiff. He testified that in connection with the 103 sets that were returned to defendant an advertising charge-back was made, but he didn't know the exact amount. He did not state what adjustment had been made, or when.

The only evidence adduced by defendant with respect to the amount of the advertising charge-back was in the testimony of Hachigian. It was stipulated that Hachigian's testimony would be the same as Kaye's, relative to the existence of a charge-back custom. He testified that defendant was "charged back" in the Jordan Marsh transaction. He was shown certain documents which he identified as "subsidiary ledger sheets" from the posting machine and which were made under his supervision; but they were not offered in evidence. Thereafter he testified, over plaintiff's objection, from the documents. He was asked what the figure $1,872.36 was and he answered, "There is a charge here of $1,872.36 for advertising charge-back." There was no evidence that defendant actually incurred any advertising expense in reselling the sets, nor was there any evidence that plaintiff knew of any custom.

Defendant's witness stated the charge for advertising charge-back was $1,872.36. However, his testimony did not reveal any basis for determining the amount. The court allowed defendant $1,180.30. There is no mention of that sum in the record and no evidence on which it can be calculated. Plaintiff asserts the judgment awarding defendant a charge-back of $1,180.30 must be deemed to rest upon testimony concerning a custom for which no foundation was laid and upon a calculation for which there is no evidence in the record. As to the amount, defendant agrees the mathematical computation is not correct, but argues that according to its computations the arithmetical oversight is not a sufficient basis for reversing the judgment. It assumes that the price plaintiff originally paid defendant for the 103 sets was $21,169.94 plus

20% of that amount, or a total of $25,403.93; that the proper 4% charge-back should have been $1,016.16, or $164.14 less than the $1,180.30 allowed by the court, and that the rule of de minimis applies.

[15–18] The foundation for the introduction of evidence of custom or usage is a showing of a series of acts of a similar character performed at different times. Ames Mercantile Co. v. Kimball S. S. Co., D.C., 125 F. 332, 335. Evidence of a habit of doing a thing in the course of business is, if clearly shown as a definite course of action, admissible as indicating that, on a particular occasion, the thing was done as usual. 31 C.J.S., Evidence, § 180, p. 881. Evidence of the doing of an act at one time is incompetent to prove a custom to do so. Wilson v. Travelers' Ins. Co., 183 Cal. 65, 70, 190 P. 366. A person is not bound by a custom or usage unless he had actual knowledge thereof, or it is so general or well-known in the community as to give rise to the presumption of such knowledge. Robertson v. Dodson, 54 Cal. App.2d 661, 664, 129 P.2d 726; 25 Cal.Jur. 419, § 4.

[19] The only evidence on the amount of the advertising allowance made by defendant was that it set aside 4% of the cost of the television sets for advertising. Defendant did not prove the original cost of the 103 sets that were returned or of those sent by plaintiff to Jordan Marsh, nor what 4% of the two transactions is. The court permitted defendant's witness to read into the record a statement that defendant had charged back to plaintiff $1,872.36 for advertising, but the court awarded damages on that account for only $1,180.30. If these figures constituted a 4% advertising allowance, they would refer to sets sold for $46,809 and $29,507.50, respectively. There was no evidence that the sets were sold at either of these prices. The allowance of $1,180.30 for an advertising charge-back is without evidentiary support.

The court found that defendant sold the 103 sets as reconditioned sets for $16,500.70. Plaintiff contends that $16,500.70 is mathematically incorrect as to the actual amount received, and is not the fair market value of the sets because: (1) at least one of the sets was given away free, (2) defendant failed to account for all the sets, and (3) the amount stated did not include other intangible consideration.

In a case of breach of warranty of quality, the general measure of damages "is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." Civ.Code, § 1789(7).

The evidence of the prices received by defendant on the resale of the 103 sets was presented in a tabulation of set numbers and prices. The tabulation showed a figure of $16,500.70 as having been the total amount received from the sale of all the sets. Kaye, president of defendant, testified that one of the sets was delivered to a dealer without charge, probably as an advertising credit, and it was also possible there were other sets for which the dealer might have been given some credit so that the price was reduced for some reason. He testified that a set listed on the exhibit was sold to someone else at a date prior to the time the 103 sets were sent back, and that the records were inaccurate.

In March of 1950, plaintiff became a distributor of defendant's television sets. Plaintiff had bought about 2,000 from March 1950 to June 1951; however, after December 1950, it had purchased only two sets. Of the 103 sets involved in this litigation, 100 had been manufactured and shipped to plaintiff between October 6 and November 28. The remaining three sets had been shipped prior to October 1st. Plaintiff had most of the sets five months before it returned them.

Hausfater testified that the prevailing prices of the sets were lower in April 1951 than what he had paid for them and that plaintiff resold them at a lower price than it had paid for them. Kaye testified that the prices of the 103 television sets were the same in March 1951 as in November 1950. However, the documentary evidence introduced by defendant showed that seven of the eight models had declined in price during that period.[7] It is apparent the court accepted the sum of $16,500.70 found in the tabulation, as being the total amount defendant received from the sale of the 103 sets. In view of the fact that the tabulation was incorrect and incomplete and that seven of the eight models had declined in price during the five months between November and April, it was error for the court to adopt defendant's tabulation as a full and correct accounting.

[20] The finding that plaintiff expressly warranted the 103 sets were new merchandise in the original cartons as originally packed by defendant and were to be in good and marketable condition, is supported by the evidence. Insofar as the finding that defendant was compelled to and did expend $7,553.89 includes $3,902.79 that defendant spent in repairing and packing the sets, it is supported by the evidence; but insofar as it includes $3,651.10 for administrative and selling expense, it is not supported by the evidence. The finding that on April 6, 1951, plaintiff was indebted to defendant in the sum of $14,085.22, insofar as it includes $1,180.30 for an advertising charge-back, is not supported by the evidence. The finding that defendant realized $16,500.70 from the sale of the reconditioned sets is not supported by the evidence.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

SMITH
v.
INDUSTRIAL ACC. COMMISSION et al. *

Civ. No. 16185.

District Court of Appeal, First District, Division 2, California.

July 15, 1954.

Rehearing Denied Aug. 13, 1954.

Hearing Granted Sept. 8, 1954.

Proceeding on petition for writ of review and annulment of order of Industrial Accident Commission denying petitioner's claim for additional workmen's compensation from the Subsequent Injuries Fund, the Commission having based its order on a finding that petitioner's pre-existing permanent disability amounted to 100%, and that he was therefore disqualified from benefits under the Subsequent Injuries Fund. The District Court of Appeal, Kaufman, J., held that where petitioner, who was previously physically impaired, suffered a subsequent compensable injury, the Commission was required to determine the combined disability and the percent of subsequent injury, and to subtract the latter from the former to determine the remainder for which petitioner should be compensated from Subsequent Injuries Fund.

Decision annulled and cause remanded.

1. Workmen's Compensation 🔑845

Purpose of Labor Code section providing that persons with previous permanent disability or physical impairment who suffer industrial injury shall receive compensation only for latter injury when considered by

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[7]

Model No.	No. of Sets	Nov. 1st—Per Unit	Price Total	March 15th Price	Credit Given	Total Credit Given
731M	15	177.45	2,611.75	175.61	160.98	2,414.70
733M	25	196.32	4,908.00	194.02	184.23	4,605.75
734W	1	237.97	237.97	234.57	227.23	227.23
033M	5	222.70*	1,113.50	220.32	223.23	1,116.15
737	25	228.75*	5,718.75	226.07	229.23	5,730.75
734M	10	243.92	2,439.20	240.52	232.23	2,322.30
735	10	232.05*	2,320.50	228.77	224.23	2,242.30
236	12	220.15**	2,641.80		209.23	2,510.76
			21,991.47			21,169.94

* January 2, 1951 prices.
** 3 sets were shipped prior to October.

* Vacated 282 P.2d 64.

itself and not in conjunction with or relation to previous disability or impairment, is to encourage employment of the handicapped without placing additional risk on employers. Labor Code, § 4750.

2. Workmen's Compensation ⚷845

Where workmen's compensation claimant, who was previously physically impaired, suffered a subsequent compensable injury, Industrial Accident Commission was required to determine the combined disability and the percent of subsequent injury, and to subtract the latter from the former to determine the remainder for which claimant should be compensated from Subsequent Injuries Fund. Labor Code, § 4751.

3. Workmen's Compensation ⚷845

Where workmen's compensation claimant, at time he sustained a subsequent compensable injury, was working and earning approximately $2,000 per year, a determination that claimant had a 100% prior disability while engaging in such work was erroneous in that it gave no consideration to fact of occupation at time of second injury. Labor Code, §§ 4660, 4751.

4. Workmen's Compensation ⚷1624

In workmen's compensation proceeding, evidence was insufficient to support respondent's contention that no further disability to engage in claimant's limited occupation was caused claimant by his injury.

Julius M. Keller, San Francisco, for petitioner.

Everett A. Corten and T. Groezinger, San Francisco, for respondent Industrial Acc. Commission.

Edmund G. Brown, Atty. Gen., of the State of California, Gerald A. Carreras, Deputy Atty. Gen., for respondent Subsequent Injuries Fund.

KAUFMAN, Justice.

Petitioner seeks a writ of review and the annulment of respondent Industrial Accident Commission's order denying his claim for additional compensation from the Subsequent Injuries Fund of the State of California. Respondent Commission based its order on a finding that employee's pre-existing permanent disability amounted to 100%, and that he was therefore disqualified from benefits under the Subsequent Injuries Fund.

[1] Labor Code, § 4750 provides that persons with previous permanent disability or physical impairment who suffer industrial injury, shall receive compensation from their employer only for the later injury when considered by itself and not in conjunction with or relation to the previous disability or impairment. The purpose of this section was to encourage the employment of the handicapped without placing additional risk on the employers. Subsequent Injuries Fund v. Industrial Accident Comm., 39 Cal.2d 83, 244 P.2d 889. Labor Code, § 4751, provided that an employee permanently partially disabled who receives a subsequent compensable injury "resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article."

Petitioner George Smith filed an application for Adjustment of Claim with respondent on September 26, 1952, alleging that on August 14, 1952 in his employment with the Mutual Stevedoring Company he suffered an injury resulting in the amputation of the little finger of his right hand. On November 3, 1952, petitioner filed a petition with respondent requesting a joinder of the Subsequent Injuries Fund as a party defendant, alleging that his prior disabilities and physical impairment together with the present disability would exceed 70%. The Commission ordered said Fund joined as a defendant.

On January 19, 1953, a permanent disability rating of 1¼% for the "loss of the distal phalanx of major little finger" (Ex. A) and a recommended permanent disability rating of 100% for all existing permanent disability including that from the last injury, was filed and served.

On January 26, 1953, the Subsequent Injuries Fund filed its objections and further hearing was held on April 6, 1953. Petitioner testified that he had never been able to work as a longshoreman since the injury to his shoulder on June 9, 1949. For that injury he had received a permanent disability rating of *38½%* on June 6, 1951. He returned to work in July 1951 working as a sweeper at an hourly rate of $1.85, whereas he had received $2.15 per hour as a longshoreman. He testified that prior to the injury to his left shoulder in 1949 his right hand began bothering him. While employed as a sweeper he frequently could not work because both arms bothered him. Prior to the injury to the finger he could write, but now only with the greatest difficulty. The amputation of the finger also causes him great difficulty in performing the duties of sweeper, interfering with his ability to hold a broom. He has not had sufficient grip since February 28, 1953 to perform the duties of sweeper.

A medical report of December 8, 1952 by Dr. D. D. Charmak states that petitioner can now do only sedentary work. The report mentions that the arthritis from which he suffers is osteo or rheumatoid, and that the condition may become worse in time. Dr. Philip Westdahl in a report of March 26, 1953, reported that at the time of the injury to the finger on August 14, 1952, petitioner was totally disabled as a longshoreman and that the pain from the combined left arm injury and his neurotrophic arthopathy only allowed him to work as a sweeper about half time. The injury to the finger added a small amount to the existing weakness of his grip. Subsequent to and independent of the injury of August 14, 1952, there has been a progression of the neuropathic disease consisting of "hyposthesia of his right index finger and an ataxia." The doctor also reported that he had a fair range of motion in both shoulders and could make good fists.

On May 15, 1953, the trial referee issued his Findings that the employee was suffering permanent disability equivalent to 100% before the accident of August 14, 1952, and ordered that he take nothing from the Subsequent Injuries Fund.

On June 26, 1953, petitioner's Petition for Reconsideration was granted, and a hearing was held at which petitioner testified.

On December 14, 1953, a recommended permanent disability rating of 100% was filed and served, the percentage being based on all disability factors prior to the injury of August 14, 1952, and showing that while prevented from working as longshoreman by these injuries he had been earning approximately $2000 per year as a sweeper on the waterfront. A recommended rating of 5¼% for the little finger injury was filed and served. On February 1, 1954, the Commission awarded petitioner the 5¼% permanent disability, but denied benefits from the Subsequent Injuries Fund.

It is the position of the respondent Commission that under Sec. 4751 of the Labor Code, an employee who though employed and earning, is, according to the Commission's rating schedules, suffering prior physical disabilities ratable at 100%, is not eligible if injured, to receive anything from the Subsequent Injuries Fund. It is also apparently the position of the Commission that such a person if 99% disabled, and therefore under the rating schedules not totally but partially disabled, who received subsequent injury bringing the total to 100%, may receive from the Subsequent Injuries Fund compensation in the amount of 100% less the percentage of the last injury.

This is a case of first impression. The Commission contends that the language in Sec. 4751, "an employee who is permanently partially disabled" must mean an employee who is less than 100% disabled as determined by the Commission rating schedules, and is not to be determined by the person's continued ability to work regardless of handicaps.

[2] Petitioner contends that under Sec. 4751, the Commission should have deter-

mined the *combined* effect of the last injury and all prior injuries. The rating schedule (Ex. H), no matter what the percentage of injuries to be combined, gives the highest rating possible as 100%. Thus an injury of 95% plus another of 30% gives a total of 100% and an injury of 95% plus another of 70%, still gives a rating of 100%. If a third injury were added to either of these cases, the rating would still be 100%. The Commission asked the rating bureau for separate determination of the prior disabilities and the latter 100% was given as the rating for prior and 5¼% for the latter. Petitioner contends that 100% should have been given for the prior combined with the latter, which would total 100% even if the prior alone would total 100%. The 5¼% rating for loss of a finger should then be subtracted from 100%, leaving a remainder in accordance with the statute of 94¾% for which he should be compensated from the Subsequent Injuries Fund. We agree with this contention.

[3] Petitioner contends that the determination that he had a 100% prior disability, is in any event contrary to the undisputed evidence since he was working and earning approximately $2000 per year when the second injury occurred. With this contention we likewise agree. Section 4660 requires that in determining percentage of permanent disability, account shall be taken of (1) the nature of the injury, (2) occupation and (3) age of the employee at the time of injury, (4) and his diminished ability to compete in an open labor market. Obviously no consideration was given to the fact of occupation at the time of the second injury, in holding that he was 100% permanently disabled while engaging in that occupation. The fact that we are here concerned with the ability to do some work at the time when the second injury was incurred, distinguishes this case from cases such as Postal Telegraph-Cable Co. v. Industrial Accident Comm., 213 Cal. 544, 3 P.2d 6; Dept. of Motor Vehicles of California v. Industrial Accident Comm., 14 Cal.2d 189, 93 P.2d 131 and Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150, which have held that the ability to do the exact work for which he has been employed is not the sole test of disability, as the Commission must determine *prospectively* the degree of permanent disability. Here we are concerned not with the *prospective*, but with the *facts* at the time of the second injury. Petitioner contends for the construction of "partial" in Sec. 4751 as meaning ability to do some work. This construction is both fair and reasonable. A totally blind man is under Sec. 4662 conclusively presumed totally disabled. Many such persons are skilled workers, but under the Commission's interpretation they could never be eligible for compensation from the Subsequent Injuries Fund.

The Commission contends that the legislative history of Sec. 4751 illustrates that it was intended to apply only to those suffering from injuries rated at less than 100%, since when first enacted in 1945, it read partially disabled "by reason of the loss of, or loss of use of, a hand, an arm, a foot, a leg, or an eye." In 1949 it was amended so as to omit the quoted phrase. It is argued that the purpose of amendment was to allow inclusion of all *partial* disabilities, and not limit it to those enumerated in the 1945 enactment.

[4] Respondent contends that no further disability to engage in the limited occupation of sweeper was caused by the finger amputation, but was caused by the progression of his preexisting disease, and in part to the scarcity of sweeping jobs. However, as noted by petitioner, the referee reported petitioner's testimony that the amputation interfered with his ability to hold a broom, and that he could not now pick up objects unless they were large. Respondent's contention is therefore unsupported by the evidence.

In petitioner's reply, it is pointed out that the Commission's interpretation discriminates between the more handicapped and the less handicapped worker. As noted earlier a 99% handicapped person (that is 99% by the rating schedule) is eligible for the Fund under the Commission's interpretation, but a 100% handicapped person is not. The phrase "permanently partially disabled" is apparently used in no other section of the Labor Code.

It is our view that the statute in question expressly directs the Commission first to determine the combined disability, then determine the percent of subsequent injury, and subtract the latter from the former to determine the remainder. This being so petitioner is entitled to the benefits set forth in Sec. 4751 of the Labor Code.

Ordered that decision of the Industrial Accident Commission be annulled and cause remanded for further proceedings in accordance with this opinion.

NOURSE, P. J., and DOOLING, J., concur.

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126 Cal.App.2d 725

EMBASSY REALTY ASSOCIATES, Inc.

v.

SOUTHWEST PRODUCTS CO. et al.

Civ. 20194.

District Court of Appeal, Second District, Division 2, California.

July 27, 1954.

Hearing Denied Sept. 16, 1954.

Action by party, claiming under assignee of stock, to compel assignor to transfer the stock. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Fox, J., held, inter alia, that evidence sustained finding that there had been a lack and failure of consideration for the assignment to the assignee.

Affirmed.

1. Judgment 🔑540

A prior adjudication is not res judicata unless issue decided therein was identical with that in present action, a final judgment of merits was rendered in prior action, and party against whom plea is raised was party or in privity with party to prior action, or controlled such litigation.

2. Judgment 🔑707

Judgment in stockholder's derivative suit to compel officers to turn over secret profits allegedly made by them by virtue of assignment of stock in another corporation was not res judicata in subsequent action by first corporation, based on assignments executed by officer to first corporation, pursuant to judgment, to compel transfer to it of stock, in view of fact that neither second corporation nor its officers was party to first action and had no control over it.

3. Judgment 🔑715(3)

Issue in stockholder's derivative suit to compel corporate officer to turn over claimed secret profits to corporation, which action resulted in judgment directing officer to assign to corporation any interest he had in stock of second corporation, and issue in subsequent action by first corporation to require second corporation to transfer stock represented by the assignment to first corporation were so different that principle of res judicata was not applicable.

4. Mortgages 🔑37(2)
Trusts 🔑43(3)

Even though writing purports to make absolute transfer, extrinsic evidence may be received of collateral agreement to hold property as security or in trust.

5. Evidence 🔑444(2)

Parol evidence is admissible to show that contract fully executed and delivered is not to be effective unless and until some condition extraneous to terms of contract has been complied with.

6. Evidence 🔑392

Parol evidence was admissible to show that assignment of corporate stock was executed for convenience only to assist assignee in obtaining financing for corporation and to show that assignee had no beneficial interest in the stock. Code Civ.Proc. § 368.

7. Assignments 🔑126
Evidence 🔑432

Lack and failure of consideration for assignment is good defense against assignee and may be shown by parol evidence. Code Civ.Proc. § 1962, subd. 2.

8. Assignments ⚷137

In action by party claiming under assignee of stock to compel transfer of the stock, evidence supported finding that there had been a lack and failure of consideration for assignment to the assignee. Code Civ.Proc. § 1962, subd. 2.

9. Witnesses ⚷16

Party seeking to compel corporation to transfer stock pursuant to two year contract had no right, by subpoena duces tecum, to check and investigate all records of the corporation from time of its incorporation to date of trial, a period of some seven years.

10. Witnesses ⚷16

Failure of party seeking subpoena duces tecum to particularize documents, which were in corporation's possession and which party desired, deprived party of any right to subpoena duces tecum.

◆

Bertram S. Harris, Los Angeles, DeWald Baum, Beverly Hills, for appellant.

John H. Poole, Pasadena, for respondents Southwest Products Co., and another.

Hahn & Hahn, Pasadena, for respondent Potter.

FOX, Justice.

Plaintiff brought this suit to compel transfer to it of 6100 shares of common stock in Southwest Products Company, herein referred to as Southwest. Plaintiff appeals from an adverse judgment.

In 1946 defendants Hackman and Potter organized Southwest. Each had 3,050 shares of its common stock out of a total of 9,600 shares. All of the stock was ordered held in escrow by the corporation commissioner, with the provision in the permit that none of said shares nor any interest therein could be sold or transferred until the written consent of the commissioner had been obtained therefor. Hackman and Potter were the principal officers and owned the controlling interest in Southwest at all times material to this action. In the summer of 1948 Southwest was in bad financial condition and in serious need of additional funds.

Plaintiff corporation, herein called Embassy, was in the real estate and investment business. Edward S. Maddock was its president and the owner of the controlling stock interest. August H. Fester was a director and officer of Embassy. He contacted Southwest as a representative of Embassy for the purpose of having Embassy attempt to assist Southwest in working out its financial problems. Southwest made available to Fester all of its books and records including its minutes and stock permit. He was also introduced to the escrow holder of the stock. Fester negotiated an agreement dated August 3, 1948, between Embassy and Southwest which was also executed by Hackman and Potter, since the agreement covered the controlling stock interest in Southwest which was held by them. Generally, this agreement provided that Embassy was to have an option to purchase Hackman and Potter's stock provided Embassy furnished Southwest additional financing in the sum of $150,000, and then the stock was to be distributed between the new investor, Embassy, and Hackman and Potter, as therein specified, which, however, is not here material. This option agreement was extended from time to time and finally expired by its own terms on September 30, 1950. After the execution of the agreement of August 3, 1948, Fester, as an employee of plaintiff, sought to obtain financing for Southwest. As a part of this undertaking Fester prepared assignment forms which he presented to Hackman and Potter for execution, which purported to assign their respective stock interests in Southwest to him. As a basis for securing their signatures to the documents Fester told them this procedure was necessary in order to facilitate the financing pursuant to the agreement of August 3d; that he would be able to show prospective investors that he was in a position to deliver the stock. Both Hackman and Potter objected to signing these instruments in that form; Fester, however, told them it was necessary if he was to continue to work on the Embassy contract and that they could put their trust in him. It was understood between Fester, Hackman and Potter that in the event Embassy was not able to perform under the option agreement the assignments would be returned to Potter and Hackman. At no time did Fester claim any ownership in this stock by virtue of these assignments—neither Fester nor Embassy paid any money or transferred any property or gave any other consideration to Hackman or Potter for these assignments. No certificates of stock were ever delivered to Fester, nor was any endorsement made on any stock certificate. Nor was any request made of the corporation commissioner for permission to transfer the certificates which were then held in escrow pursuant to the provisions of the stock permit. The assignments were returned August 30, 1951. Embassy was never able to obtain any financing for Southwest pursuant to the option agreement and therefore was never in a position to exercise its option.

In October, 1950, Frances A. Wright, a minority stockholder of Embassy, commenced a stockholders' derivative suit against Edward S. Maddock, as president, director and majority stockholder of Embassy, and against Fester as an employee, director and officer of Embassy, on the theory that they had obtained secret benefits while in the employ of Embassy and had retained these for their personal benefit. The alleged profits included many items, among them being stock in Southwest assertedly held in their own names. After a trial the court gave judgment in favor of Maddock but against Fester as to any interest he might have in the stock of Southwest as a result of the aforementioned assignments made to him by Hackman and Potter. As a result of that judgment Fester assigned to Embassy whatever right, title and interest he had in and to the stock of Southwest by virtue of the Hackman and Potter assignments.

Neither Hackman, Potter nor Southwest was a party to that action. The only connection that any of them had with the suit was that Potter was subpoenaed and testified as a witness, and the Hackman and Potter assignments to Fester, which had been returned by him, were produced in court in response to a subpoena duces tecum served upon the secretary of Southwest.

At no time has Hackman, Potter or Southwest ever been employed by, or owned stock in, Embassy. Neither Hackman nor Potter has ever been an officer of Embassy. Their only connection with Embassy grew out of the agreement of August 3, 1948. Maddock was never an officer, director or employee of, nor did he ever own any stock in, Southwest. Neither did Embassy own any of Southwest's stock. Fester's connection with Embassy was terminated at the end of November 1949. He was employed by Southwest from December, 1949, through June 1951.

This suit is based on the assignments executed by Fester to plaintiff conveying to it any right, title, and interest he had in and to the stock of Southwest by reason of the Hackman and Potter assignments to him. Plaintiff's theory is that the judgment in Wright v. Maddock was res judicata as to the ownership of this stock.

The trial court held, inter alia, that the judgment in Wright v. Maddock was not res judicata as to the ownership of the stock in question; that the assignments by Hackman and Potter to Fester were for convenience only to assist him in obtaining financing for Southwest under the agreement of August 3, 1948; that the assignments were to be used and to be effective only in the event Embassy was able to obtain the financing therein provided for, which it was never able to do; and that there was no consideration for the assignments. Plaintiff appeals from the judgment which denies it any relief. Its arguments, however, are not persuasive.

[1] A prior adjudication is not res judicata unless the issue decided therein was identical with that in the present action, a final judgment on the merits was rendered in the prior action, and the party against whom the plea is raised was a party or in privity with a party to the prior action, or controlled such litigation. Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; Dillard v. McKnight, 34 Cal.2d 209, 216, 209 P.2d 387, 11 A.L.R.2d 835;

Alexander v. Hammarberg, 103 Cal.App.2d 872, 882, 230 P.2d 399; Stafford v. Russell, 117 Cal.App.2d 319, 320, 255 P.2d 872.

[2] Applying this rule, it is clear that the doctrine of res judicata is not here applicable. In the first place, neither Potter, Hackman, nor Southwest was a party to the Wright v. Maddock action. Likewise, neither of them was in privity with any party to that action, and had no control over it. None of these three parties had a right to make a defense therein or to appeal from the judgment in the prior action. The fact that Potter testified in the earlier suit certainly does not make the judgment binding on him. Likewise, the production in court by Southwest of the original assignments in response to a subpoena duces tecum does not make the judgment binding on it. Fester, who was an officer of and employed by Embassy when these assignments were secured by him and who was later employed by Southwest, had terminated such employment more than six months prior to the trial of the Wright v. Maddock case. There is no showing that either Southwest, Potter or Hackman thereafter had any direction of or control over Fester, or that at any time they had any part in determining the position that either Fester or Maddock would take in the prior litigation.

[3] An examination of the pleadings in Wright v. Maddock demonstrates that the issue decided therein was not "identical with the one" presented in the instant case. The prior suit was to determine whether Fester and Maddock, as employees and officials of Embassy, had made any secret profits which they had retained; and if so, to compel them to turn the same over to Embassy. As an incident of that suit Fester was ordered to assign to Embassy any interest he had acquired in the stock of Southwest. The case at bar, however, seeks to require Potter, Hackman and Southwest to transfer and deliver to plaintiff 6,100 shares of Southwest's stock standing in the names of Potter and Hackman. The issue here is the claim of ownership of that stock by Potter and Hackman. Obviously the issues in the two cases are different. Hence the principle of res judicata may not be invoked against these parties.

[4–6] Plaintiff argues that the trial court violated the parol evidence rule in admitting oral evidence that Potter and Hackman executed and delivered the assignments to Fester for convenience only to assist Fester as an employee of plaintiff in obtaining financing under the option agreement and that these assignments were to be used and to be effective only in the event plaintiff exercised its option by obtaining the financing specified therein. This rule, however, is not here applicable. Even though a writing purports to make an absolute transfer, extrinsic evidence may be received of a collateral agreement to hold the property as security or in trust. In re Estate of Gaines, 15 Cal.2d 255, 261, 100 P.2d 1055; Jarkieh v. Badagliacco, 75 Cal.App.2d 505, 511–512, 170 P.2d 994. Also the rule is well established that parol evidence is admissible to show that a contract fully executed and delivered is not to be effective unless and until some condition extraneous to the terms of the contract, has been complied with, as where it is not to be effective until some future specified event transpires. Severance v. Knight-Counihan Co., 29 Cal.2d 561, 563, 177 P.2d 4, 172 A.L.R. 1107; Gleeson v. Dunn, 113 Cal.App. 347, 350, 298 P. 119; Teel v. Bank of Eureka, 42 Cal.App.2d 807, 811–812, 110 P.2d 78; 3 Williston, Contracts, rev.ed., sec. 634. The parol evidence did not contradict the assignments or seek to vary their terms, and was not admitted for such purpose. It was received rather to show that Fester did not have the beneficial ownership of the stock but held it for Potter and Hackman, and that he was not at liberty to use these assignments until and unless plaintiff obtained the financing for Southwest provided for in the option agreement. Under the above authorities, such parol evidence was properly admitted. It is, of course, axiomatic that since Fester acquired no beneficial ownership in this stock, he conveyed nothing to plaintiff by his assignment to it of all his right, title and interest therein, and that plaintiff was subject to the same defenses as Fester. Code Civ. Proc. § 368.

[7, 8] One of the important findings was that "there was lack of and failure of consideration" for the Potter and Hackman assignments. This is a good defense against an assignee and may be shown by parol evidence. Code Civ.Proc. § 1962(2); Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 299, 106 P.2d 4. This finding is fully supported not only by the testimony of Potter and Hackman but also by that of Fester as well. They were all familiar with the circumstances under which the assignments were made.

Since the findings that we have discussed are amply supported by properly admissible evidence, and since these findings are adequate to sustain the judgment, it is unnecessary for us to consider other challenged findings.

Plaintiff complains that the findings in Wright v. Maddock are contrary to the findings in the instant case. Since, however, as previously pointed out, the doctrine of res judicata may not be invoked against these defendants, that decision and the findings on which it was based are not controlling in the case at bar.

[9, 10] Plaintiff charges that the trial court refused to permit the plaintiff "to rebut the evidence of its adversary" by either parol or documentary evidence. Plaintiff apparently had an idea that some finances were obtained for Southwest as a result of the agreement of August 3, 1948, and the extensions thereof. The only person who appears to have had anything to do with that agreement and plaintiff's efforts to carry it out, who was not a witness in this case, was Maddock, who, according to plaintiff's counsel, was in Chicago at the time of the trial. It does not appear, however, that he had been subpoenaed. Thus it is the plaintiff's fault, and not the court's that Maddock was not available as a witness. Furthermore, the transcript of the testimony at the former trial was received in evidence in this trial. Maddock testified at that time, hence his story was before the court in this case. The "documentary evidence" to which plaintiff refers relates to the corporate records of Southwest. Plaintiff served a subpoena duces tecum[1] on Southwest apparently requiring it to produce all of its records from 1946 to 1953. Obviously it was too broad for, among other reasons, it covered a period of approximately two years prior to the agreement of August 3, 1948, and some three years after the expiration of that agreement in September, 1950. Plaintiff does not appear to have specified, either in its affidavit for the subpoena duces tecum or during the course of the trial, any particular documents or records which were material to any issue in the case. It merely wanted to check and investigate all the records of Southwest from the time of its incorporation to the date of the trial—a period of some seven years. This it had no right to do. McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 396, 159 P.2d 944; People v. Keith Ry. Equipment Co., 70 Cal.App.2d 339, 361, 161 P.2d 244; Pelton Motors, Inc. v. Superior Court, 120 Cal.App.2d 565, 569, 261 P.2d 275; Proctor & Gamble Mfg. Co. v. Superior Court, 124 Cal.App.2d 157, 268 P.2d 199. That plaintiff had opportunity to get any particular documents that were material is demonstrated by what transpired near the end of the trial. At the conclusion of the rebuttal testimony of Mr. Poole, attorney for Southwest, counsel for plaintiff requested the production of Southwest's records from 1946 to 1953. Mr. Poole stated he would be glad to produce anything that was pertinent. The court then advised counsel for plaintiff that "If there is any particular record that you can name, we will see whether or not it is material, and then I will direct as to whether or not it should be produced * * *." It is thus clear that plaintiff did not make a proper showing for the production of the records of Southwest and that the court did not abuse its discretion in its rulings in these matters.

An examination of the entire record demonstrates that all parties to this action had a fair trial and that the trial judge correctly decided the case.

The judgment is affirmed.

We concur:

MOORE, P. J., and McCOMB, J., concur.

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[1] The subpoena is not a part of the record on appeal.

126 Cal.App.2d 429

COCHRAN v. ELLSWORTH.

Civ. 19951.

District Court of Appeal, Second District,
Division 1, California.
July 7, 1954.

As Amended on Denial of Rehearing
Aug. 4, 1954.

Action by real estate broker against owner for commission. The Superior Court, Los Angeles County, James H. Pope, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Mosk, J. pro tem., held that where agreement whereunder broker claimed commission provided that commission would be paid in installments at the close of escrow and in event of consummation of the sale, and escrow was never closed, and purchase price and deeds were never delivered, broker was entitled to no compensation, even though failure of negotiations resulted from owner's voluntary yielding to purchaser's unjustified demand.

Judgment affirmed.

1. Contracts 🔑145

The place of making a contract, and its equivalent, the place of contracting, properly mean, for purpose of determining applicable law, the place in which the final act was done which made the promise or promises binding, and determination of what that act was is a question to be determined by the law of contract.

2. Brokers 🔑40

The mere engagement of a broker to dispose of property does not create an enforceable contract, and the signing of an authorization to act is not a last act essential to the validity of a brokerage contract for purpose of the lex loci contractus rule.

3. Brokers 🔑40

The engagement of a broker to dispose of specified property does not obligate the broker to find a purchaser and does not create an enforceable contract.

4. Brokers 🔑40, 54

A brokerage contract is not enforceable until the broker finds a purchaser ready, able and willing to buy the property at the authorized price, and the validity of such a contract is to be determined by the law of the state where the contract was consummated, that is, the place where the purchaser was found.

5. Brokers 🔑42

The statutes requiring that brokers be licensed as prerequisite to their recovering compensation were intended to protect landowners from fictitious claims, not to protect the real estate owner against legitimate claims for services which he authorized in writing, and which were honestly rendered, and efforts to avoid payment of a just claim merely because an agreement was signed in a place requiring a license are not favored.

6. Brokers 🔑42

Where property was in Arizona and owner in Arizona, and escrow instructions were revised in Arizona and signed there by the seller, but the broker, the purchaser, and all other elements of the transaction were located or took place in California, broker's right to recover commission for obtaining a ready purchaser was governed by California, not Arizona, law, and fact that broker did not have an Arizona license did not invalidate agreement. Laws Ariz. 1937, c. 53; Civ.Code, §§ 1643, 1654.

7. Brokers 🔑52, 54, 60

Generally, a real estate broker has earned his commission when he has brought to the vendor a purchaser who is ready, willing and able to buy upon terms on which agent is authorized to sell, or when a written contract upon any terms acceptable to vendor has been entered into with a purchaser originally brought to vendor by broker, and it is not necessary for the sale to be completed.

8. Brokers 🔑69

If the owner makes concessions to a purchaser obtained by broker, the concessions may not result in loss to broker without his consent.

9. Brokers 🔑63(1), 64(1)

A real estate broker who has rendered all required services is not to be denied compensation therefor by the whims of a defaulting vendor or purchaser who arbitrarily refuses to perform under a sales contract.

10. Brokers ⚷64(1)

A vendor who, a purchaser having been procured by a broker, voluntarily yields to the purchaser's unjustified demand and breaks off negotiation cannot, by so doing, deprive the broker of his commission.

11. Contracts ⚷186(4)

A third person who relies for compensation upon the binding written promises of a contract may not be deprived of his compensation by the parties' collusive agreement to terminate the contract or by a party's acquiescence in the other's wrongful insistence upon rescission.

12. Brokers ⚷39

An owner and a broker may enter into a binding agreement that no commission shall be considered earned until the happening of a certain specified event or upon certain defined terms and conditions or upon any named contingency.

13. Contracts ⚷278(2)

When a condition precedent is adopted by parties to a contract, substantial, if not strict, observance of the provisions relating thereto is necessary.

14. Appeal and Error ⚷1011(1)

When parol evidence is admitted as an aid to construction of a contract, the trial court's construction of the instrument is ordinarily conclusive on review if the extrinsic evidence is conflicting and the determination is supported by the evidence.

15. Brokers ⚷86(1)

In broker's action against owner for commission, parol evidence admitted as aid to construction of agreement whereunder broker claimed commission supported finding that the phrase "in event of consummation of the sale," the condition upon which commission was payable, was intended to mean that commission would be payable if purchaser completed the transaction of purchase.

16. Brokers ⚷60

The words "consummation of the sale", as used in a brokerage agreement, have a well-defined legal meaning, and refer to a future event, rather than an obligation immediately arising upon execution of instrument, and refer to the completion of the transaction, and in real estate cases, payment of the purchase price and conveyance of title.

See publication Words and Phrases, for other judicial constructions and definitions of "Consummation of the Sale".

17. Brokers ⚷64(2)

Where agreement whereunder real estate broker claimed commission provided that compensation would be payable in installments at the close of escrow and in event of consummation of the sale, but escrow was never closed, purchase price never delivered and title never conveyed, broker was entitled to no compensation, even though he had procured a ready purchaser and failure of negotiations resulted from vendor's voluntarily yielding to purchaser's unjustified demand.

On Petition for Rehearing

18. Escrows ⚷12

Title may pass in escrow when all of the conditions of the escrow have been performed and the grantee is entitled to possession of the deed.

◆

Demler & Eckert and Elizabeth Cochran, Long Beach, for appellant.

Best, Best & Krieger, Riverside, and Joseph A. Ball, Long Beach, for respondent.

MOSK, Justice pro tem.

Desiring to sell his real property, consisting of 480 acres, the entire town of Stanfield, Arizona, respondent Earle Ellsworth in January, 1950, listed the property with Hapeman-McDonald, real estate brokers, in Riverside, California. Shortly thereafter appellant, a real estate broker licensed in California, but not in Arizona, learned of the listing, advertised the property and made efforts to obtain a purchaser.

On March 5, 1950, respondent informed appellant that the agency of Hapeman-McDonald was being revoked but that appellant could continue his efforts to sell the property. About this time appellant interested one Charles Fitzgerald, a Long Beach medical doctor, in the property and on March 4, 1950, Dr. Fitzgerald and his wife inspected the property unaccompanied by appellant.

Within a few days thereafter, on or about March 8, 1950, respondent Dr. Fitzgerald and appellant met in the Fitzgerald home in Long Beach, California, and negotiated for the sale of the Arizona property. Pursuant to these negotiations escrow instructions were drafted by the Farmers and Merchants Bank of Long Beach. On March 14, 1950, appellant went to Arizona where he further conferred with respondent, who advised him that he desired to have his own attorney in Arizona prepare the escrow instructions. The attorney, Eugene K. Mangum, drafted new instructions and at the same time, pursuant to a request from appellant, prepared a separate memorandum by the terms of which appellant was to receive a broker's commission in the total sum of $8,200.

The latter agreement, executed by both respondent and appellant, provided in part as follows:

"Whereas, party of the second part has acted as broker in arranging for the sale of certain Arizona property owned by party of the first part and others, and

"Whereas, it is desired by this Agreement to establish the terms of payment of the commission for such services performed by party of the second part,

"Now, Therefore, it is mutually agreed:

"I.

"In the event of consummation of the sale of the property hereinabove referred to, party of second part is to be entitled to a commission in the amount of Eighty-two Hundred ($8200.00) Dollars, payable as follows: The sum of $1200.00 at the close of escrow, and the sum of $7,000.00 on or before November 15, 1950."

The parties concede that the escrow instructions constituted a binding contract of purchase and sale of the property. The escrow was thereafter opened in the Farmers and Merchants Bank in Long Beach. The buyer, Dr. Fitzgerald, deposited in the escrow a deed to his Long Beach home, $10,000 in cash and his promissory note secured by a deed of trust on the Arizona property. He also paid the sum of $4,000 cash outside of escrow for the stock of goods in the store located in Stanfield. For this he received a bill of sale from the respondent. On or about April 15, 1950, Dr. Fitzgerald took possession of the Arizona property. Subsequent thereto, at some time undisclosed by the record, respondent met all conditions required of him by the escrow.

The escrow was never closed for on June 1, 1950, Dr. Fitzgerald served a notice of rescission upon respondent, claiming fraudulent misrepresentations concerning the property had been made to him. Respondent promptly instituted an action for specific performance against Dr. Fitzgerald in the court of Pinal County, Arizona.

This action was never brought to trial, for Fitzgerald and respondent, after negotiations through their attorneys, mutually rescinded the transaction and instructed the escrow holder to return the monies, deeds and other papers to the parties who had deposited same.

Not having received his commission, appellant brought this action for the purpose of collection. The trial court found that respondent made no false representations to Dr. Fitzgerald but that the latter desired "to get out of the bargain from his own choice". The trial court also found that the brokerage contract was executed in Arizona, that appellant was not a licensed real estate broker under the laws of the state of Arizona and that under those laws a broker cannot recover a commission upon a broker's contract unless so licensed. The court further found that it was the intention of the parties that the commission would be payable only if Dr. Fitzgerald completed the transaction of purchase, and that since he did not, no commission was due. From that determination, the broker has appealed.

In their settled statement, the parties have agreed there are two questions to be resolved on appeal: (1) when the owner of real property located in Arizona comes into California and lists such property with a California broker, does the fact that the written memorandum of his promise to pay broker's commission was signed in Arizona preclude the broker from collecting his fee; and (2) under the evidence was the sale of the real property involved "consummated", so as to entitle the broker to his commission under a contract which called for payment of commission upon "consummation" of sale?

1. *Does lack of an Arizona license prevent recovery by appellant?*

The first query of the parties on this appeal poses a perplexing problem involving the validity of the broker's contract, he having been licensed in California but not in Arizona. Both California and Arizona have a statute of frauds requirement that real estate brokers' contracts, to be enforceable, must be in writing. But beyond that, whether we here apply Arizona or California law is a unique dilemma in the conflicts of laws field. The following factual capsule will demonstrate the difficulty: there was one transaction; the property was in Arizona; the broker was in California; the seller was in Arizona; the buyer in California; the seller gave oral authorization to the broker in California; the written brokerage contract was executed in Arizona; the broker's services were rendered in California; the purchaser was obtained in California; the sale was negotiated in California; the escrow instructions were prepared in California but revised in Arizona; the escrow instructions were signed by the seller in Arizona but by the purchaser in California; the escrow was opened in California.

In many jurisdictions it has been held that an isolated transaction does not preclude recovery of a commission by a nonresident unlicensed real estate broker where he is not shown to be otherwise carrying on the business of a real estate broker in the state. Ressler v. Marks, 308 Pa. 205, 162 A. 666, 86 A.L.R. 638; Boggan v. Clark, 141 Miss. 849, 105 So. 760; Land Co. of Florida v. Fetty, 5 Cir., 15 F.2d 942; Vossler v. Earle, 273 Ill. 367, 112 N.E. 687. However the laws of Arizona specifically provide that "the performance of one act * * * shall constitute the performer thereof a real estate broker." Arizona Laws 1937, ch. 53, p. 177. If appellant is otherwise subject to the laws of Arizona by virtue of his contract, he is not exempt because only a single transaction was involved.

Three possible rules have been suggested for ascertaining the law governing the validity of a contract: (1) the intention of the parties; (2) the place of performance; (3) the place of making the contract. These are discussed at length by Beale in 23 Harv.L.R. 260 ff., and he concludes (p. 272) that "the principle which is both sound theoretically and most practical in operation is the principle that contracts are in every case governed as to their nature and validity by the law of the place where they are made."

[1] The place of making the contract, and its equivalent, the place of contracting, properly mean the place in which the final act was done which made the promise or promises binding. Just what event is the final one necessary to make a contract is primarily a question to be determined by the law of contracts. 2 Beale, The Conflict of Laws, p. 1045. In contract law, the universal principle disposing of this, says Williston (Vol. I, p. 309), is "that the place of the contract is the place where the last act necessary to the completion of the contract was done,—that is, where the contract first creates a legal obligation". To the same effect is Fitzhugh v. University Realty Co., 46 Cal.App. 198, 199, 188 P. 1023. An example is this situation described in Michelin Tire Co. v. Coleman & Bentel Co., 179 Cal. 598, at page 604, 178 P. 507, 510: "The contract in question was prepared in Los Angeles, signed by the defendant company there and forwarded to the Michelin Tire Company of New Jersey at Milltown for acceptance. It contained a provision that it should not be binding until accepted by the Michelin Tire Company. Upon receipt of the contract at Milltown, the Michelin Tire Company, after making a *substantial* change in one of the provisions of the contract, signed the same and returned it to the defendant company with advices as to the change. Until this change had been approved, it was not the contract between the parties. The defendant company upon receipt of the contract as modified, by letter

dated November 5, 1908, and mailed from Los Angeles, advised the Michelin Tire Company that it accepted the contract as modified. Under the authorities the contract was clearly executed in California, where the last act in its execution was performed. Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90."

[2-4] Ordinarily the "last act essential to the validity" of a brokerage contract is not the signing of authorization to act. The mere engagement of a broker to dispose of specified property does not create an enforceable contract, for the broker is not obligated to find a purchaser. An enforceable contract does not result until the broker finds one able and willing to buy the property at the authorized price. The validity of such a contract is to be determined by the law of the state where the contract was consummated, that is, the place where the purchaser was found. 11 Cal.Jur.2d p. 153. This is not inconsistent with the rule that the *lex loci contractus* determines the validity and legal effect of a contract; it is merely a method of ascertaining the *loci contractus.*

An exception to the rule, however, is discussed in 159 A.L.R. 267:

"It is well settled, expressly or by necessary implication, by practically all the cases in which the courts have had the occasion to consider the question, that real-estate brokerage contracts authorizing or employing the broker to sell or buy real estate do not involve any transfer of an interest in land within the contemplation of the rule that contracts relating to a transfer of an interest in land are governed by the law of the jurisdiction where the land is located; and that such brokerage contracts are in the category of contracts of employment for personal services, which, under the general rule relating to the governing law of contracts, are governed by the law of the place where they are made and are to be performed, and that, if they are to be performed at a place other than where they are made, then by the law of the place where they are to be performed—and not by the law of the situs of the property as such." To the same general effect is Manhattan Life Ins. Co. v. Johnson, 188 N.Y. 108, 113, 80 N.E. 658, 660, 9 L.R.A.,N.S., 1142.

There are some cogent reasons for not paying blind obeisance to the authority of the place of contracting in this day when ease of transportation and communication virtually erase state boundaries as commercial limitations. The *lex loci contractus* rule is not universally recognized and has been criticized in that it frequently elevates fortuitous and insignificant circumstances to crucial importance in establishing the controlling law. As stated in 31 Cal. L.Rev. 95, 96, "In a society in which business is characteristically transacted while traveling, over the telephone, through the mails and telegraph, the place of acceptance may be in a state unrelated to previous negotiations or subsequent performance—a place involved solely because one party is passing through it. It seems strange to give the law of that place great weight."

In Johnson v. Allen, 108 Utah 148, 158 P. 2d 134, 159 A.L.R. 256, the court held a contract was not invalid where it did not have to be performed in a state in which the broker was not licensed. The fact that some of the negotiations were conducted in the state in which the broker was unlicensed is not controlling, held the court in Foley v. Hassey, 55 Wyo. 24, 95 P.2d 85. Also see Tillman v. Gibson, 44 Ga.App. 440, 161 S.E. 630.

Failure to rigidly adhere to the *lex loci contractus* creates problems, it is true. Yet by considering the facts in each case individually, courts have found a way to render substantial justice. In O'Dea v. Throm, 250 Ill.App. 577, conversations between seller and broker took place in Illinois, but a confirming written communication, posted in Illinois, was received by the broker while in Florida, situs of the real property. The court held Illinois law to prevail. In Howell v. North, 93 Neb. 505, 140 N.W. 779, the seller and broker dealt with each other in Nebraska, the property and ultimate sale were both in Colorado. The court held, 140 N.W. at page 780, the law of Colorado, "the place where the act was to be performed", was controlling. In Aronson v. Carobine, 129 Misc. 800, 222 N.Y.S. 721, with an agreement made in New York to sell property located in New Jersey by a broker unlicensed in New Jersey, the court held the contract valid on the ground it was for personal services and these were rendered in New York. Restatement Conflict of Laws, Sec. 347, puts it this way: "* * a promise may be legal although the acts called for would be illegal if to be performed in the state where the contract was made. * * * Illustrations:

"1. The purchase of grain futures is forbidden by the law of X but is legal by the law of Y. A agrees with B in X to purchase grain futures in Y. The bargain is legal."

[5] Back of many of these cases is the desire of the courts to see that a broker is compensated for services actually rendered pursuant to agreement. As stated in Howell v. North, 93 Neb. 505, 140 N.W. 779, 780: "The purpose of the statute was to protect landowners from the fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants; but it was never the intention of the Legislature to protect the real estate owner against legitimate claims for services which he authorized in writing, and which were honestly rendered."

Therefore courts will frown upon efforts to avoid payment of a just claim merely because an agreement was signed in a place requiring a license. The court curtly disposed of such contention in Peters v. Andrews, 74 Ind.App. 578, 129 N.E. 328, 329: "We do not need to cite authority to support us in deciding that a resident of Mattoon, Ill., who engages the services of a resident of Knox county, Ind., to sell his farm in such county, cannot avoid paying for such services by going into a city where it is unlawful to engage in the real estate brokerage business without a license, to execute his contract of sale with the purchaser by his agent, and his agreement to pay such agent for his services."

[6] In the instant case we have a contract for personal services, most of which the parties well know had already been performed in California, and the balance of which they contemplated to be performed in California. In this situation the bare physical act of signing the written instrument was a fortuitous, fleeting and relatively insignificant circumstance in the total contractual relationship between the parties. It should not be elevated to paramount importance, particularly when to do so will serve only the purpose of rendering invalid an otherwise legal agreement. Nor do we overlook the fact that the party here challenging the contract is the one who, through his own attorney, prepared the instrument and supervised its execution. Where a doubt exists, a contract is to be interpreted most strongly against the party responsible for the uncertainty. Civ.Code, § 1654. A contract is to receive such interpretation as will make it lawful and operative if reasonably possible. Civ.Code, § 1643.

Therefore we are governed in this case by California, not Arizona law. Since plaintiff was duly licensed as a broker in California, where his services were performed, the agreement was not void.

2. *Was the sale "consummated" as contemplated by the agreement?*

[7–9] Generally speaking, a real estate broker has earned his commission when he has brought to the vendor a purchaser who is ready, willing and able to buy the property upon the terms on which the agent is authorized to sell, or when a written contract upon any terms acceptable to the seller has been entered into with a purchaser originally brought to the vendor by the agent. Alison v. Chapman, 36 Cal.App. 759, 173 P. 389. It is not necessary for the sale to be completed, under the foregoing rule, for the broker to be entitled to his commission. Carlin v. Lifur, 2 Cal.App. 590, 84 P. 292. Or if the owner makes concessions to the purchaser, it may not result in loss to the broker without his consent. Backman v. Guadalupe Realty Co., 78 Cal.App. 347, 352, 248 P. 296. A broker who has rendered all required services is not to be denied compensation therefor by the whims of a defaulting vendor or purchaser who arbitrarily refuses to perform under a sales contract.

[10, 11] In the instant case, if the parties had entered into the usual type of real estate brokerage contract, the respondent would have been liable despite the subsequent termination of the sales agreement. Although the trial court found the vendor had made no false representations justifying the purchaser's attempted rescission, nevertheless the vendor and purchaser agreed between themselves on the terms of a rescission. Thus it appears that the vendor, upon no compulsion of court order, voluntarily yielded to what the trier of fact here has determined to be an unjustified demand. By so doing he could not, under a standard broker's contract, deprive the broker of the fruits of his labor. Lesser v. W. B. McGerry & Co., 121 Cal.App. 193, 197, 8 P.2d 1058; California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511. Some cases have excused a seller from liability to the broker after a rescission if the seller acted in good faith. Leventritt v. Cowell, 21 Cal.App. 597, 601, 132 P. 627; Dunne v. Colomb, 192 Cal. 740, 221 P. 912; Prince v. Selby Smelting & Lead Co., 35 Cal.App. 684, 170 P. 1075. It is not an act of good faith, however, to collusively agree with a buyer to terminate the purchase contract, or to acquiesce in wrongful insistence upon rescission. The binding written promises of a contract, upon which a third person relies for compensation earned, may not be so casually reduced to mere illusory texture.

But here we have no form brokerage contract. The instant agreement, specially prepared after negotiation, provided "in the event of consummation of the sale" a commission was to be paid, the first payment to be "at the close of escrow". Therefore two events, unless they should occur simultaneously, had to come to pass before liability was to arise.

[12, 13] An owner and broker may, if they wish, enter into a binding agreement that no commission shall be considered earned until the happening of a certain specified event, Edgecomb v. Callahan, 132 Cal.App. 248, 22 P.2d 521, or upon certain defined terms and conditions, Backman v. Guadalupe Realty Co., supra, or upon any named contingency, Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 157, 245 P.2d 650. When a condition precedent is adopted by the parties to a contract, the court will exact a substantial if not strict observance of the provisions before finding liability. Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 894, 202 P.2d 365.

The event upon which the first payment was conditioned never occurred as the escrow was not closed, a situation parallel to that in Wilson v. Security-First Nat. Bank, 84 Cal.App.2d 427, 190 P.2d 975. Appellant does not clear that hurdle by maintaining that the "close of escrow" provision relates not to a condition precedent, but merely to the time of payment. For that time has not come to pass, and thus the whole sum sued for is not due.

More important here, however, is the proper construction to be accorded the phrase "in the event of consummation of the sale". Upon insistence of appellant that the phrase was ambiguous, and over opposition of respondent whose position in this regard we believe was sound, the trial court permitted parol evidence of the negotiations of the parties leading to the execution of the written instrument. The court's finding was "that there had been discussion between the parties about the prospective purchaser and whether he would go through with the transaction, and the court finds that it was the intention of the parties that the commission would be payable if Dr. Fitzgerald completed the transaction of purchase. * * *"

[14, 15] When parol evidence is admitted as an aid to construction, upon appeal the trial court's construction of the instrument is ordinarily conclusive if the extrinsic evidence is conflicting, and the determination is supported by the evidence, as it is in this case. Woodbine v. Van Horn, 29 Cal. 2d 95, 104, 173 P.2d 17.

[16] Without regard to the extrinsic evidence, however, the words "consummation of the sale" have a reasonably well defined meaning under the law. First of all, they refer to a future event, not to an obli-

gation immediately arising upon execution of the instrument here in question. Alison v. Chapman, supra. Secondly, the cases clearly hold that "consummation of the sale" means completion of the transaction, and where real property is involved, payment of the purchase price and conveyance of title. Peak v. Jurgens, 5 Cal.App.2d 573, 43 P.2d 569. The word "consummate" means "to bring to completion". McGill v. Fleming, 32 Cal.App.2d 601, 90 P.2d 341, 343; Connor v. Riggins, 21 Cal.App. 756, 132 P. 849.

[17] Where a broker has seen fit to allow payment of his compensation to be contingent upon performance of a contract between parties other than himself, he cannot complain if, through the nonperformance of that contract, his own contingent rights be lost. If the broker suffers any hardship from that result, it is unfortunately inherent in the form of his contract, which was the only written means he chose for his protection. Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856.

The sale could have been completed only upon payment of the purchase price and delivery of deeds conveying title and close of escrow. Those events did not transpire and therefore the sale was not consummated within the provisions of the agreement. We do not mean to hold, however, that after consummation of the sale a rescission with the consent of an innocent vendor who voluntarily chooses not to hold a defaulting purchaser would relieve an obligation to pay for a broker's services. Clearly that would be unjust to the broker. But here we have the rescission taking place prior to consummation of the transaction, and with the broker's compensation contingent upon consummation, liability did not arise.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

On Petition for Rehearing

PER CURIAM.

[18] On petition for rehearing, appellant urges that the transaction was consummated because title passed in escrow, even though a deed was not delivered to the purchaser. It is true that title may pass in escrow when all of the conditions of the escrow have been performed and the grantee is entitled to possession of the deed. Holman v. Toten, 54 Cal.App.2d 309, 128 P.2d 808; Hagge v. Drew, 27 Cal.2d 368, 375, 165 P.2d 461; Blumenthal v. Liebman, 109 Cal.App.2d 374, 379, 240 P.2d 699. But in this instance two circumstances indicate close of escrow was essential to consummation of the transaction: first, the finding of the trial court that the commission was to be payable if the purchaser "completed the transaction of purchase" and the escrow was a significant phase of the "transaction of purchase"; and second, the first portion of the commission was not payable until "close of escrow".

We therefore add to the first sentence of the final paragraph of our typewritten opinion the words "and close of escrow", so that lines 7 and 8, page 17 [272 P.2d 911] will now read: "The sale could have been completed only upon payment of the purchase price, delivery of deeds conveying title and close of escrow". With the opinion so amended, the petition for rehearing is denied.

126 Cal.App.2d 571

In re ROWLEY'S ESTATE.

ROWLEY et al.

v.

GRAND LODGE OF IOWA OF ANCIENT, FREE & ACCEPTED MASONS et al.

Civ. 20005.

District Court of Appeal, Second District, Division 3, California.

July 15, 1954.

Hearing Denied Sept. 8, 1954.

Proceeding for determination of heirship brought by relatives who were not named in will. The Superior Court, Los Angeles County, John Gee Clark, J., held that devisees and legatees named in will were entitled to take under will. Petitioners appealed. The District Court of Appeal, Parker Wood, J., held that under will giving life estate to wife, if she survived, with remainders to named legatees, legatees were entitled to take under will though wife predeceased testator.

Decree affirmed.

1. Wills 🔑455, 456

Where testator writes will, without legal aid, it is not to be expected that he would use language, punctuation, and arrangement of paragraphs as would be used by expert draftsman, and words must be given their ordinary grammatical sense.

2. Wills 🔑449

The writing of a will raises presumption of intention to dispose of all of testator's property.

3. Wills 🔑449

Interpretation of will which will prevent total intestacy is preferred. Probate Code, § 102.

4. Wills 🔑852

Where will gave life estate to wife, if she survived, and gave remainders to named legatees in same paragraph, legatees were entitled to take under will though wife predeceased testator. Probate Code, §§ 101, 102, 140, 142.

Slane, Mantalica & Davis, Los Angeles, Lloyd Tevis, Pasadena, Lewis C. TeeGarden, Los Angeles, for appellants.

Kimpton Ellis, Los Angeles, James C. Hyne, Oceanside, Walter H. W. Weiler, Los Angeles, Dudley R. Furse, Hollywood, Ogden, Crocker & Steelman, Los Angeles, for respondents.

PARKER WOOD, Justice.

Herman L. Rowley died on February 19, 1951. His holographic will was admitted to probate on March 26, 1951. On December 21, 1951 petitioners herein, who were not named as beneficiaries in the will, filed a petition for a decree determining heirship, and they alleged that they were first cousins of decedent and entitled to all his estate. Under the decree, it was determined that the devisees and legatees named in the will were entitled to distribution of the estate in the respective portions designated for each of them in the will. Petitioners appeal from the decree.

The record on appeal consists of the clerk's transcript, which includes the petition, statements of claims of beneficiaries under the will in answer to the petition, findings of fact and conclusions of law, and the decree.

The will may be summarized generally by stating that it provided that in the event the wife of the testator survived him all his property was to be held in trust for her, and at her death the trust property was to be distributed to the several legatees named in the will.

Decedent's wife, Myrtie Rowley, died on October 31, 1950 (approximately three and one-half months before the death of decedent).

Appellants contend that since the wife did not survive the testator the will was not effective to dispose of any of his estate, and he died intestate.

The will, made on May 1, 1950, was in words and figures as follows:

> "Los Angeles, Cala 5/1/50
>
> "I, Herman L. Rowley, being of sound and disposing mind and memory, Do hereby make publish and declair this My last Will and Tustement, hereby revolking all wills and codicils at any time executed by me.
>
> "No. 1 I direct that my just debts shall be paid.
>
> "No. 2 In event my wife Myrtie Rowley, shall survive me, then and in that event, I hereby give and bequath all my property both real and personal of any kind or nature to her. I direct that the Bank of Amer. Trust and savings Assn. of Los Angeles, Cala to act as Trustee who shall keep and manage the property, and use the income and as much of the principle as is necessary to keep her in the position in Life to which she is accustomed to, Care for her and in Case of illness to provide all she needs and desires and

final internment, which is to be had in Forrest Lawn Memorial Park, Glendal in Crypt No. 5185 or 5191 and No. A. 199964 which are bought and paid for in full. Regarding the farms in Iowa and personal property there, I direct Ira Johnson of Perry, Iowa as executor or in Case he is not available, I desire that Donald Johnson his son act as executor, Who shall also supervise the renting, and operation of the farms, pay the taxes and reasonable amount for repairs and upkeep, ect. and remit the proceeds to the Trustee in Cala. with true and accurate report of the proceedings, who will pay him for services and reimburse him for necessary expense, that he is put to. I also desire that in Iowa the farms be kept in tact and not desposed of until the death of my wife. At her death, I direct the Trustee to sell and convert into cash all real and personal property, making the final disbursements and Close the Estate and Close the Trust.

"A. I give, devise and bequeath to Alice Hubbell 10,000.00.

"B. I give, devise and bequeath to Marshall Ammerman $10,000.00.

"(C) – I give, devise and bequeath to Don Ammerman 5000.00

"D – I give, devise and bequeath to Allan Ammerman 5000.00

"E. I give, devise and bequeath Lee Ammerman $5000.00

"F. I give, devise and bequeath to Ralph Carpenter 5000.00 Marion Iowa

"G. I give, devise and bequeath to H. C. Ammerman 5000.00 Carmel, Cala.

"H. I give, devise and bequeath to Vera Hand, 5000.00 Berrien Springs, Mich.

"Any objections or contest made by any of the beneficaries herin shall exempt them from any inheritance, what so ever. And the amounts are net to the Beneficiaries, all inheritance tax to be paid out of my Estate.

"G – I devise, and bequeath all the resdue to the Grand Masonic Lodge of the State of Iowa, to be used as follows. 150,000.00 to be used for the construction and equipment of a Masonic home in Perry, Iowa for worthy and needy Masons in good standing, to be known as the Rowley Memorial home. The balance for investment and income therefrom to be used to assist in maintaining and operation of the home. In making this gift to the Grand Lodge, I direct that it shall be supervissed and handled by officiers of the Grand Lodge of Iowa, together with the officiers of the Local Lodge of Perry, who shall act as trustee. It is my desire that this home be operated as a non-profit institution and any charges made to occupants shall be sufficient only to mainatain and operate the home. In the Event the Grand Lodge of Iowa, has not made formal plans and ready to proceed with the building as directed in three years after the death of my wife, Then I direct that the money that they have or will receive as foresaid shall revert to the Grand Lodge of State of Okla. with a home to be built at Cordell, Okla. The Home to be built supervised and controlled, the same as mention heretofore.

"I nominate and appoint as my executor in California O. E. Wesenberg, of the Farmers Mers. Bank Long Beach and in event he is not avaiable I desire Georgia Kelley of 2973 Maple Court, San Deigo, Cala. to act as Executor. I desire Ira Johnson of Perry, Iowa to act as my Executor in Iowa and in Case he is not avaiable, I desire Donald Johnson of Perry, as my Executor in Iowa who shall out the provisions of this Will.

"Herman L. Rowley
"5–1–50"

The court found that decedent left no spouse, brother, sister, nephew, niece, descendant, or ancestor surviving him.

Appellants argue that by the words and physical construction of the will the decedent intended intestacy if his wife predeceased him; that the testator was only concerned with his estate in the event of the survival of his wife; that the contingency of the wife's survival affects the remainders and since the contingency did not occur, the life estate and the remainder interests failed to vest and the remainders were defeated.

With respect to the words and physical construction of the will, appellants assert that the decedent numbered only two paragraphs, that is, "No. 1" and "No. 2," and he made the purported bequests in subdivisions of paragraph "No. 2." They assert further that since the first part of paragraph "No. 2" contained the provision that if the wife survived him the trust should be created, and that since subdivisions A, B, C, D, E, F, G, H, and G, which contained the remainder bequests, immediately followed such first part, the remainder bequests were not independent of the life estate but were connected with it and followed it in "unbroken continuity" and, like the life estate, were "contingent upon happening of the event [survival of wife] which is a condition of the life estate."

Rules for the interpretation of wills are stated in Re Estate of Lefranc, 38 Cal.2d 289 at pages 295, 296, 239 P.2d 617, 621. Some of those rules are: (1) "A 'will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.' (Prob. Code, § 101.)" (2) "'The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.' (Prob. Code, § 102.)" (3) "'The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator, and this general rule is in harmony with the declaration of our code that the provisions of a will must be construed, if possible, so as to effect that purpose.'"

Section 140 of the Probate Code provides: "The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator."

Section 142 of the Probate Code provides: "A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will."

In Re Estate of Raymond, 96 Cal.App.2d 808 at page 814, 216 P.2d 515 at page 518, it was said: "There is a further rule, however, to be followed in the interpretation of the provisions of a will and that is that the instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention and the meaning of the particular words, phrases and provisions shall be subordinated to such scheme, plan or dominant purpose."

[1] It is not to be supposed that a testator who writes a will, without legal aid, will use the same niceties of language, punctuation, and arrangement of paragraphs as would be used by an expert draftsman. See In re Estate of Soulie, 72 Cal.App.2d 332, 334, 164 P.2d 565 and "the words must be given their ordinary grammatical sense", In re Estate of Clary, 98 Cal.App.2d 524, 526, 220 P.2d 754, 756. "No particular words are necessary to show a testamentary intent." In re Estate of Taylor, 119 Cal.App.2d 574, 579, 259 P.2d 1014, 1016.

[2-4] Appellant's position seems to be that the testator intended that the specific bequests and the bequest of the residue should be effective only if the wife sur-

vived him; that his sole motive in writing the will was to create a life estate for her, and if she did not survive him so that that could be done then he would be satisfied with a disposition of his property under the rules of succession. In other words, they seem to argue that if she survived him for any period of time, however short that period might be, then he wanted to give specific amounts of money to certain persons named in the will, and he wanted to give the residue to the Grand Lodge of Masons in Iowa (or Oklahoma) to be used in building and maintaining a home for needy members of the Lodge, which home would bear his name; but if she did not survive him, he did not want to make those specific bequests or the bequest for the purpose of building the memorial home. According to the argument of appellant, the result of Mr. Rowley's efforts in writing the will of approximately 700 words in his own handwriting, containing the several specific directions as to the disposition of his property, was that he died intestate. Under a rule of interpretation above referred to, there is a presumption, from the writing of such will, that Mr. Rowley intended to dispose of all his property. Also, under another rule, an interpretation which will prevent total intestacy is preferred. In his will, immediately after making the provision for a trust for his wife during her life, Mr. Rowley gave the direction that "At her death, I direct the Trustee to * * * convert into Cash all real and personal property making the final disbursements and Close the Estate and Close the Trust." Then, immediately after that provision as to final disbursements and closing the estate and the trust, he stated specifically and at some length the manner in which he wanted all his property distributed. It seems clear that the testator intended to provide for his wife, if she survived him, by placing a limitation on her estate, and then providing for a complete distribution of his property which remained after the termination of her estate. In the Estate of Gregory, 12 Cal.App. 309, 107 P. 566, the will gave the residue of the estate to a certain person in trust to hold during the life of the testator's wife, and the will provided that upon the death of the wife the residue of the estate then remaining be paid to the testator's grandchildren. The wife died prior to the death of the testator. In that case the court said 12 Cal.App. at page 311, 107 P. at page 567: "The real question in the case is: Did the testator intend to dispose of the whole of his estate, and is his will susceptible to such construction? We think so, and that it is plain from the provisions of the fifth paragraph of his will, above quoted [paragraph giving residue in trust], that the testator constituted the residue of his estate into a trust fund, and provided that upon the death of his wife whatever was left of this trust fund should go to the two grandchildren named. The fact that the wife never lived to become the beneficiary of the trust created in her favor is no reason for holding that the subsequent provision of the will directing the disposition of the fund should be defeated." In the present case, the trial judge's interpretation of the will was that the testator intended that, upon his death and in the event his wife predeceased him, his estate vest (in) and be distributed to the various beneficiaries named in his will. The interpretation of the trial court was correct.

The decree is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS, J., dissenting.

BAUER et al.
v.
COUNTY OF VENTURA et al. *
Civ. 19955.

District Court of Appeal, Second District, Division 3, California.

July 28, 1954.

Rehearing Denied Aug. 20, 1954.

Hearing Granted Sept. 17, 1954.

Action against county, drainage district, and members of County Board of Supervisors, for damage to plaintiffs' property caused when drainage ditch overflowed. The Superior Court, Ventura County, Ernest D. Wagner, J., entered orders sustaining demurrers, and plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held, inter alia, that complaint, alleging that county and storm drain maintenance district constructed drainage ditch with pipe obstruction in it in such manner that it would not carry storm water past and away from plaintiffs' property and that county and district diverted water from its natural course into ditch in an amount greater than capacity of ditch to carry water beyond plaintiffs' property so as to proximately damage plaintiffs' property and that plaintiff had received no compensation for the damage, stated cause of action for taking or damaging private property without just compensation.

Reversed.

1. Drains ⚷63

Storm drain maintenance district was not a "local agency" within statute making local agency liable for injuries to persons and property resulting from dangerous or defective condition of public property under certain conditions. Government Code, § 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Local Agency".

2. Counties ⚷141

County was a "local agency" within statute making local agency liable for injuries to persons and property resulting from dangerous or defective conditions of public property under certain circumstances. Government Code, § 53051.

3. Eminent Domain ⚷293(1)

Complaint, alleging that county and storm drain maintenance district constructed drainage ditch with pipe obstruction in it in such manner that it would not carry storm water past and away from plaintiffs' property and that county and district diverted water from its natural course into ditch in an amount greater than capacity of ditch to carry water beyond plaintiffs' property so as to proximately damage plaintiffs' property and that plaintiff had received no compensation for the damage, stated cause of action for taking or damaging private property without just compensation. Government Code, § 53051; Const. art. 1, § 14.

4. Drains ⚷63

Drainage ditch constructed by county was "works" within statute defining "public property" as used in statute making local agency liable for injury caused by defect in public property. Government Code, §§ 53050, 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Works".

5. Pleading ⚷254

Fact that allegations in amended complaint, seeking damages from county and drainage district for injury caused by construction of drainage ditch with pipe across it in such manner that water overflowed from ditch onto plaintiffs' property, referred to pipe as obstruction in ditch and also referred to obstructions in the plural and were ambiguous insofar as they purported to describe place where pipe extended across ditch, were not of sufficient importance to justify sustaining demurrer. Government Code, § 53051; Const. art. 1, § 14.

6. Drains ⚷17

Statute, specifying circumstances under which government officer is liable for damage or injury caused by defective or dangerous condition of public property, was not applicable where damage allegedly resulted from claimed negligence in construction and maintenance of drainage ditch. Government Code, § 1953.

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* Opinion vacated 289 P.2d 1.

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William T. Selby, Ventura, for appellants.

Roy A. Gustafson, Dist. Atty. of Ventura County, Ventura, Harry E. Sackett, Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiffs appeal from judgments of dismissal based upon orders sustaining demurrers to their amended complaint. A general demurrer and a special demurrer of defendant county of Ventura were sustained with leave to amend within ten days. The plaintiffs having failed to amend within said time, a judgment was rendered dismissing the action as to said defendant. General demurrers of the other defendants were sustained without leave to amend. (The other defendants were: Saticoy Storm Drain Maintenance District, and the individuals who were members of the board of supervisors.)

The amended complaint alleges as follows:

I.

The county of Ventura is a political subdivision of California. Defendant Saticoy Storm Drain Maintenance District is a special district in the county of Ventura that is under the control of the board of supervisors of said county. The defendants Pierce, Lefever, Barrett, Price, and Carty are and, at all times herein mentioned, were members of the board of supervisors of said county.

II.

At all times herein mentioned, plaintiffs were and are the owners of certain real property in said county of Ventura (legal description set forth therein). Said property is and was improved with a dwelling house, garage, gardens, fences, and a building which was used as a factory, machine shop, and woodworking shop. On March 15, 1952, and at all other times mentioned prior thereto, plaintiffs were operating said factory.

III.

Said real property lies northeast of Wells Road and fronts on Wells Road at the town of Saticoy. The business section of Saticoy is on ground lower than said real property and in a southeasterly direction therefrom. There is a substantial slope of said property in a southeasterly direction. Franklin Barranca is a watercourse carrying water from the hills northwest of Saticoy to the Santa Clara River at a point southeast of Saticoy. In its natural state the waters of that barranca would flow in a southeasterly direction approximately one-fourth mile away from said property and would not flow near the property. The waters falling on lands lying northeasterly or north or east from said property would, unless diverted by artificial means, flow away from plaintiffs' property toward the Santa Clara River, which lies below and southeasterly from said property.

IV.

In 1939, the Saticoy Storm Drain Maintenance District and the county of Ventura built a system of ditches and levees diverting the water of said barranca in a southwesterly direction from the natural course and along the ditch that was constructed by said defendants at a point southeasterly from and below plaintiffs' property, said ditch being constructed adjacent to but not upon plaintiffs' property. Said ditch as originally constructed was below the level of plaintiffs' property and the southwesterly bank thereof was lower than plaintiffs' property so that in the event said ditch should overflow it would overflow away from plaintiffs' property. From time to time since 1939, said defendants (county and storm drain district) have enlarged said system of ditches and levees lying above and northerly from plaintiffs' property thus confining the waters diverted and increasing the amount of water diverted towards plaintiffs' property. From time to time after 1939 to March 15, 1952, said defendants (county and district), acting pursuant to order of the Board of Supervisors of Ventura County, performed work upon that portion of the ditch and the dikes constituting the banks thereof, which lie adjacent to the southeasterly line of plaintiffs' property. In doing that work, said defendants caused accumulated debris and soil to be removed from the bottom of said ditch and to be placed upon the southeasterly bank of the ditch, thus raising the height of the southeasterly bank. In 1950 and 1951, and to March 15, 1952, the level of the southeasterly bank of the ditch was so raised that it was substantially higher than plaintiffs' property, which lies on the northwesterly bank of the ditch. No bank or levee was placed along the northwesterly bank of the ditch to prevent diversion of water onto plaintiffs' property. At a point adjacent to Wells Road and at the southerly corner of plaintiffs' "said real property said ditch and the dikes thereof hereinbefore described were constructed a pipe extended across and through said ditch in such manner as to create an obstruction to said ditch and the waters flowing therein." All said work of construction of the ditch, banks, and dikes, and all the diversion of water into the ditch, was done by said defendants (county and district) and was wholly under the supervision and control of said defendants. The direction and control of said work was at all times in 1950, 1951, and 1952, under the direct supervision of defendants Pierce, Lefever, Barrett, Price, and Carty.

V.

In the construction of the ditches, banks, and levees, the defendants county and district negligently and carelessly failed to construct the same in an adequate manner to carry the storm waters diverted into the same past and away from plaintiffs' land, and negligently and carelessly failed to construct said conduits and systems in a manner adequate for the purpose for which they were intended, and negligently and carelessly permitted obstructions to be placed in the ditch, and negligently and carelessly permitted and caused debris and stumps to be placed therein. On March 15, 1952, the ditch was constructed and maintained in a dangerous and defective condition. Said board of supervisors, and each of the members thereof, and each of the defendants, failed and neglected to remedy said condition within a reasonable time after such notice or knowledge. All said works were constructed by said defendants, or at the direction of said defendants.

VI.

On March 15, 1952, waters were collected by means of the system of ditches, dikes, and levees, and were diverted from their natural course and into the ditch which extends along the southeasterly line of plaintiffs' property, said waters so diverted being in an amount greater than the capacity of the ditch to carry them beyond plaintiffs' property. Debris and stumps, which had been permitted to collect in the ditch, were permitted to collect upon the obstructions therein around which the ditch had been constructed by defendants, and which were established by said defendants within the ditch at the time of the construction thereof. As a proximate result of the dangerous and defective condition of the ditch, of the obstructions established therein, and of the acts of defendants in diverting water into the ditch, and in construction of said banks and levees, the water so diverted by means of the ditch flowed onto plaintiffs' property and into plaintiffs' factory, garden, and house causing damage thereto and to materials stored in the factory.

VII.

As a proximate result of the acts of defendants, plaintiffs have been damaged in the amount of $5,000.

VIII.

On June 11, 1952, plaintiffs filed with said board of supervisors the verified claim of plaintiffs, a copy of which is attached to the amended complaint and marked exhibit A. On June 21, 1952, said board of supervisors denied plaintiffs' claim.

IX.

Plaintiffs have received no compensation for the damage and taking of their said property for such public use.

[1-3] According to the amended complaint, the natural course of the water was one-fourth mile from plaintiffs' property; in 1939, defendants county and district di-

verted the water from its natural course by constructing a system of ditches; one of the ditches was constructed along the side of plaintiffs' property and a pipe was extended across and through the ditch at a place in the ditch, near the corner of plaintiffs' property, in such a manner as to create an obstruction to the water in the ditch; in 1950, 1951, and 1952 they made the bank of the ditch which was opposite plaintiffs' property, and across the ditch therefrom, higher than plaintiffs' property; they did not place a bank or levee on the side of the ditch next to plaintiffs' property; they negligently and carelessly failed to construct the ditch on opposite bank in an adequate manner to carry the storm water past and away from plaintiffs' property; on March 15, 1952, water was diverted from its natural course into the ditch in an amount greater than the capacity of the ditch to carry water beyond plaintiffs' property; as a proximate result of the dangerous and defective condition of the ditch, of the obstructions therein, of the acts of defendants in diverting the water and constructing the banks, water flowed onto and damaged plaintiffs' property; plaintiffs have not received any compensation for the damage and for the taking of their property for such public use. Those allegations stated a cause of action against the county and against the district within the scope of Article I, section 14, of the Constitution of California, which prohibits the taking or damaging of private property without just compensation. In the case of Clement v. State Reclamation Board, 35 Cal.2d 628 at pages 637, 638, 220 P.2d 897 at page 903, it was said: "If, however, the construction of a flood control project diverts natural stream waters onto the land of a private owner and causes damage thereto, that property is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or a school." See also Elliott v. County of Los Angeles, 183 Cal. 472, 475, 191 P. 899; Smith v. City of Los Angeles, 66 Cal.App.2d 562, 573, 153 P.2d 69. Respondents (defendants) assert, however, that the facts alleged in the amended complaint herein show that the damage to plaintiffs' property resulted from a mere act of negligence on the part of the county or the district in the operation of a public work and such negligence does not amount to taking or damaging private property for public use. They argue that the amended complaint did not allege that the damage resulted from the construction of the ditches alone, but it alleged that defendants constructed the ditches which diverted the water away from its natural course and that while the water was so diverted the defendants committed an additional act of negligence by permitting stumps and debris to collect in the ditch adjacent to plaintiffs' property, and that by a combination of these factors (the diversion of the water and the collection of stumps and debris) water flowed upon plaintiffs' property. They argue further that for the purpose of this appeal the diversion is immaterial—the case is the same as though defendants had the duty of clearing the debris from a stream and negligently failed to perform that duty. Based upon the premise that only negligence in failing to remove the stumps and debris was alleged, the respondents assert that the district was not liable by reason of negligence, because it was immune from such liability—there being no statutory waiver of its immunity under section 53051 of the Government Code.[1] That section provides that a local agency (which means city, county, or school district) is liable for injuries to persons and property resulting from the dangerous or defective condition of public property under certain conditions. A storm drain maintenance district is not one of the local agencies referred to in said section, and it is true that the storm drain district herein is not liable under the provisions of said section for injuries to persons or property resulting from the dangerous or defective condition of public property. The county is a local agency referred to in said section, and the question as to the liability of the county under that section and under the allegations of the amended complaint will be discussed later herein. The amended complaint did contain allegations that stumps and debris, which had been permitted to collect in the ditch, were permitted to collect upon the obstructions around which the ditch had been constructed and which were established within the ditch by the defendants at the time of the construction thereof. As above stated, it was also alleged that a pipe extended across and through the ditch at a corner of plaintiffs' property. A copy of the claim which plaintiffs presented to the Board of Supervisors (attached to the amended complaint as a part thereof) states that the pipe was about 12 inches in diameter and so placed as to act as a dam and as to interfere with the movement of debris through the ditch. The pipe across the ditch was a part of the construction of the ditch. Irrespective of the allegations regarding the stumps and debris, the amended complaint alleges in essence that defendants county and district constructed the ditch with a pipe obstruction in it, and constructed the ditch in such a manner that it would not carry the storm water past and away from plaintiffs' property, and said defendants diverted water from its natural course into the ditch in an amount greater than the capacity of the ditch to carry water beyond plaintiffs' property. As above stated, the amended complaint states a cause of action against the county and the district within the scope of Article I, section 14, of the California Constitution.

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[1] "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[4] Respondents contend that a cause of action was not stated against defendant county under the provisions of section 53051 of the Government Code. That section provides, as above stated, to the effect that a county is liable for injuries to property resulting from the dangerous or defective condition of public property under certain conditions. As to such liability, the amended complaint alleged in essence that the county negligently failed to construct the ditch in an adequate manner to carry the storm waters past and way from plaintiffs' property, and negligently permitted stumps and debris to be placed therein, and on March 15, 1952, the ditch was constructed and maintained in a dangerous and defective condition, and on said day water which was diverted from its natural course into the ditch flowed onto and damaged plaintiffs' property. Respondents argue that the amended complaint fails to state a cause of action under said section 53051 because it is not alleged that the ditch is public property or the property of the county. They state in their brief that, "As to tort liability of the county, plaintiffs have shown that they have a good cause of action, and defendants so admit, except that they failed to plead it. The fatal omission was the failure to allege the ditch was the public property of the county." This point, with reference to ownership, was not presented in the trial court. Section 53050 of the Government Code provides in part: "* * * (b) 'Public property' means public street, highway, building, park, grounds, works, or property." The ditch constructed by the county comes within the classification of "works" referred to in that section. In Young v. County of Ventura, 39 Cal.App.2d 732 at page 738, 104 P.2d 102 at page 106, it was said: "The storm ditch constructed and maintained by defendant county unquestionably comes within the classification of 'publc works' as this term is used in the statutes giving plaintiffs a right of action and prescribing the procedure for their action. It was designed to subserve a purpose of public use * * *. It was not necessary that it be constructed upon public property, but it could be constructed and maintained by the county upon private property. * * * The statutes in question do not provide that the public works be constructed upon property owned by the political subdivisions referred to therein." The statutes referred to therein were Statutes of 1923, page 675, section 2,

Act 5619, Deering's General Laws 1937, pertaining to liability of counties, municipalities, and school districts for negligence—known as The Public Liability Act. The provisions of those statutes and the provisions of said sections 53050 and 53031 of the Government Code are substantially the same with reference to the point involved herein. It was not necessary to allege that the ditch was public property or the property of Ventura County.

[5] Respondents assert further that if a cause of action was stated against the county, the amended complaint was uncertain, ambiguous and unintelligible, in that, in one paragraph a pipe is referred to as an obstruction, and in two other paragraphs there were allegations regarding obstructions in the ditch—and it cannot be determined how many obstructions were there. They also assert they cannot ascertain the meaning of a certain sentence in the amended complaint (the sentence wherein there is a purported description of the place where a pipe extended across the ditch). Those matters were not of sufficient importance to justify sustaining the demurrer. Some of the language used in describing the location of the pipe is not clear, but it was clearly alleged that a pipe was across the ditch at the southerly corner of plaintiff's property.

[6] Respondents assert further that the supervisors were not liable because the conditions of their liability imposed by section 1953 of the Government Code have not been met. That section provides: "No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear: (a) The injury sustained was the direct and proximate result of such defective or dangerous condition. (b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directely attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner. (c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him. (d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition. (e) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition." Respondents assert that even if it be assumed that the allegations were sufficient to meet the requirements of said subdivision (a) and (b), the allegations do not meet the requirements of subdivisions (c), (d), or (e); that it was not alleged that the supervisors had the duty to remedy the condition at the expense of the county and that funds for that purpose were immediately available; that it was not alleged that the supervisors failed to give warning of such condition; that it was not alleged that the plaintiffs exercised due care to avoid the danger due to such condition. The amended complaint states that the direction and control of said work was at all times in 1950, 1951, and 1952 under the direct supervision of the defendants who were members of the board of supervisors; that the members of said board failed to remedy said condition within a reasonable time after such notice or knowledge; that all said works were constructed by said defendants or at their direction. Appellants state that the provisions of section 1953 of the Government Code are not applicable if a tort is committed by the supervisors in doing an act which is not authorized by their public office; that they were not authorized by reason of their office to divert water from its natural course onto plaintiffs' property, and they are individually responsible. The demurrer of the supervisors was sustained without leave to amend. If the provisions of said section 1953 are applicable here, it does not appear that plaintiffs could not have amended their complaint to meet the requirements of all said subdivisions—to allege that funds were immediately available, and that the supervisors failed to give warning. In Moore v. Burton, 75 Cal.App. 395, 242 P. 902, which

was an action against trustees of a levee district for injury to land caused by diversion of water by dams built under the supervision of the trustees, a demurrer was sustained. The court said that it may be fairly inferred from the allegations that the damage to the land was not directly caused by the failure to repair the broken levee, but by the construction and maintenance of the dams. It was contended by the defendants (trustees) therein that the plaintiffs had not alleged facts to meet the requirements of provisions of the act of 1919 relating to the liability of officers of districts for injuries to persons or property from defects and dangers in public work. The provisions of that act are similar to the provisions of said section 1953 of the Government Code. The court therein said, 75 Cal.App. at page 400, 242 P. at page 904: "[I]t fairly appearing from the allegations of the complaint that the injuries described resulted directly and proximately from the negligent erection and maintenance of the dams described, the pleading in this particular was sufficient. It appears * * * to have been the intention of the Legislature to make a distinction between those cases where defective or dangerous conditions in public work are directly attributable to negligent construction in the first instance by an officer having the immediate control or direction of such work, and those wherein such conditions are due to the negligence of persons not under his supervision, or to use, accident, or natural causes, by requiring in the latter instances notice thereof, the authority and duty, with funds available, to remedy those conditions, and that it shall first appear; these facts being shown, that he failed to remedy them within a reasonable time or give adequate warning thereof." In that case it was also said that, under the allegations of the complaint it was not necessary to allege that plaintiff was carefully using the public property, since it appeared "that the work described, unlike roads, bridges, or works constructed for similar purposes, was not of a character permitting its use by appellant." Under the allegations of the amended complaint in the present case, it appears that the supervisors raised the bank of the ditch opposite plaintiffs' property so that it was substantially higher than plaintiffs' property and that no bank or levee was placed on the side of the ditch next to plaintiffs' property. As to the matter of notice, it was said in Fackrell v. City of San Diego, 26 Cal.2d 196 at page 203, 157 P.2d 625 at page 629, 158 A.L.R. 773: "The rule is well established that when it is shown that a certain street and sidewalk improvement has been planned by city officers and constructed in accordance with such plan, and that by carrying out the plan a dangerous or defective condition has been created, no further proof is needed to charge the city with notice of that condition." The demurrer of the supervisors should not have been sustained.

The trial court erred in sustaining the demurrers.

The judgments are reversed.

SHINN, P. J., and VALLÉE, J., concur.

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126 Cal.App.2d 643

ZAR v. ALAFETICH et al.

Civ. 20070.

District Court of Appeal, Second District, Division 1, California.

July 22, 1954.

Rehearing Denied Aug. 16, 1954.

Action for damages for personal injuries sustained by seaman in course of his employment. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeals, Mosk, J. pro tem., held that evidence was insufficient to warrant finding that injuries suffered by seaman were due to any negligence of defendant employers or the fellow servant of the seaman.

Judgment affirmed.

1. Trial 🔑139(1)

A motion for nonsuit may properly be granted only when, disregarding evidence that conflicts with that of plaintiff, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.

2. Trial ⚷159

Although, in Jones Act cases filed in state court, procedural matters are governed by state laws and matters of substance by federal law, the federal law on nonsuits is generally the same as that prevailing in the state of California. Jones Act, 46 U.S.C.A. § 688.

3. Seamen ⚷29(1)

The Jones Act is to be liberally construed to carry out its full purpose, which is to enlarge admiralty's protection to its wards. Jones Act, 46 U.S.C.A. § 688.

4. Seamen ⚷29(3)

Under the Jones Act, negligent use of an appliance by a fellow seaman is deemed the negligence of the employer, and thus the fact that injury to an employee results from negligence of a fellow employee does not confer immunity upon the employer. Jones Act, 46 U.S.C.A. § 688.

5. Appeal and Error ⚷927(3), 989

Reviewing court, in disposing of an appeal from a judgment of nonsuit, must view evidence in the light most favorable to the appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant.

6. Negligence ⚷121(2)

The doctrine of res ipsa loquitur is applicable only if the accident is of a kind which ordinarily does not occur in absence of some one's negligence, and it must have been caused by an agency or instrumentality within exclusive control of defendant, and must not have been due to any voluntary action or contribution on part of plaintiff.

7. Seamen ⚷29(5.12)

Where seaman was injured when pulling taut against a hard object a tire which fellow seaman was endeavoring to cut with axe, and injury occurred when seaman toppled backward as axe was swung, the doctrine of res ipsa loquitur was not operative against employer, when the entire operation was performed under the very direction of the seaman, and because the instrumentality causing injury was not under exclusive control of employer.

8. Master and Servant ⚷154(1)

The failure to give further instructions or constant warnings is not negligence as to injuries to an employee when the experienced employee knew all the actual conditions involved in his undertaking and there was no concealed danger.

9. Seamen ⚷29(1)

Damages may be recovered under the Jones Act only for negligence, and it does not create liability without fault. Jones Act, 46 U.S.C.A. § 688.

10. Seamen ⚷29(5.14)

In action for injuries to seaman who toppled backwards when holding tire which another seaman was attempting to cut with axe, evidence was insufficient to warrant finding that the accident was result of any fault on part of defendant employers or the fellow servant of the seamen. Jones Act, 46 U.S.C.A. § 688.

* * *

Margolis, McTernan & Branton, by John W. Porter, Los Angeles, for appellant.

Lasher B. Gallagher, Los Angeles, for respondent.

MOSK, Justice pro tem.

Appellant sought to recover damages for personal injuries sustained during the course of his employment as a member of the crew of the Sea Rose, a commercial fishing vessel owned and operated by the respondents. His action was brought in state court pursuant to provisions of the Jones Act, 46 U.S.C.A. § 688. Upon completion of appellant's presentation, the trial court granted respondents' motion for a nonsuit. Our only question on appeal is whether the court erred in taking the matter from the jury.

[1] The cases indicate that nonsuits should be granted sparingly. A motion for nonsuit properly may be granted when and only when, disregarding evidence that conflicts with that of plaintiff, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff. Palmquist v. Mercer, 43 Cal. 2d 92, 272 P.2d 26; Turner v. Ralph M. Parsons Co., 117 Cal.App.2d 109, 254 P.2d 970; Card v. Boms, 210 Cal. 200, 202, 291 P. 190; Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 229, 209 P.2d 1.

[2] While in Jones Act cases filed in state courts, procedural matters are governed by state laws and matters of substance by federal law, an examination of the cases indicates that the federal law on nonsuits is generally the same as that prevailing in California. McGuigan v. Southern Pac. Co., 112 Cal.App.2d 704, 714, 247 P.2d 415.

[3] It has been said that the Jones Act is to be liberally construed to carry out its full purpose, which is to enlarge admiralty's protection to its wards. Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239, 245. For a discussion of the pronounced trend in this direction see 36 Cal.L.Rev. 183–196. Thus in cases of seamen, as in those of railroadmen under the Federal Employees' Liability Act, 45 U.S.C.A. § 51 et seq., if there is any substantial evidence or reasonable inference therefrom that would sustain findings of negligence and proximate cause, a nonsuit should not be granted.

[4] Whatever, in the absence of the Jones Act, might have been the effect upon respondents' liability of the fact that appellant and the coworker whose role is hereinafter discussed were both in their employ, that Act prevents this fact from conferring an immunity upon the respondents in a negligence suit. De Zon v. American President Lines, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065, 1071. Negligent use of an appliance by a fellow seaman will be deemed the negligence of the employer. Mahnich v. Southern S. S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561. To the same effect is Beadle v. Spencer, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082. See discussion in 46 U.S.C.A., preceding § 688. Consideration of the law for the rigid discipline to which seamen are subjected has resulted in recovery where a seaman deliberately selected a hazardous method of working although aware of a safer alternative. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265. See note in 52 Harv.L.Rev. 1008. There is no question of the applicability to the instant case of the Jones Act even though the accident happened shoreside. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596.

[5] The role of the appellate court on appeals from an order granting a nonsuit is circumscribed, as indicated in this quotation from Raber v. Tumin, 36 Cal.2d 654, 656, 226 P.2d 574, 575: "* * * while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit. In the latter case the appellate court must view the evidence as though judgment had gone in favor of the appellant, and order a reversal if such a judgment can be sustained." Or as stated in Golceff v. Sugarman, 36 Cal.2d 152, 153, 222 P.2d 665, 666, " 'The uniform rule which an appellate court should follow in disposing of an appeal from a judgment of nonsuit is, that the court must view the evidence in the light most favorable to appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to appellant'."

Bearing in mind the foregoing accepted rules of law, we shall review the facts in the instant case.

The appellant, Nick Zar, 35 years old, had been a fisherman all of his adult life, the past three years on the Sea Rose. He had fished on all types of vessels and had served in every capacity except that of engineer and cook. He was the son-in-law of the respondent Luka Alafetich, co-owner of the boat with Jesse Skomerza. On February 1, 1950, the Sea Rose was on dry dock at Terminal Island for repairing, painting and general overhaul. She had been sardine fishing previously and was preparing for the approaching tuna season. A part of the dry dock consisted of a narrow catwalk running broadside of the vessel at a height of some 14 feet above the adjoining pier. The catwalk was supported by steady upright beams.

Zar arrived at the boat between 8 and 8:30 in the morning. None of the crew were present except Skomerza, who acted as chief engineer, and seaman Nick Kuljis. The skipper was attending a funeral that morning, and he had left no specific work instructions. The crew worked the boat on a share basis, so there "is no set job, what you do on a boat. I mean you got a certain job, then if another man is needed, you help him and you—you are in different positions. When a guy needs help you help him, that is all". Share basis on the Sea Rose meant a percentage of the net profit from the sale of the catch to the boat's owners, and the balance divided among the 12 crew members. Zar went aboard the boat and noticed Kuljis cutting a tire carcass in order to make a fender for the protection of the boat or skiff. Kuljis was having difficulty in cutting, the tire "jumping off a little block he had it set on, a little block, about a two or four inch block, and every time he would cut it, it would fall off and he wouldn't get a good chance to do the job right."

Observing the plight of Kuljis, and having had experience in slicing tire carcasses, Zar suggested the tire be placed on a solid object, and pursuant to that suggestion, it was brought to one of the 6 x 6 timber uprights supporting the catwalk or scaffolding, and was draped over the top of that steady beam. The evidence is not clear whether Zar alone carried the tire or whether Kuljis took it part of the short distance to their destination, but Zar placed it over the timber. It is unquestioned that no one in authority commanded, requested or approved of this activity.

Crouching, Zar held the tire in position with one hand and grasped the timber with the other. The tire was pulled taut over the top of the upright. He told Kuljis he would hold it and Kuljis should "chop it". No further words passed between the two men. He did not see Kuljis swing the axe, but saw it at the instant it struck the tire. Toppling backward and sideways, he fell to the dock below and sustained severe personal injuries.

From the foregoing facts appellant maintains that although the axe did not strike him, the blow coming without warning jarred him from his position. Respondents contend the appellant was pulling on the tire according to his own plan of procedure, that when it was cut his body was propelled pursuant to the laws of physics in the direction in which he had been pulling.

[6] Appellant first urges that res ipsa loquitur is invoked here and that this alone required the case to go to the jury. The doctrine of res ipsa loquitur has three conditions: (1) the accident must be of a kind which ordinarily does not occur in the absence of some one's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258.

[7] Measuring the facts by the foregoing trifurcated rule, we find they fail to fit at least two of the requisites. First of all, the instrumentality was not under the exclusive control of the respondents. Appellant maintains the injury was caused by the axe alone, but that ignores the fact that the axe at no time came into direct contact with the person of appellant. In reality, the accident was the result of physical forces set in motion by the combination of the axe plus the taut tire. The two jointly were the responsible instrumentality, and there is no doubt that the tire was deliberately held by and under the control of the appellant. Secondly, the entire operation was due to the voluntary action, and performed under the very direction of appel-

lant. Under those circumstances, res ipsa loquitur was not applicable.

In Johnson v. United States, 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468, 471, it was held res ipsa loquitur was applicable to acts of a fellow servant in a Jones Act case. But the facts were clearly distinguishable from the instant case, for there it was the duty of one seaman to hold a 25 pound block, and he permitted it to fall on the plaintiff's head. There was no explanation offered as to why the block fell. The court specifically pointed out that the injured man was not in any way "implicated" in the incident. Certainly he was not a voluntary participant.

Considerably more comparable is Seville v. U. S., 9 Cir., 163 F.2d 296, 298. There a seaman was struck by the swinging of a sling load raised by the vessel's electric winch, for the reason that he "did not move fast enough to escape the swing". Justice Denman wrote in 163 F.2d at page 298 that "Appellant seeks to invoke the doctrine of res ipsa loquitur. We cannot see its application where, as here, there is the usual and expected swinging of a sling load and the accident as well may have been caused by the failure to avoid it as by negligence of the injured man's fellow workmen."

Also somewhat analagous is the case of Bourg v. J. Ray McDermott & Co., La. App., 52 So.2d 717, in which the complaint alleged that the deceased was struck by the pilot wheel going out of control because of respondent's negligence. Res ipsa loquitur did not apply, said the court, because the object causing the injury, the wheel, had not been under the exclusive control of the respondents, but on the contrary, the deceased was directing the operations of the vessel.

Still another case factually similar is Rosenquist v. Isthmian S. S. Co., 2 Cir., 205 F.2d 486. As the plaintiff and a fellow seaman named Violente were jointly carrying a tarpaulin bundle, the fellow seaman dropped it, resulting in injury to the plaintiff therein. The court held, 205 F.2d at page 489, that res ipsa loquitur did not apply, for "Negligence may be measured as a product of the gravity of the injury, if it occurs, multiplied by the factor of its probability. The chance that any serious danger would happen from dropping Violente's end of the tarpaulin was substantially zero. Hence we cannot think that Violente was charged with any duty toward plaintiff to guard against letting slip his grip on the tarpaulin." Submitting the issue of negligence to the jury, said the court, was error. Also see Sweeney v. Erving, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815; Callan v. Cope, 9 Cir., 165 F.2d 703.

Appellant herein maintains negligence was shown by Kuljis' inopportune wielding of the axe. Generally whether any specific conduct or absent quantum of care constitutes negligence is a question of fact. It is of course true that the care to be exercised must be in proportion to the danger to be avoided. And it is a general rule that a person engaging in an act which the circumstances indicate may be dangerous must take such care as prudence suggests to avoid injury. The John Carroll, 2 Cir., 275 F. 302, 306.

But here the act of which appellant complains, the descent of the axe upon the tire, even if assumed to be dangerous, was not only anticipated by appellant, but actually performed under appellant's direction. He testified that after the tire casing was placed in position over the upright, he "told him I'd hold and for him to chop it".

[8] Appellant further argues that Kuljis nevertheless should have given some audible notice the moment before swinging the axe. Under the circumstances of this case, however, where the appellant was fully aware of all the conditions and the nature of the act contemplated and under way, we cannot see how a repetitious announcement of intention would have aided appellant or prevented the unfortunate accident. The failure to give further instructions or constant warnings is not negligence when the experienced servant knew all the actual conditions involved in his undertaking and there was no concealed danger. Mugford v. Atlantic etc. Co., 7 Cal.App. 672, 676, 95 P. 674.

[9, 10] Damages may be recovered under the Jones Act only for negligence; it

does not create liability without fault. Jamison v. Encarnacion, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082; Burton v. Grieg, 5 Cir., 271 F. 271. The evidence herein does not indicate any fault on the part of defendants or the fellow servant. The trial court properly granted the motion for nonsuit.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

126 Cal.App.2d 755

STAHL v. FAHRMAN et al.

Civ. 20113.

District Court of Appeal, Second District, Division 1, California.

July 28, 1954.

Action was brought to foreclose trust deed. The Superior Court of Los Angeles County, William R. McKay and Ellsworth Meyer, JJ., entered judgment adverse to one of the defendants, an order denying motion to vacate and set aside judgment and to rescind and cancel stipulation for judgment, and an order denying motion for continuance to permit that defendant to file answering affidavits, and he appealed. The District Court of Appeal, White, P. J., held that where there was no showing that judgment for the foreclosure of trust deed was not fair and just, or that a trial on the merits could result in a judgment for defendant or even in a judgment less favorable to plaintiff, and the only mistake of defendant in entering into stipulation for the judgment was an error of law which could and should have been avoided by checking the law, and defendant's motion to set aside the judgment and for relief from the stipulation was noticed for hearing only two days before expiration of 45 day stay of execution given to him pursuant to the stipulation, defendant was guilty of culpable and inexcusable negligence and was not entitled to have judgment set aside.

Attempted appeal from order denying motion for continuance dismissed and order denying motion to vacate and set aside judgment and judgment affirmed.

1. Appeal and Error 🔑907(1)

Where record on appeal did not contain judgment as made and entered, District Court of Appeal was required to assume that the judgment complied with the stipulation of the parties in every respect.

2. Appeal and Error 🔑154(4)

A judgment entered on consent of the parties will not be disturbed upon appeal.

3. Appeal and Error 🔑846(5)

Where findings have been waived, trial court is presumed to have found all facts necessary to support its judgment.

4. Appeal and Error 🔑846(5)

Where reviewing court has before it neither the documentary evidence nor any record of the oral proceedings before the trial court, the reviewing court must assume that evidence fully supported each and every finding of fact required to support the judgment.

5. Judgment 🔑90

Where there was no showing that judgment for foreclosure of trust deed was not fair and just, or that a trial on the merits could result in a judgment for defendant or even in a judgment less favorable to plaintiff, and the only mistake of defendant in entering into stipulation for the judgment was an error of law which could and should have been avoided by checking the law, and defendant's motion to set aside the judgment and for relief from the stipulation was noticed for hearing only two days before expiration of 45-day stay of execution given to him pursuant to the stipulation, defendant was guilty of culpable and inexcusable negligence and was not entitled to have judgment set aside.

6. Judgment 🔑143(10)

It is not the purpose of statute dealing with the setting aside of a default judgment to permit the setting aside of a judgment which is the result of inexcusable inadvertence, surprise, or neglect of defendant or defendant's attorney in performance of attorney's obligations to defendants. Code Civ.Proc. § 473.

7. Costs ⟹260(5)

Where appeal was frivolous and for the sole purpose of procuring an extension of time for redemption of realty after foreclosure of trust deed, appellant would be required to pay respondent the sum of $100 in addition to the usual and ordinary costs on appeal.

◆

Lawrence A. David, in propria persona.

Charles J. Katz, Samuel W. Blum, Los Angeles, for respondent.

WHITE, Presiding Justice.

The facts, upon which this appeal must be decided, are quite different from those discussed in the briefs of appellant and respondent, because of the inadequate record on appeal, from which has been omitted the pleadings, evidence, oral proceedings upon motions, and even the judgment.

The Clerk's Transcript discloses a "Stipulation for Judgment" executed by the attorneys for appellant and respondent under date of December 22, 1952 and filed December 31, 1952, that "the amount justly due and unpaid unto the plaintiff on the note and deed of trust sued upon in this action is $13,150.00 principal, with interest at the rate of 7.2% per annum from August 23, 1950, together with attorney's fees in the amount of $1,000.00". By the same instrument, it is further stipulated that all of said sums be declared a lien upon certain real property, prior to the lien or claim of appellant; that a decree of foreclosure may be entered without notice to appellant; that appellant "be barred and foreclosed of all rights, claims, or equity of redemption in said premises or any part thereof after the lapse of the period of redemption as provided by law and statute; that the plaintiff waives any deficiency judgment against the defendant, Lawrence A. David; that the Court may enter a judgment in accordance with the foregoing without further notice to any of the said defendants. Execution is stayed to and including February 12, 1953. Findings are waived. Cross Complaint is dismissed with prejudice."

[1-4] The record on appeal not containing the judgment as made and entered, we must assume that it complied with the stipulation of the parties in every respect. A judgment entered upon the consent of the parties will not be disturbed upon appeal. Hood v. Verdugo Lumber Co., 219 Cal. 558, 561, 27 P.2d 897; Pawling v. Malley, 107 Cal.App.2d 652, 654, 237 P.2d 663. Findings having been waived, the trial court is presumed to have found all the facts necessary to support its judgment, Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421; and where, as here, the appellate court has before it neither the documentary evidence nor any record of the oral proceedings before the trial court, it must be assumed that the evidence fully supported each and every finding of fact required to support the judgment. Bekins Van Lines, Inc. v. Johnson, supra, 21 Cal.2d at page 137, 130 P.2d 421.

While both appellant and respondent, in their respective briefs, have stated and discussed matters not in the record before us, we find no claim of any error of law, inequity, or failure to properly exercise discretion on the part of the court below.

Appellant "claims relief from the stipulation by reason of mistake of law and fact in that it was entered into in the mistaken belief of appellant and his counsel that the time for redemption of the property would be one year and not three months and that the circumstances under which the stipulation was made constituted excusable neglect and inadvertence".

Stipulation for judgment was filed December 31, 1952. Notice of entry of judgment was served upon appellant January 8, 1953. Execution was stayed to and including February 12, 1953. February 3rd, notice was given and filed that appellant would on February 10, 1953, move for an order vacating and setting aside the judgment and "rescinding and cancelling the stipulation for judgment" upon the grounds of "mistake, inadvertence, surprise and excusable neglect". Said notice of motion specifies that motion "will be made and based on the records, files, and pleadings herein and on the affidavits of Lawrence A. David and Benjamin D. Brown, and other evidence which may be presented at the time of hearing." The "records, files and pleadings" and the "other evidence" are not in the record on appeal. The affidavits filed with the notice of motion have been examined by us. Appellant avers that he "would not have authorized the stipulation if he had known that the law only provided and that he would only have three months to redeem the property". From the affidavit of appellant's attorney, it appears "that affiant would never have advised said defendant to agree to said stipulation if he had known that the period was not one year; that upon returning to his office affiant ascertained that the period of redemption was not one year under all circumstances but was only three months".

[5, 6] Nowhere in the record or briefs before us is there any indication that the judgment is not fair and just, or that a trial upon the merits could result in a judgment for appellant or even in one less favorable to respondent. As shown by the affidavit of appellant's attorney, the only alleged mistake is an error of law which could and should have been avoided by checking the law, and which was discovered by him "upon returning to his office"—probably before the judgment was prepared, signed, filed or entered. Nevertheless, appellant's motion to set aside the judgment and for relief from the stipulation was noticed for hearing only two days before the expiration of the 45-day stay of execution given to him pursuant to the stipulation. If, as stated in the affidavits of appellant and his counsel, the length of the period of redemption was the determining factor in their decision to stipulate, then the failure to check this simple question of law was not inadvertence or excusable neglect, but culpable and inexcusable negligence. It is not the purpose of section 473 of the Code of Civil Procedure to permit the setting aside of judgments "which are the result of inexcusable inadvertence, surprise or neglect of defendants, themselves, or of their attorneys in the performance of the latters' obligations to their clients." Hughes v. Wright, 64 Cal.App.2d 897, 910, 903, 149 P.2d 392, 395; Elms v. Elms, 72 Cal.App.2d 508, 513, 164 P.2d 936.

Not only has appellant ignored the rules on appeal which were made and are to be adhered to in order that the work of the courts may progress in an orderly fashion, but here the sole purpose of the appeal manifestly was to delay the satisfaction of respondent's just claims; and appellant has delayed execution of respondent's judgment beyond the period of redemption which he says he erroneously believed was allowed him under the law. Although appellant, acting in pro. per., is not expected to show the same degree of skill in the presentation of his appeal as is expected of an attorney, nevertheless appellant must have known, under the facts of this case, that it was unfair to appeal for the sole purpose of procuring for himself an extension of time beyond that allowed by law.

[7] The attempted appeal from the order denying motion for continuance is dismissed. The order denying the motion to vacate and set aside the judgment, and the judgment, are affirmed. As a penalty for taking what is manifestly a frivolous appeal, appellant is required to pay to respondent the sum of $100, in addition to the usual and ordinary costs on appeal.

DORAN and DRAPEAU, JJ., concur.

126 Cal.App.2d 733

GERFERS
v.
SAN DIEGO TRANSIT SYSTEM et al.

Civ. 4841.

District Court of Appeal, Fourth District, California.

July 27, 1954.

Action for injuries sustained by passenger who fell while bus was in motion. The Superior Court, San Diego County, Joe L. Shell, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where plaintiff's evidence alone would have justified a finding of contributory negligence, instruction on contributory negligence was not prejudicial error, even though contributory negligence had not been pleaded.

Judgment affirmed

1. Negligence ⚷117

As a general rule, the contributory negligence of plaintiff must be specially pleaded by defendant in order that he may rely on such defense, but where plaintiff's contributory negligence appears from the allegations of his complaint, or from evidence introduced in his behalf, the plea of contributory negligence is available to the defense, although not pleaded in the answer.

2. Negligence ⚷138(2), 139(1)

In negligence actions, as in other cases, a party is entitled to proper instructions upon any matter which is in issue, and upon any legal inference which may be drawn from the evidence.

3. Carriers ⚷346(2)

In action for injuries sustained by passenger who fell while bus was in motion, plaintiff's evidence alone would have supported finding that plaintiff had been contributorily negligent in attempting to change her position on the moving bus without using handles on bus seats for support.

4. Appeal and Error ⚷882(12)

Where plaintiff's own evidence, in action for injuries sustained when she fell while a passenger on a moving bus, would have supported finding of contributory negligence, the giving of an instruction on contributory negligence was not prejudicial error, even though this defense had not been pleaded.

5. Trial ⚷260(8)

Where, in action for injuries sustained by passenger who fell on moving bus, jury was instructed that defendants owed duty of utmost care and diligence, refusal to give instruction on defendants' duty to provide seats and greater duty owed where seats are not available, was not prejudicial error. Code Civ.Proc. § 2055; Civil Code §§ 2100, 2185.

◆

David S. Casey, San Diego, for appellant.

Lindley, Lazar & Scales, John H. Barrett, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiff appeals from an adverse judgment rendered by a jury in favor of defendants as a result of claimed injuries plaintiff suffered while riding as a passenger on defendants' bus.

Plaintiff boarded the bus in downtown San Diego and all seats were taken. She was carrying a purse and some bakery goods in two separate packages in her arms. She took hold of a railing immediately to the rear of the bus driver and after some distance traveling, someone told her of a vacant seat about three seats back toward the rear of the bus. Plaintiff turned to walk toward the vacant seat while the bus was in motion, and she had taken a few steps, apparently without holding onto the seat backs, and according to her testimony, the bus gave an unusual jerk or jar, causing her to be thrown to the front of the bus, striking the horizontal railing. The bus driver admitted she struck the horizontal railing with her back but denied that there were any unusual jerks, jars or gyrations of the bus at the time plaintiff lost her balance.

Plaintiff testified as to the extent of her injuries and claimed there were many things she was formerly able to do but was unable to do after she was injured. Defendants offered in evidence moving pictures of her actions after the claimed injury, which impeached her testimony to a great degree in this regard.

[1] Plaintiff in her complaint alleged that her injuries were proximately caused by the negligence of defendants. Defendants denied such negligence and did not allege contributory negligence of the plaintiff or set up any other such affirmative defense. It is claimed by plaintiff on this appeal that the trial court, notwithstanding defendants did not plead contributory negligence, in effect, gave such an instruction. The complaint is that prejudicial error resulted because such an instruction was given. It appears to us that no prejudicial error resulted when the instruction given is considered in connection with the evidence produced and other instructions given. The portion of the instruction complained of is in the language of B.A.J.I. 204E, first paragraph, as follows:

> "The requirement that the carrier exercise the utmost care for the passenger's safety does not relieve the passenger of the duty to exercise ordinary care for her own safety. This responsibility rests upon the passenger at all times, and if she fails in it, and that failure contributes in any degree as a proximate cause of injury to herself, she may not recover from the carrier for such injury."

This is preceded by the notation that it should be used only in a case where the defense of contributory negligence is submitted to the jury. Plaintiff cites many cases holding that the defense of contributory negligence must, as a general rule, be specially pleaded. (19 Cal.Jur. p. 681, sec. 104, and cases cited.) However, there are certain well-recognized exceptions to this general rule, as indicated in Hoffman v. Southern Pacific Co., 84 Cal. App. 337, 258 P. 397, where it is said (quoting from the syllabus):

> "As a general rule, the contributory negligence of plaintiff must be specially pleaded by defendant in order that he may rely on such defense, but where plaintiff's contributory negligence appears from the allegations of his complaint, or from evidence introduced in his behalf, the plea of contributory negligence is available to the defense, although not pleaded in the answer."

See also Hughes v. Atchison, T. & S. F. Ry. Co., 121 Cal.App. 271, 8 P.2d 853; Gundry v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 753, 286 P. 718.

Apparently, defendants tried the case upon the theory that defendants were not negligent. It is defendants' position that they purposely avoided pleading contributory negligence of the plaintiff as a defense because by the mere use of the term "contributory negligence" it imports negligence on the part of defendants, and counsel stated that he had learned from sad experience in defending such actions the danger involved in such practice because it could become a weapon in the hands of the plaintiff; that he knows of no prescribed pleading which allows a defendant to plead that it was not negligent but the plaintiff was; that accordingly, defendants' defense was most vigorous in its denial of negligence, and so long as the jury found the defendants were not negligent it must follow that any injury sustained by plaintiff was a result of her own negligence.

The court fully instructed the jury that it was plaintiff's burden to prove negligence on the part of defendants and that such negligence was a proximate cause of her injury. Proximate cause was defined in the language of B.A.J.I. Instruction No. 104, Alt. An instruction on *res ipsa loquitur* was given, followed by an instruction that defendants were required to use the "utmost care and diligence" that could reasonably be exercised under the conditions prevailing. Then follows the instruction of which plaintiff complains. The court then instructed the jury that the issues presented were two: First, was the defendant's bus operator negligent? That if the answer is "No" then "your deliberations are concluded". Second, if the answer is "Yes" then it must determine if such negligence was a proximate cause of the injury, and if answered in the negative then its verdict must be for the defendants; but if answered in the affirmative, it must fix the damage. No specific instruction, other than that above stated, was given on the question of contributory negligence. That term was not defined to the jury.

[2] In negligence actions, as in other cases, a party is entitled to proper instructions upon any matter which is in issue, and upon any legal inference which may be drawn from the evidence. (53 Am.Jur. 452.)

The giving of an instruction on contributory negligence was criticized in Shippy v. Peninsula Rapid Transit Co., 197 Cal. 290, 296, 240 P. 785. In that case no issue as to contributory negligence was tendered by the evidence or pleadings, and the court held that the trial court should have refrained from giving the instruction. However, under the facts of that case, it was held that the giving of the instruction would not necessarily constitute reversible error.

The question here to be answered is whether the evidence presented by the plaintiff shows or would support a finding of contributory negligence on her part. If so, the giving of the instruction would not be, under the evidence and other instructions given, prejudicially erroneous. In reviewing that evidence plaintiff testified she was aged about 70 years and had been housekeeping in hotels; that while she was walking to the empty seat pointed out to her, the bus gave an unusual lunge but that she could not tell whether it was because of a start, stop or change of course; that she was so frightened she could not tell just what happened but she remembered after she grabbed the rail again and recovered her balance she went to the seat and sat down and still had her packages and handbag with her; that the driver then turned around and inquired if she had hurt herself and that she made no reply. She testified she did not believe she was hurt until she dismounted from the bus and then she realized she "didn't feel just myself", and that night she awakened and felt pain in her back and went to see her doctor; that she then went from there to the defendant company's office and reported her injuries; and that she was later examined by the company's doctors and that after taking X-rays of her spine they "brushed me off and told me it didn't amount to anything". She testified she subsequently went to an insurance company doctor where she carried an accident policy and he examined her and told her there was "nothing the matter" with her.

The bus driver, called as plaintiff's witness under section 2055 of the Code of Civil Procedure, testified he was operating the bus and that plaintiff mounted it at Seventh and Broadway and thereafter was standing back of him; that as the bus proceeded north on 25th Street, at about 20 miles per hour, he was preparing to make a turn East on B Street and applied the brakes in a normal manner to make a right turn; that at that time he felt plaintiff bump the horizontal rail back of him with her back; that some other passenger steadied her and helped her to the seat; that he inquired if she was hurt and she did not reply; that he then stopped the bus and passed out slips of paper to the passengers for signatures.

Defendants' passenger witnesses testified they observed plaintiff fall back against the bar but sensed nothing unusual in the manner in which the bus was operated on 25th Street at the time; that there was no change of speed in the bus before it started to turn on B Street. One witness thought it was when the bus was making the turn that plaintiff fell against the rail but others did not think so. One testified that she was then assisted to her seat and that she did not notice any sign of distress from her but they believed a person standing in the aisle could be jerked around in any bus if she was not holding onto something.

[3, 4] It is apparent from plaintiff's evidence alone that the jury might well have found plaintiff to have been guilty of contributory negligence in attempting to change her position at the rail to a vacant seat on a moving bus without taking the precaution of engaging the use of handles

on the bus seats for support. From the evidence the jury might well have concluded that defendants were not negligent or that the proximate cause of plaintiff's injuries was solely her own lack of care or that she, in fact, suffered no injury as a result of the accident. Accordingly, no prejudicial error resulted in giving the instruction about which plaintiff complains.

[5] The next complaint is that the court committed prejudicial error in refusing to give, as covered, plaintiff's instructions to the jury to the effect that a carrier owed a duty to provide seats, and accordingly a carrier is charged with a greater degree of care for the safety of passengers when seats are not available, citing Civil Code, § 2185; Kelly v. Santa Barbara etc. R. R. Co., 171 Cal. 415 153 P. 903; and Sweet v. Los Angeles Railway Co., 79 Cal.App.2d 195, 179 P.2d 824.

The most reasonable rule in this respect is stated in the cited case of Kelly v. Santa Barbara etc. R. R. Co., supra, where a section of the code substantially the same as section 2185 of the Civil Code is considered. There it was said 171 Cal. at page 418, 153 P. at page 904:

> "The congested travel upon street and interurban railways at certain hours of the day and upon holidays, upon the one hand, makes it difficult, if not impossible, for the common carrier to provide suitable accommodations for every passenger who desires to ride, and, upon the other hand, compels many of the traveling public to make their journeys under strained conditions or forego it altogether."

It was there held that the giving of an instruction substantially in the language of section 2185 of the Civil Code might have served to mislead the jury into believing that in the particular case the gravamen of the charge of negligence was that defendant did not give plaintiff a seat or standing-room upon the platform. It then held that plaintiff, however, waived whatever right he had to such accommodations by voluntarily taking his position upon the step and paying his fare for passage; that he agreed with the company that as a matter of self-preservation he would take such reasonable care of himself as his position of added peril demanded, and the company in turn agreed with him that it would so operate its car as not to expose him to any greater peril than his position necessarily imposed; that under such circumstances a new contract springs into existence between the passenger and the company; and that the passenger, in voluntarily taking the position of greater peril assumes the natural obvious risk attending such position of peril. It becomes incumbent upon him, therefore, in the exercise of due care which the law always exacts, to take greater precautions for his own safety than if he were seated; that upon the other hand, the company, in accepting the passenger's fare with knowledge of the increased danger of his position, is under obligation to use greater precautions in the operation of the car for the protection of such passenger than would be necessary if all were seated. It then held that all the actions and conduct of the passenger should be considered by the jury, as a factual question, in determining whether the plaintiff was guilty of contributory negligence.

The question here presented is whether the instructions given covered the question of the increased duty of care for the protection of a passenger who had no seat. The jury was instructed in another instruction offered by plaintiff and given in the language of section 2100 of the Civil Code to the effect that:

> "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

This was followed by an instruction that the defendant is not an insurer of the safety of its passengers, that is to say, it does not warrant such safety in the sense of a guarantee; that its responsibility was not to use the most effective methods for safety that the human mind can imagine, nor that the best scientific skill might suggest, but the care required is the highest that reasonably could have been exercised consistently with the mode of transportation used, and the practical operation of its business as a carrier; and that this requirement must be measured in the light of the best precautions that were in common, practical use in the same business and proved to be efficacious, at the time of the alleged occurrence.

Just what degree of care would be greater than the "utmost care and diligence" is not indicated by counsel for the plaintiff. To instruct the jury that a greater degree of care than the "utmost care" would appear to be unauthorized and unwarranted. We conclude that the subject matter was sufficiently covered and no prejudicial error resulted in refusing the proffered instructions.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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126 Cal.App.2d 548

PARKINSON v. CALDWELL et al.

Civ. 15833.

District Court of Appeal, First District, Division 2, California.

July 15, 1954.

Rehearing Denied Aug. 13, 1954.

Hearing Denied Sept. 8, 1954.

Action by the special administrator of a decedent's estate for the proceeds of a note payable to decedent. One of defendants filed a cross-complaint praying payment of the proceeds to plaintiff for use in payment of the estate's obligations. From a judgment of the Superior Court in and for the County of Santa Clara, Byrl R. Salsman, J., for plaintiff, the other defendants appealed. The District Court of Appeal, Dooling, J., held that decedent's pledge of the note and a trust deed securing it to one of appellants and another as collateral security for decedent's note to pledgees was invalid as violating provisions of decedent's agreement with cross-complainant as remainderman after decedent's life estate in trust under his sister's will and a decree of distribution of testatrix' estate that decedent should hold the original note until its maturity.

Judgment affirmed.

1. Pledges 🔑5

A provision of agreement between testatrix' brother and nephew, after contest of will devising her estate to brother in trust for life with remainder to nephew, that a note executed by brother as trustee to himself as payee pursuant to such agreement, incorporated in decree of distribution of testatrix' estate, should be held by payee until it became due, meant that trustee should continue in possession of note as payee thereof, so that his subsequent pledge of note and trust deed securing it as collateral security for his note to pledgees was invalid as violating such agreement. Civ.Code, §§ 3108, 3266.

2. Bills and Notes 🔑357

A pledgee of note is deemed a holder thereof for value to extent of his lien. Civ. Code, § 3108.

3. Bills and Notes 🔑144

An agreement by payee of note to hold it until its maturity forbids holding thereof by any other person during such time.

4. Assignments 🔑58

An agreement not to assign a debt is effective, where language thereof is clear.

5. Assignments 🔑58
Bills and Notes 🔑214

Parties to contract may show by apt words therein that rights created thereby shall not be assignable, and provision of note for money loaned maker by payee that note is not assignable means that payee's right to money loaned is non-assignable.

6. Bills and Notes 🔑144

A provision of agreement, incorporated in distribution decree, between life beneficiary and remainderman under will, that note to be executed by life tenant to himself as payee for amount due him from testatrix' estate should be held by him until it became due, prohibited his transfer of note before maturity to any one by pledge or otherwise.

7. Bills and Notes ⟹144

A provision of agreement, incorporated in decree of distribution of testatrix' estate, between life beneficiary in trust and remainderman under will, that note to be executed by trustee to himself as payee for amount due him from estate should be held by him until it became due, was not invalid limitation on his power to assign or transfer note.

8. Contracts ⟹1

A contract right has its origin in agreement of parties, who may place limitation on such right, by their free agreement, at very time of its creation.

9. Assignments ⟹58

A contract providing in terms that it is not transferable cannot be transferred, though it might otherwise be transferable.

10. Pledges ⟹4

Where agreement, between life beneficiary of testamentary trust and remainderman, and note, payable to life beneficiary from trust estate, prohibited assignment of note without consent of remainderman for purpose of protecting remainderman's rights in case life beneficiary violated trust, award of proceeds of note to life beneficiary's estate, although beneficiary had, in violation of agreement, pledged note, would not result in unjust enrichment of life beneficiary's estate at expense of pledgee, in view of fact that life beneficiary's estate was insolvent and was liable to remainderman for taxes on trust estate which life beneficiary had failed to pay. Civ.Code, §§ 840, 3543.

Royal E. Handlos, San Francisco, for San Jose Abstract & Title Ins. Co. and Viola Lester.

Crist, Stafford & Peters, John M. Donegan, Palo Alto, for Thomas B. Caldwell.

Victor A. Chargin and Victor A. Chargin, Jr., San Jose, for A. L. Parkinson.

DOOLING, Justice.

This is an appeal from a judgment in favor of plaintiff as administrator of the estate of T. W. Caldwell in which the plaintiff was decreed to be entitled to the proceeds of a promissory note secured by a deed of trust. The note had been paid by cross-complainant T. B. Caldwell to the San Jose Abstract and Title Insurance Company who along with Viola Lester complete the number of parties to this action.

Maud L. Caldwell the sister of T. W. Caldwell (hereinafter called the Uncle) and aunt of T. B. Caldwell (hereinafter called the Nephew) died in 1935. She devised her entire estate to the Uncle for life with the remainder to go to the Nephew. Her estate was left in trust with the Uncle, the life beneficiary, to act as trustee of the property.

As a result of a will contest, the Uncle and Nephew entered into an agreement which provided for the distribution of the property under the terms of the will with the additional provision that the Uncle should not sell, encumber or reinvest the property of the estate without the Nephew's consent. The agreement also recognized that the Uncle had a valid claim against the estate in the amount of $24,876.65, and part of this claim was to be secured by a promissory note and deed of trust on the Barcelona Apartments, which was a part of the trust estate, in the amount of $13,942.05. This note was to be payable to the Uncle one year after his death but not before 3 years after date of note with interest at 6% per annum. The agreement provided further: "Said note shall be payable to party of the first part and *shall be held by him* until it shall become due according to its terms unless there be an agreement between the parties to the contrary. Said party of the first part agrees to pay the interest on said note and deed of trust to himself and not to file Notice of Default or foreclose said note or deed of trust until after its maturity date and that there shall be no acceleration of maturity by reason of any default in the payment of interest, unless a special agreement is made to the contrary. It is agreed and understood that said party of the first part as trustee under the last Will and Testament of Maud S. Caldwell, Deceased, may execute said note and deed of trust to himself as individual, and that said note and trust deed shall constitute a valid lien against the said property; party of the second part hereby recognizes said note and deed of trust as a valid existing obligation as hereinabove set forth." (Emphasis ours.)

The court distributed the estate pursuant to the provisions of the will of decedent and the above agreement, carrying the provisions of the agreement above quoted into the decree.

After the entry of the decree of final distribution, the Uncle as trustee executed the promissory note to himself as payee and the deed of trust to secure it, pursuant to the terms of the agreement. The note on its face, in accordance with the prior agreement and decree of distribution, contained the provision: "This Note shall be held by said payee until it shall become due according to its terms, unless there be an agreement between said payee and Thomas B. Caldwell to the contrary." The deed of trust was recorded on January 19, 1937 and on the same day the Uncle executed a promissory note to John S. and Viola Lester, as joint tenants for the sum of $12,000. As collateral security the Uncle pledged the promissory note executed by him as trustee payable to himself as an individual and also the deed of trust which was security for this promissory note.

On the death of the Uncle the Nephew deposited the sum of $13,455.83 with the San Jose Abstract and Title Insurance Company in payment of the note and asked the latter as trustee of the trust deed to reconvey the property to him. Evidently the Title Company did this in February 1952.

Prior to the death of the Uncle, John Lester died and Viola Lester as surviving joint tenant demanded of the Title Insurance Company that it pay her $12,000 with interest out of the $13,455.83 deposited with the company on the ground that she held the note and trust deed as security for the Uncle's debt.

Plaintiff, the administrator of the Uncle's estate, brought an action praying that he be decreed owner of the original promissory note and deed of trust and of the moneys deposited by the Nephew with the Title Company. One defendant and cross-complainant is the Nephew and he prayed that the court order the money to be turned over to plaintiff in order that it may be used in the proper payment of the obligations of the estate of the Uncle. Defendants Viola and Title Company prayed that the company be directed to pay to Viola $12,000 plus interest and that the remainder only be paid to the plaintiff. The trial court found for plaintiff in that the purported pledge of the Caldwell note and deed of trust has no force and effect and the $13,455.83 is to be paid to the plaintiff.

Appellants are the Title Company and Viola Lester and they make three contentions on appeal: (1) The pledge of the Caldwell note and deed of trust is valid; (2) the restriction against the transfer of the Caldwell note is void; (3) the judgment violates the unjust enrichment rule.

[1, 2] The first question presented involves the proper construction of the words: "This note shall be *held* by said payee until it becomes due * * *." The holder of a note is defined in the Uniform Negotiable Instrument Act, Civil Code, § 3266: " 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Since the word "holder" has a settled meaning in the law of negotiable instruments, the meaning of the agreement that the note shall be "held" by the payee seems clear. By the very definition above quoted it means that he shall as payee continue "in possession of it". This agreement was clearly violated when the Uncle pledged the note. Not only did he cease to be in possession of the note but under section 3108 Civil Code the pledgee of a promissory note "is deemed a holder for value to the extent of his lien", and the California cases so hold. First Nat. Bank of Tustin v. Landreth, 128 Cal.App. 138, 143, 16 P.2d 1010; Robb v. Cardoza, 127 Cal. App. 588, 590–591, 16 P.2d 325; Williams v. Walker, 66 Cal.App. 672, 675, 226 P. 939;

People's State Bank v. Penello, 59 Cal.App. 174, 177, 210 P. 432.

[3] Appellants cite cases holding that the pledgor of a promissory note retains title to the note. They are not here in point. The pledgee becomes a holder of the note to the extent of his lien and an agreement by the payee to hold the note until its maturity clearly forbids that any other person should hold it during that time.

[4] Where the language is clear an agreement not to assign a debt is effective. The precise question was elaborately discussed by the New York Court of Appeals in Allhusen v. Caristo Const. Co., 303 N.Y. 446, 103 N.E.2d 891 at page 893 the court concluded:

"In the light of the foregoing, we think it is reasonably clear that, while the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom to contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited."

[5] So in 4 Corbin on Contracts, § 872, p. 486 the author says:

"In any case, it is quite possible for the parties to show by apt words that rights created by the contract shall not be assignable. It is obvious that they mean exactly this and nothing else in case the contract is unilateral from the beginning. * * * So if A lends money to B, receiving from B a note that expressly declares that it is not assignable, there is no doubt that they mean A's right to the money to be non-assignable."

[6] The Uncle here both by express agreement and by the decree of distribution, which was the only source of his authority to execute the note as trustee to himself as payee, was expressly bound to hold the note until maturity. The purpose of that limitation was clear, that he should not transfer the note before maturity to any one, either by way of pledge or otherwise.

[7, 8] We are not impressed by the argument that this limitation on the power to assign or transfer the note is invalid. A contract right has its origin in the agreement of the parties and if the parties by their free agreement place a limitation on the right at the very time of its creation no good reason occurs to us why they may not do so. The New York Court of Appeals in Allhusen v. Caristo Const. Co., supra, 303 N.Y. 446, 103 N.E.2d at page 893 said of a similar argument of invalidity: "Such a holding is not violative of public policy. Professor Williston, in his treatise on Contracts, states (Vol. 2, § 422, p. 1214): 'The question of the free alienation of property does not seem to be involved.' The New York cases do not hold otherwise * * *. Plaintiff's claimed rights arise out of the very contract embodying the provision now sought to be invalidated. The right to moneys under the contracts is but a companion to other jural relations forming an aggregation of actual and potential interrelated rights and obligations. No sound reason appears why an assignee should remain unaffected by a provision in the very contract which gave life to the claim he asserts."

[9] The California courts are in accord. In La Rue v. Groezinger, 84 Cal. 281 at page 283, 24 P. 42 at page 43, the court said: "if the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it otherwise might be so." And the court said in Fairbanks v. Crump Irrigation & Supply Co., Inc., 108 Cal.App. 197 at page 205, 291 P. 629 at page 632, 292 P. 529.

"The contract, as we saw, provided that 'any and all moneys due' might be assigned with Fairbanks' 'written consent.' Appellant rightly says that no such language was needed to make payments due assignable. But the language, having been used, must be given some effect, and it would have none unless it were tantamount to a provision that payments should *not* be assigned *until due,* and *not then without Fairbanks' written consent.* We are aware of no reason why the provision, as so construed, should not be given effect."

We see no reason to follow the cases from other jurisdictions cited by appellants which seem to hold otherwise.

[10] Finally appellants argue that to permit the Uncle's estate to recover the proceeds of the note will result in its unjust enrichment, since the Uncle received the money the repayment of which was attempted to be secured by the pledge of this note. Were only the Uncle's estate and appellants involved this might well be true, but the agreement not to assign without the consent of the Nephew was obviously inserted for the protection of the Nephew's rights. It was established in the trial court that the estate of the Uncle is insolvent and that the Nephew has a claim against the Uncle's estate of approximately $10,000 for taxes which the Uncle failed to pay on the trust estate during his life time. It is the express duty of the life tenant to pay taxes: "The owner of a life estate * * * must pay the taxes * * *." Civ.Code, § 840, and the liability of the Uncle's estate on this claim cannot be questioned. The purpose of the agreement to hold the note unless the Nephew consented to its transfer, can only have been for the protection of the Nephew's rights. The note was secured by deed of trust on property in which the Nephew had a remainder in fee. Its payment after the Uncle's death according to its terms could only be by the Nephew, to protect the property which secured it, or by sale of the Nephew's property under the deed of trust. The Nephew thus had a very real interest in the transaction. He had the further interest of being assured that the money due on the note would be paid to the estate, and there be available for his protection in case his Uncle violated any of the terms of the trust, a contingency which has in fact occurred. Appellant Lester with full knowledge of the limitation on the power of transfer took the note in pledge with her eyes open. The note on its face gave notice to appellants that the Nephew was interested in the agreement of the Uncle to hold the note until maturity, because it expressly provided "unless there be an agreement between said payee and Thomas B. Caldwell to the contrary." As between appellants and the Nephew the equities are with the Nephew and the rule of Civ.Code, § 3543 is applicable: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; EDMONDS, J., dissenting.

126 Cal.App.2d 606

PIERCE v. NASH et al.

Civ. 19954.

District Court of Appeal, Second Appellate District, Division 2, California.

July 20, 1954.

Rehearing Denied Aug. 6, 1954.

Hearing Denied Sept. 8, 1954.

Action for damages for constructive eviction. The trial court, Clarke E. Stephens, J., rendered decision for lessees but granted lessors' motion for new trial, and lessees appealed. The District Court of Appeal, Fox, J., held that where it appeared that where lessors, although they knew that installation of wooden support posts would substantially interfere with lessees' use of the premises as a pool hall and had available other means of support which would not have interfered with lessees' business requirements, installed the wooden posts, lessors' act constituted invasion of lessees' rights under the lease and justified their vacation of the premises.

Order reversed.

1. Appeal and Error ⚷933(4)

Where order granting new trial was general and did not designate ground upon which it was granted, it would be presumed, on appeal, that it was not based on ground of insufficiency of evidence, and reviewing court would be precluded from considering insufficiency of the evidence unless evidence was without conflict and insufficient as a matter of law. Code Civ.Proc. § 657.

2. Appeal and Error ⚷933(4)

Where order granting new trial did not designate ground upon which it was granted, and statutory grounds of irregularity of proceedings and accident or surprise were not supported by affidavits, it would be presumed that order was not founded thereon. Code Civ.Proc. § 657, subds. 1, 3.

3. Appeal and Error 🔑933(1)

Upon an appeal from an order granting a new trial, all intendments favor the order as against the verdict.

4. Appeal and Error 🔑854(6), 977(3)

An order granting a new trial will only be disturbed on appeal where there is a manifest abuse of discretion, and when such an order is in general terms it will be affirmed if it could have been properly granted upon any of the grounds upon which the motion was predicated.

5. Landlord and Tenant 🔑132(1)

An assigned lease carries with it, even in absence of special covenant for quiet enjoyment, an implied covenant binding upon lessors during the continuation of the term, and this covenant means that a tenant shall not be wrongfully disturbed in his possession by the lessor. Civ.Code, § 1927.

6. Landlord and Tenant 🔑172(2)

Any disturbance of the tenant's possession by the lessor or at his procurement which renders the premises unfit for the purposes for which they are demised or which has the effect of depriving the tenant of the beneficial enjoyment of the premises, amounts to a "constructive eviction," provided the tenant vacates the premises within a reasonable time.

See publication Words and Phrases, for other judicial constructions and definitions of "Constructive Eviction".

7. Landlord and Tenant 🔑172(2)

It is not necessary to a constructive eviction that there should be an express intention of the landlord to compel his tenant to leave the demised premises or to deprive him of the beneficial enjoyment thereof, and acts or omissions which are calculated to, and do, deprive the tenant of the use and enjoyment of the demised premises and make it necessary for him to remove from the premises, constitute a constructive eviction.

8. Landlord and Tenant 🔑172(2)

That landlords, who knew that installation of wooden posts in demised premises would deprive tenant of premises' use as a pool hall and who had available other means of support which would not have interfered with tenant's business requirements, installed the posts to support ceiling, constituted a constructive eviction and justified tenant's vacation of the premises.

9. Courts 🔑89

It is elementary that the language used in any opinion is to be understood in the light of facts and the issue before the court.

10. Landlord and Tenant 🔑180(3)

Where the landlord's acts, on their face, constitute a substantial interference with a tenant's right of quiet enjoyment which landlord has covenanted to respect, the burden is upon landlord, in an action for damages for constructive eviction, to justify his conduct.

11. Landlord and Tenant 🔑180(3)

Where constructive eviction is claimed under circumstances in which the landlord's physical acts on the premises have deprived the tenant of the beneficial use and enjoyment of the property leased, it is not necessary that the tenant establish bad faith on landlord's part.

12. Landlord and Tenant 🔑180(6)

Findings, in constructive eviction case, that required ceiling support could have been accomplished to satisfaction of the Department of Building and Safety by means other than the installation of the wooden posts and in a manner that would not interfere with tenants' business, together with general finding for tenants, sufficiently disposed of landlords' contention that they had made only such repairs and alterations as the law required and that plaintiff was not deprived of a substantial portion of the leased premises.

13. Landlord and Tenant 🔑180(3)

In action for damages for constructive eviction, evidence sustained findings that landlords' installation of wooden support posts deprived tenants, who used premises as a pool hall, of a substantial portion of the leased premises and that installation of the posts was not required by law.

14. Landlord and Tenant ⚷180(3)

In action for damages for constructive eviction, wherein tenants contended that landlords' actions had deprived them of the use of the premises as a pool hall, evidence sustained finding that the premises had been leased for the purpose of operating a pool hall business.

15. New Trial ⚷102(1)

On a motion for a new trial, on ground of newly discovered evidence, it is incumbent on movant to show that he has exercised reasonable diligence to discover, before the trial, the evidence upon which he relies.

16. New Trial ⚷102(1)

Motion for new trial on ground of newly discovered evidence will be denied where the evidence might have been produced by the exercise of reasonable diligence, or where movant has not shown due diligence in discovering and producing it, or where no reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced.

17. New Trial ⚷150(4)

Affidavits which were filed in support of motion for new trial on ground of newly discovered evidence and which alleged that the evidence could not have been discovered with reasonable diligence but failed to allege facts showing that movant could not have obtained the evidence prior to the time of trial had he used reasonable diligence, were insufficient.

18. Appeal and Error ⚷981
New Trial ⚷99

The granting or denial of a motion for new trial upon ground of newly discovered evidence is generally a matter within discretion of trial court, and order will be affirmed unless clear abuse of discretion is shown, but this rule has no application where basis upon which order is made furnishes no basis for exercise of discretion.

19. New Trial ⚷76([illegible])

An order for new trial on ground of excessive damages is necessarily granted on the ground of insufficiency of the evidence to sustain a verdict for the amount awarded. Code Civ.Proc. § 657, subd. 5.

20. Landlord and Tenant ⚷180(4)

Loss of prospective business earnings for balance of the lease is an item of damages which may be properly awarded where a tenant has been wrongfully evicted.

21. Landlord and Tenant ⚷180(4)

In action for constructive eviction evidence was sufficient to sustain award of damages for loss of prospective earnings.

22. Landlord and Tenant ⚷172(2)

Absent a showing that landlord, in using wooden posts rather than steel supports for ceiling of leased premises, had acted in necessary compliance with any regulation of the National Production Authority. National Production Authority regulation providing that no person shall be held liable for damages for any act or failure to act in conformity to the regulations did not relieve landlord from liability for constructive eviction occasioned by use of wooden posts.

23. Evidence ⚷392

In action by lessee and assignee of lease for damages for constructive eviction, landlord could be required to testify concerning conditions and terms of the assignment notwithstanding that his oral evidence might tend to vary the terms of the documents of assignment.

24. Evidence ⚷424

The rule that parol evidence cannot be received to contradict or vary a written contract does not apply in an action between a party to a contract and a third party.

25. Evidence ⚷472(1)

In an action for constructive eviction, landlord could not testify as to whether he had done only work required by the Department of Building and Safety, since such testimony would have been landlord's conclusion and this conclusion was for the court to draw.

Glenn R. Watson, Los Angeles, and Robert G. Beverly, Manhattan Beach, for appellant.

Paul J. Otto, Victor Bewley, Los Angeles, for respondents.

FOX, Justice.

This is an appeal by plaintiff from an order granting defendants Gaylord Burke and Robert P. Burke a new trial after judgment for plaintiff. The matter was tried by the court without a jury. Defendants did not take a cross-appeal from the judgment.

The action is for damages for constructive eviction of plaintiff, lessee of the premises here involved. The complaint recites that on April 26, 1948, Harry F. Burke leased these premises, by a writing, for a term of five years, to one R. Crawford. The defendants are alleged to be the successors in interest of Harry F. Burke. On about February 21, 1949, Crawford assigned this lease to the plaintiff. It was alleged that at the time of the execution of the lease and at all subsequent times Crawford and plaintiff were engaged in the business of operating a pool hall or "snooker parlor;" that the nature of this business required pool tables to be located at intervals sufficient to provide space for plaintiff's customers to move around them without hindrance; that defendants were aware of the characteristics of Crawford's business when the lease was executed and that the lease was made to Crawford for the purpose of carrying on such a business; that on March 13, 1951, defendant commenced erecting supporting posts at intervals throughout the leased premises against plaintiff's wishes and despite his assertion to them that such action would put him "out of business"; that the presence of the posts made the premises unfit and unsuitable for occupancy as a "snooker parlor" in accordance with the purpose for which they were rented; that plaintiff was forced to abandon and surrender possession of the premises to defendants on March 27, 1951, and that plaintiff suffered damages as a result of his eviction by defendants.

By way of affirmative defense, the answer alleged that the building here involved, including the premises leased to plaintiff, had become unsafe and its condition was below the minimum safety standards required by the Building Code of the city of Los Angeles; that on about January 8, 1951, the defendants received a notification from the Department of Building and Safety to comply in the following manner with the requirements of the Los Angeles Municipal Code: "Provide adequate support for second floor where solid plastered partitions were removed"; and that only the repairs and alterations required by law were made.

The court found generally in accord with the allegations of the complaint. The findings stated in part: that after receiving the notice from the city to provide adequate support, defendants filed, on February 7, 1951, an application for a building permit, coupled with plans for the performance of the corrective work by strengthening the existing beams by adding steel U-plates and without the installation of any additional upright supports or parts; that these plans were approved and defendants were granted permission to complete the work as therein provided; that on February 27, 1951, defendants filed another application for a permit, together with plans for the installation of additional upright parts on the premises, in lieu of the work provided for in the prior application; that this second plan was likewise approved and permission to proceed granted; that the supporting posts which defendants thereafter installed on the leased premises from floor to ceiling were so placed that four of the six pool tables could not be used due to inadequate space for movement around them, rendering the premises unsuitable for use as a pool hall and depriving plaintiff of the enjoyment of a substantial portion of the premises; that plaintiff vacated the premises and surrendered possession to defendants, which were thereafter used by defendant Gaylord Burke for the operation of his cleaning business; "that defendants could have provided adequate support for the second floor by a means other than the installation of additional posts * * * and in a manner that would not interfere with plaintiffs business or render the premises unfit or unsuitable for pool hall purposes or deprive plaintiff of the beneficial enjoyment of said premises;" that defendants knew another means of support was practicable prior to their installation of the posts; that "[I]t is not true that the posts installed by defendants were required by law to be so installed."

Upon these findings the court concluded that defendants constructively evicted plaintiff from the premises and awarded damages of $4,375.

[1, 2] Defendants' motion for a new trial specified all of the grounds enumerated in section 657 of the Code of Civil Procedure with the exception of subdivision (2) thereof, which was inapplicable as the matter was not tried before a jury. The order granting the new trial was general and did not designate the ground on which it was granted. It must, therefore, be presumed that it was not based on the ground of the insufficiency of the evidence to sustain the decision, Code Civ.Proc. § 657; Renfer v. Skaggs, 96 Cal.App.2d 380, 385, 215 P.2d 487. We are thus precluded from considering the insufficiency of the evidence to support the judgment unless the evidence was without conflict and insufficient as a matter of law. Adams v. American President Lines, 23 Cal.2d 681, 683, 146 P.2d 1; Carvalho v. Lusardi, 114 Cal. App.2d 733, 734, 251 P.2d 37. This point will be discussed below. Furthermore, the grounds set forth in Code of Civil Procedure, sec. 657, subds. (1) and (3), namely, irregularity of the proceedings and accident or surprise, must be supported by affidavits. Code Civ.Proc. § 658. Since no affidavits were filed in support of either of these grounds, it must be likewise presumed that the order was not founded thereon. Gardner v. Marshall American Brake, etc., Company, 24 Cal.2d 686, 690, 691, 151 P.2d 122; Breeze v. Southern Petro Tank Line Co., 5 Cal.App.2d 507, 510, 43 P.2d 584. There is thus left for consideration the following grounds: (1) That the decision is against law; (2) newly discovered evidence; (3) excessive damages; and (4) errors in law occurring at the trial.

[3, 4] Upon an appeal from an order granting a new trial, all intendments favor the order as against the verdict. Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701. The law is clear that an order granting a new trial will only be disturbed on appeal where there is a manifest abuse of discretion, and that when such an order is in general terms it will be affirmed if it could have been properly granted upon any of the grounds upon which the motion was predicated. Scott v. Times-Mirror Co., 178 Cal. 688, 174 P. 312; Breeze v. Southern Petro Tank Line Co., supra. In conformity with Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 361, 170 P.2d 465, we have therefore reviewed the entire record on which the order was based to discover whether such error appears as would justify the trial court in making its order upon any of the grounds last stated. We have found no error, and are satisfied that the order granting a new trial cannot be upheld.

As is apparent from defendants' brief and their memorandum of points and authorities filed in support of their motion, the most important point argued upon the motion for a new trial was that the decision is against the law. They assert the evidence fails to show any bad faith on their part, and that they only used wooden posts in place of a steel U-beam because steel was unavailable for civilian use because of the Korean hostilities. Hence defendants contend the judgment in the instant case is against law where damages are awarded for a constructive eviction when the issue of their bad faith is absent from the pleadings, evidence, findings of fact and conclusions of law. Their argument proceeds from the premise that even in a case such as is here presented, where the positive acts of the lessor have disturbed the tenant's possession and have so seriously impaired his beneficial enjoyment of the premises that he is compelled to quit them, the tenant may not recover damages without an affirmative showing of bad faith on the lessor's part. But that is not the law.

[5–7] The lease assigned to plaintiff carried with it, even in the absence of a special covenant for quiet enjoyment, an implied one binding upon the defendants during the continuation of the term, Civ.

Code, § 1927; Kushner v. Home Service Co., 91 Cal.App. 692, 697, 267 P. 555. Whether expressed or implied, this covenant means that a tenant shall not be wrongfully evicted or disturbed in his possession by the lessor. McDowell v. Hyman, 117 Cal. 67, 69, 48 P. 984; Mills v. Richards, 84 Cal.App. 52, 57, 257 P. 542. The rule is firmly entrenched, and the authorities supporting it are legion, that any disturbance of the tenant's possession by the lessor or at his procurement which renders the premises unfit for the purposes for which they are demised or which has the effect of depriving the tenant of the beneficial enjoyment of the premises, amounts to a constructive eviction, provided the tenant vacates the premises within a reasonable time. Veysey v. Moriyama, 184 Cal. 802, 805, 195 P. 662, 20 A.L.R. 1363; Agar v. Winslow, 123 Cal. 587, 593, 56 P. 422; Sanders v. Allen, 83 Cal.App.2d 362, 366, 188 P.2d 760; Johnson v. Snyder, 99 Cal. App.2d 86, 221 P.2d 164; Riechhold v. Sommarstrom Investment Co., 83 Cal.App. 173, 177, 256 P. 592; Giraud v. Milovich, 29 Cal.App.2d 543, 547, 85 P.2d 182. See, generally, 3 Williston, Contracts, secs. 891 and 892. There is language in some cases which makes the landlord's intention to deprive the tenant of the enjoyment and use of the premises an essential element of constructive eviction. 52 C.J.S., Landlord and Tenant, § 455. But when it is said that in order to constitute a constructive eviction there must be an intent on the part of the landlord to deprive the tenant of the premises, it is not meant that there must exist an actual subjective intention in the mind of the landlord. It may be inferred from the character of his acts if their natural and probable consequences are such as to deprive the tenant of the use and enjoyment of the leased premises. Thirteenth & Washington Sts. Corp. v. Neslen, Utah, 254 P.2d 847, 849; Burnstine v. Margulies, 18 N.J.Super. 259, 87 A. 37; Skally v. Shute, 132 Mass. 367, 372; Buchanan v. Orange, 118 Va. 511, 88 S.E. 52, 54, L.R.A.1916E, 739; 2 Tiffany, Landlord and Tenant, 2d ed., sec. 185(b), p. 1259. Thus the question of intention is coupled with the presumption that a landlord intends the natural and probable consequences of his acts; and where the acts of the landlord effectively deprive the tenant of the use and enjoyment of the premises, the intent to evict is implied from the character of the acts done.[1] Powell v. Merrill, 92 Vt. 124, 103 A. 259; Kimball v. Lincoln Theatre Corp., 125 Neb. 677, 251 N.W. 290; Leech v. Husbands, 4 W.W. Harr. 362, 34 Del. 362, 152 A. 729; Skally v. Shute, supra; Shindler v. Grove Hall, etc., Lunch, 282 Mass. 32, 184 N.E. 673; 52 C.J.S., Landlord and Tenant, § 455; 2 Tiffany, Landlord and Tenant, sec. 185 (b), p. 1259. Thus, by the great weight of authority, "it is not necessary that there should be an express intention of the landlord to compel his tenant to leave the demised premises or to deprive him of the beneficial enjoyment thereof; acts or omissions of the landlord which are calculated to, and do, deprive the tenant of the use and enjoyment of the demised premises and make it necessary for him to remove from the premises constitute a constructive eviction." 52 C.J.S., Landlord and Tenant, § 456, page 173.

[8] In consonance with these established principles, the trial court correctly rendered judgment in plaintiff's favor upon its findings that the installation of the wooden posts resulted in depriving plaintiff of the beneficial enjoyment of a substantial

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[1] Under the more modern doctrine in cases of this character, a showing of the landlord's intent to dispossess is not required: " 'if the landlord's acts necessarily deprive the tenant permanently or for a substantial time of the enjoyment of the property it can hardly be material with what intention the landlord acts.' " Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959, 963; 3 Williston on Contracts, sec. 891. As the court stated in Bromberger v. Empire Flashlight Co., 138 Misc. 754, 246 N.Y.S. 67, 71, " 'It is not essential that the acts of the landlord should be committed with intent to compel the tenant to leave the property, or to deprive him of the beneficial enjoyment thereof. If they are calculated to and do make it necessary for the tenant to move, they constitute an eviction.' "

part of the leased premises and that defendants could have provided the necessary building support by other means and in a manner which would not have interfered with plaintiff's business requirements. On the basis of the evidence disclosed by the record and the facts found, the acts of the lessors in interfering with plaintiff's use and enjoyment of the premises were of so substantial a character as to constitute an invasion of his rights under the lease and to justify his vacation of the premises. The plaintiff sustained his burden of proving that the lease was terminated by a constructive eviction upon his establishing that defendants had breached their convenant of quiet enjoyment by materially disturbing his possession through alterations of the premises which rendered them unfit for the purpose let. McDowell v. Hyman, 117 Cal. 67, 48 P. 984; Riechhold v. Sommarstrom Investment Co., 83 Cal.App. 173, 256 P. 592; Mills v. Richards, 84 Cal.App. 52, 257 P. 542. See Agoure v. Lewis, 15 Cal. App. 71, 113 P. 882. To avoid liability, it was incumbent on defendants to justify their actions, if possible. This they attempted by their defense that only repairs and alterations required by law were made. The trial court found against this claim upon a showing that the Department of Building and Safety had approved the use of steel U-plates, a method of support that did not require wooden posts and would not interfere with plaintiff's use of the premises. Defendants urge that their decision to use wooden posts was taken in good faith since steel was not available due to the war emergency. Though this was not urged as an affirmative defense in the pleadings, some testimony was introduced on the subject. This showed only that there was a shortage of steel and that prices were high. Defendant Gaylord Burke testified that his agent inquired about the cost of steel for the repairs and learned that it would be "around $1,200." Burke thereupon told plaintiff that he considered the cost prohibitive. Defendants did not present evidence which convinced the court that they could not have legitimately procured steel. The court apparently indulged in the reasonable inference that although defendants' original plan called for a steel U-beam, they switched to wooden posts to reduce the cost to themselves despite the fact that they were upon notice that this would effectively put plaintiff out of business.

For their proposition that the burden was upon plaintiff to establish bad faith in order to recover damages for constructive eviction, defendants rely principally on Lindenberg v. MacDonald, 34 Cal.2d 678, 214 P.2d 5, 6, 14 A.L.R.2d 1436. In that case, an owner leased premises to defendants who agreed to tear down the existing structure and erect a new building. In 1942, defendants subleased store space in the building to plaintiff for a term of three years. The sublease was made subject to all the terms and conditions of the lease between defendants and the owner of the property. A provision in the sublease read: "'Lessor may terminate this lease in the event that the existing improvements are to be torn down to make way for the erection of a new building on sixty (60) days written notice addressed to the lessee.'" In November, 1944, defendants notified plaintiff in writing to vacate, although they had not as yet secured the required construction permit from the War Production Board, which they nevertheless "felt sure" would be granted. Thereafter, the war in Europe took a turn for the worse and defendants were advised their chances of obtaining a permit were uncertain. Defendants thereupon informed their tenants, including plaintiff, of the situation, and offered to allow them to stay on a "short termination" basis. Plaintiff declined this offer and vacated the premises on January 13, 1945. Defendants' application for a permit was denied on January 23, 1945. However, they continued their efforts until a permit was granted in August, 1945, when they tore down the old building and commenced construction of the new one. Plaintiff brought suit for damages for constructive eviction and the trial court directed a verdict for defendants. This was affirmed on appeal. The court held that the mere giving of a notice by defendants to vacate in the good faith belief that they were acting in accord with the condition stipulated in the lease did not amount to a constructive eviction.

Therefore, plaintiff's surrender of the premises was voluntary and did not give rise to a cause of action for damages.

[9–11] It is readily apparent from this outline of the facts that there is no parallel between the Lindenberg case and the instant matter. In the Lindenberg case, defendants were obligated to the owners to demolish the building and erect a new one, a fact with which the plaintiff was acquainted. They gave notice of termination in the good faith belief that a permit to build would be obtained. They fully informed their tenants of their uncertainty about getting a permit because of the war situation and offered them the opportunity to remain on a "short termination" basis until a permit was granted. All of their tenants except plaintiff and one other remained on this basis. They diligently proceeded with their attempts to secure a permit and completed the wrecking of the building as soon as was reasonably possible under the circumstances. It is in relation to these facts that the court stated 34 Cal.2d at page 683, 214 P.2d at page 8: "* * * the trial court correctly determined, *in the light of all the circumstances shown,* that in order for plaintiff to recover damages for constructive unlawful eviction, or on any conceivable appropriate theory, it was incumbent upon him to establish bad faith by defendants and that no evidence was introduced which on any tenable view could support a finding of bad faith." (Italics added.) This language was used in a case where the only disturbance of the tenant's possession was through the medium of a notice to vacate under a lease providing for its termination in case the building was to be torn down to make way for the erection of a new one. In the special factual circumstances there obtaining, the court employed the quoted phraseology in announcing the rule that where a tenant abandons possession in response to a notice to vacate given by the lessor in the good faith belief that a condition stipulated in the lease is about to take place, the lessor will not be liable for damages for constructive eviction if it subsequently happens that the condition did not materialize. "It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." Porter v. Bakersfield & Kern Electric Ry. Co., 36 Cal.2d 582, 590, 225 P.2d 223, 228; Eatwell v. Beck, 41 Cal.2d 128, 136, 257 P.2d 643. The cases discussed and relied upon in the Lindenberg case centered around the question of whether a mere notice to quit followed by vacation of the premises by the tenant is sufficient to constitute constructive eviction. Lindenberg v. MacDonald, 34 Cal.2d 678, 683–684, 214 P.2d 5. But that is not the issue presented in the case at bar, where the incidents disturbing the tenant's peaceful possession occurred upon the leased premises by the physical acts of the lessor. In such a case, where the acts on their face constitute a substantial interference with the tenant's right of quiet enjoyment which the lessor has convenanted to respect, the burden is upon the lessor to justify his conduct. There is no suggestion in the Lindenberg case of any disposition to modify the well settled principles previously discussed by requiring the tenant to establish bad faith on the lessor's part where constructive eviction is claimed under circumstances in which the lessor's physical acts on the premises have deprived the tenant of the beneficial use and enjoyment of the property leased. See Kulawitz v. Pacific, etc., Paper Co., 25 Cal.2d 664, 670, 155 P.2d 24; Johnson v. Snyder, 99 Cal.App.2d 86, 88, 221 P.2d 164; Aaker v. Smith, 87 Cal.App.2d 36, 46, 196 P.2d 150; Sanders v. Allen, 83 Cal.App.2d 362, 366, 188 P.2d 760; McDowell v. Hyman, 117 Cal. 67, 71, 48 P. 984; Mills v. Richards, 84 Cal.App. 52, 57, 257 P. 542; and collection of cases, 15 Cal.Jur., secs. 89, 90, pp. 679, 680.

The case of Riechhold v. Sommarstrom Investment Co., 83 Cal.App. 173, 256 P. 592, cited by defendants, does not support their position. In that case, the defendant company, owner of the premises, purporting to comply with a building inspector's order to replace four wooden pillars, unnecessarily installed a solid wall which partitioned off plaintiff's butcher shop from a part of the premises which he sub-leased from the co-defendant, Witkow, who operated a grocery store. The grocery and butcher shop together were known as the "Sunkist Market." Witkow had suggested to the defendant company that the partition wall be erected. The court upheld an award as to the defendant company without any showing of bad faith on its part, stating: "It is an established rule that any disturbance of a tenant's possession by a landlord or by someone acting under his authority, whereby the premises are rendered unfit for occupancy for the purposes for which they are demised, or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction if the tenant so elects and surrenders his possession. [Citations.] * * * Conceding the right in the landlord to have entered the premises to put them in a safe condition, this authority did not warrant it in making the extensive improvements which it did * * * The company * * * had no right to disturb plaintiff's possession beyond that reasonably necessary to comply with the demand, and having done so it was bound to compensate the tenant for the loss he suffered by reason of being compelled to abandon the leased premises for the unexpired term." As to defendant Witkow, who had not himself made the installation complained of, liability was predicated on his testimony that he had requested the defendant landlord to construct the wall in question to get rid of plaintiff.

[12] Defendants assert that the court failed to find on the material issue raised by their defense to the effect that they made only such repairs and alterations as the law required and that plaintiff was not deprived of a substantial portion of the leased premises. We attach no merit to this claim. The findings are that the required work could have been accomplished to the satisfaction of the Department of Building and Safety either by the use of steel U-plates or by wooden posts. This is evidenced by the approval given to the plans calling for the steel plate. Thus, as found by the court, it was not true "that the posts installed by the defendants were required by law to be so installed." The court found also that the installation of the upright posts interfered with plaintiff's business and that defendants "could have provided adequate support for the second floor by a means other than the installation of additional posts * * * and in a manner that would not interfere with plaintiff's business." These express findings, and the general finding that all allegations in the answer inconsistent with the express findings are untrue, fully dispose of all issues raised by this defense.

[13] It is also urged that, as a matter of law, there is no evidence to support the findings last mentioned.[2] As has been indicated, the notice from the Department of Building and Safety contains no requirement that wood posts be used; in fact, this department approved the use of the steel U-plate. The engineer who drew the plans testified that the utilization of the steel U-plate would have solved the problem without the need of additional posts. However, defendants contend that "no evidence contradicts the testimony that steel was not available." We have already observed that if steel were not available, this should have been pleaded as a matter of defense, which defendants failed to do. But contrary to their contention, defendant Gaylord Burke testified that he had learned from his agent that he could obtain steel for $1,200; this witness also testified that he told plaintiff he considered the cost to be prohibitive. Building Inspector Turner testified that he observed steel being used in building construction in 1951. A rea-

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[2] These findings read as follows: "It is true that defendants could have provided adequate support for the second floor by a means other than the installation of additional posts in the demised premises and in a manner that would not interfere with plaintiff's business or render the premises unfit or unsuitable for pool hall purposes or deprive the plaintiff of the beneficial enjoyment of said premises. It is true that the defendants knew another means of support was practicable, prior to defendants' installation of said additional posts in the premises. It is not true that the posts installed by defendants were required by law to be so installed." (Finding XIV.)

sonable inference from this testimony is that defendants elected not to use steel because of its cost.

[14] Defendants also attack the finding that the premises were leased for the purpose of operating a pool hall business. The original lessee testified that immediately after signing the lease he commenced to operate a pool hall, which he continued to operate until the assignment of the lease and sale of the business to plaintiff. Plaintiff testified he discussed his operations with Gaylord Burke immediately on taking over with a view toward obtaining a five year lease and Mr. Burke told him that "it would be all right" and that he would approve such a lease. Also of significance is the fact that in the lease to Crawford which was assigned to plaintiff, there was inserted on the printed form the following provision: "It is further agreed that in case of the Plaster falling on the (sic) any of the tables, the said R. Crawford will assume all liabilatty (sic) of the same." In the light of the lessee's business, it is most likely the term "tables" as therein used refers to pool tables and lends inferential support to the court's finding that the property was leased for the operation of a pool hall.

On the facts as found, there was such a substantial disturbance of the plaintiff's rights under the lease and deprivation of his beneficial enjoyment of the premises by the acts of the defendants as to constitute a constructive eviction, giving him justifiable cause to vacate the premises. Since the court decided the case in accordance with the applicable law in the first instance, there was no basis for the granting of a new trial on the ground that the decision was against law.

[15-16] We turn now to the question of whether the trial court abused its discretion in granting a new trial on the ground of newly discovered evidence. The applicable rules are well settled. On the hearing of the motion for a new trial, it is incumbent on the moving party to show that he has exercised reasonable diligence to discover before the trial the evidence upon which he relies. Slemons v. Paterson, 14 Cal.2d 612, 616, 96 P.2d 125; Edwards v. Floyd, 96 Cal.App.2d 361, 362, 215 P.2d 117. A motion for a new trial will be denied where the evidence might have been produced by the exercise of reasonable diligence, or where the moving party has not shown due diligence in discovering and producing it, or where no reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced. Mitchell v. Preston, 101 Cal. App.2d 205, 207-208, 225 P.2d 229; 20 Cal. Jur., New Trial, p. 85. "A general averment of 'diligence' is not sufficient. The particular circumstances or acts performed by the moving party must be stated (citations)." Edwards v. Floyd, supra [96 Cal. App.2d 361, 362, 215 P.2d 118]. In support of this ground, the affidavit of defendants' attorney, Victor Bewley, states that "he has newly discovered evidence material to the defendants which he could not with reasonable diligence have discovered and produced at the trial." This evidence is stated to consist of an "unsigned affidavit" of one S. S. Smith, identified as the Priority Chief of the National Production Authority of the United States Government, attached as an exhibit. This "unsigned affidavit" was to the effect that the affiant was acquainted with the availability of steel during 1951 and that there was a shortage of structural steel, including heavy U-beams, during 1951 and 1952. The Bewley affidavit states that the above newly discovered evidence confirms Gaylord Burke's testimony that he was unable to obtain a U-beam after diligent search, as well as Mr. Turner's testimony that there were limitations imposed by the federal government on the acquisition of steel.

[17, 18] It is at once clear that under the authorities, defendant's affidavits were insufficient to support an order granting a new trial on the ground of newly discovered evidence. The affidavit is devoid of a single statement of fact which shows any diligence, or even an effort, to obtain, prior to the time of trial, the alleged newly discovered evidence. Counsel's statement that he has newly discovered evidence "which he could not with reasonable diligence have discovered and produced at the trial" was a mere conclusion, and "did not constitute

facts sufficient to show that defendants could not have obtained the evidence prior to the time of trial had they used reasonable diligence." Edwards v. Floyd, supra, 96 Cal.App.2d at page 363, 215 P.2d at page 119. No showing is made that S. S. Smith, who is designated as an official of the federal government in its Los Angeles office, the place where the action was tried, was not available at the time of trial. The nonavailability of steel was a matter of defense, and, as plaintiff points out, the question was raised in the first days of the trial, October 15 and 16, 1952. The case was continued for completion of the trial to October 21st. No explanation is given why Smith's evidence could not have been obtained during this interval, if not earlier. It is thus plain that defendants' motion was so lacking in support upon this ground that there was no legal basis upon which the trial court could exercise its discretion. The following language from Slemons v. Paterson, 14 Cal.2d 612, 615, 616, 96 P.2d 125, 127, in which the Supreme Court reversed an order granting a new trial on the ground of newly discovered evidence, is particularly in point here: "While the granting or denial of a motion for a new trial upon the ground of newly discovered evidence is generally a matter within the discretion of the trial court, and such an order will be affirmed unless a clear abuse of discretion is shown, this rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion. Such is the situation in the case at bar. The affidavit of plaintiffs is so lacking in essential particulars that it afforded no basis for the exercise of the discretion of the trial court in granting the motion.

"* * * It does not appear from plaintiffs' affidavit that they made any effort whatever to obtain the evidence prior to the trial. If the evidence had been obtained and presented, the issues presented by the pleadings could have been finally determined without further delay or additional expense to the parties. It is a matter of public interest that there be an end to litigation and that a new trial should not be granted for the purpose of enabling a party to produce further evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial. Sec. 657, subd. 4, Code Civ. Proc. The affidavits supporting the motion must show that there has been no lack of diligence. (Citing cases.)"

[19–21] The order likewise cannot be upheld on the ground of "excessive damages appearing to have been given under the influence of passion or prejudice". (Code Civ.Proc., sec. 657(5).) Such an order is necessarily granted on the ground of the insufficiency of the evidence to sustain a verdict for the amount awarded. Sinz v. Owens, 33 Cal.2d 749, 760, 205 P.2d 3, 8 A.L.R.2d 757; Griffey v. Pacific Electric Ry. Co., 58 Cal.App. 509, 513, 209 P. 45. The court awarded the sum of $4,375 based on anticipated net profits of $175 per month for the unexpired 25 months of the lease. The loss of prospective business earnings for the balance of the lease is an item of damage which may be properly awarded where a tenant has been wrongfully evicted. Hawthorne v. Siegel, 88 Cal. 159, 25 P. 1114; Tooke v. Allen, 85 Cal.App.2d 230, 237–238, 192 P.2d 804; Riechhold v. Sommarstrom Investment Co., 83 Cal.App. 173, 178, 256 P. 592. The evidence as to net profits was undisputed and was arrived at under applicable principles of law. The record fully demonstrates that the award was not influenced by passion or prejudice, nor is this contended in defendants' brief. Their argument is directed solely to the fact that under the law they were not *liable* for the damages which plaintiff sustained. The fallacy of this argument has already been established.

[22] Defendants also assert that they are insulated from any claim for damages by virtue of a Regulation 2, sec. 22, of the National Production Authority which provides in part that no person shall be held liable for damages "for any act or failure to act resulting directly or indirectly from compliance with a rule, obligation or order of N.P.A. * * *" This contention is specious. Defendants do not cite in their brief, nor does the record disclose, any

particular rule, regulation or order of the N.P.A. with which they were obliged to comply, nor do they refer to any regulation prohibiting them from using steel for repair of the premises.

[23, 24] Lastly, it is contended the order was proper on the ground of errors of law occurring at the trial. Defendants assert that the trial court erred in overruling an objection to the following question asked of Gaylord Burke under cross-examination: "In that conversation with Mr. Crawford and Mr. Pierce, was there anything said by Mr. Pierce to the effect that his purchase, his completion of the purchase of this business would depend upon his being assured that there was a proper lease or an extension of lease and also the getting of the necessary city license." Mr. Burke answered: "There was a discussion regarding the possible extension of the lease, but I don't remember anything about the acquiring of a license or anything to that effect." The error complained of is the impropriety of admitting oral evidence tending to vary the terms of the documents transferring Crawford's business to plaintiff. However, Burke was a stranger to that contract. "The rule that parol evidence cannot be received to contradict or vary a written contract does not apply in an action between a party to a contract and a third party (citations)." Broder v. Epstein, 101 Cal.App.2d 197, 199, 225 P.2d 10, 11.

[25] The other alleged error relates to the sustaining of plaintiff's objections to a line of questions asked of Gaylord Burke on direct examination with regard to whether he had done only the work required by the notice from the Department of Building and Safety. These questions clearly would have required answers as to the witness' conclusion as to whether the installation of posts was required, and were properly excluded. It was the province of the court to determine whether the notice required such posts to be installed, or merely required that additional support be provided without spelling out any specific means to achieve this result.

Since the findings in the case at bar properly dispose of all issues, the decision of the trial court not having been "against law" and no other ground appearing upon which the order can be upheld, the order granting a new trial must be reversed.

Order reversed.

MOORE, P. J., and McCOMB, J., concur

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126 Cal.App.2d 513

GILLESPIE v. ORMSBY.

Civ. 20157.

District Court of Appeal, Second District,
Division 2, California.

July 14, 1954.

Hearing Denied Sept. 8, 1954.

Suit on oil well drilling contract wherein defendant cross-complained for rescission. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment from which the plaintiff appealed. The District Court of Appeal, Fox, J., held, inter alia, that evidence warranted finding that plaintiff had not complied with his contractual obligations of plugging back well to 1100 feet and attempting to secure production in paying quantities at that level, entitling defendant to rescission and return of his contributions.

Judgment affirmed.

1. Contracts 🔑147(2)

In construing a contract, the primary object is to ascertain and give effect to intention of the parties, as derived, in the first instance, from the language of the contract.

2. Contracts 🔑169

The words, phrases and sentences of a contract are to be construed in the light of the expressed objectives and fundamental purposes of the parties thereto.

3. Contracts 🔑155

A written contract is to be construed strictly against its drafter.

4. Contracts ⚷169

Where necessary to gain true intent of parties from contract, court will consider circumstances surrounding the execution of the agreement. Code Civ.Proc. § 1860.

5. Mines and Minerals ⚷109

Oil drilling contract by which operator was obligated to commence deepening of certain oil and gas well to depth of 1900 feet or less, specifically directing that if oil or gas was not encountered between present depth and 1900 feet, the well should be plugged back to approximately 1100 feet, casing run, the well tested and an attempt made to complete well and place same on production, imposed obligation upon operator, in event oil was not encountered in paying quantities in deepening operations, to plug back to 1100 feet and attempt to bring in a commercially producing well at that level.

6. Contracts ⚷309(1)

The doctrine of frustration affords no excuse for nonperformance of a contractual duty where there has been no supervening, unforeseeable event and where all the material facts affecting plaintiff's duty of performance were known to him at the time the contract was made.

7. Mines and Minerals ⚷109

Where oil drilling contract imposed duty upon operator to plug back to 1100 feet and attempt to procure production in paying quantities if drilling beyond that depth was unsuccessful, doctrine of frustration, on theory that there was little indication of getting oil in paying quantities from 1100 feet, could not be relied upon by operator in avoidance of his duty to plug back and attempt to procure production.

8. Mines and Minerals ⚷109

In suit on oil well drilling contract, wherein defendant cross-complained for rescission, evidence supported finding that plaintiff had not complied with an integral obligation under the agreement to plug back the well to 1100 feet and attempt to obtain production in paying quantities at that level, entitling defendant to rescission and recovery of contribution made by him under the contract.

9. Fraud ⚷11(1)

Although actionable fraud cannot ordinarily be found on basis of expression of opinion, there is an exception that the opinion must in fact be honestly entertained and the expression of a dishonest opinion to one entitled to rely thereon is a deceit which, if it results in injury, can form the basis of an action.

10. Mines and Minerals ⚷109

In suit on oil well drilling contract, wherein defendant cross-complained for rescission on ground of fraud, record warranted conclusion that representation by plaintiff that he had a well which he could make into a commercial producer at 1100 feet, even if an expression of opinion, was dishonestly made in that opinion was not one honestly entertained, constituting fraud for which rescission might be had.

11. Fraud ⚷17

One who speaks is not only obligated to tell the truth, but he is equally bound not to suppress or conceal any facts within his knowledge which materially qualify those stated.

12. Mines and Minerals ⚷109

In suit on oil well drilling contract, wherein defendant cross-complained for rescission on ground of fraud through representation by plaintiff that he had a well capable of production at the 1100 foot level, wherein it was contended that there had been no reliance by defendant in that an independent investigation had been made, evidence warranted finding that there had been no independent investigation, but that defendant had relied upon representation of plaintiff.

13. Appeal and Error ⚷989, 994(1), 996

It is not the province of an appellate tribunal to reappraise the evidence, re-evaluate the credibility of witnesses, resolve conflicts in the evidence, or draw inferences contrary to those drawn by the trial court.

Ben C. Cohen, Alfred Lubin, Fletcher Bowron, Los Angeles, for appellant.

Murchison & Cumming, Bicknell J. Showers, Los Angeles, for respondent.

FOX, Justice.

In this action for breach of contract, with a cross-complaint raising issues of fraud and misrepresentations, plaintiff appeals from an adverse judgment.

By his amended complaint plaintiff sought damages based on defendant's alleged breach of a contract relating to the drilling of an oil well known as the Fitzhugh-Wilhite No. 10 (hereinafter referred to as Well No. 10). Plaintiff alleged that he had substantially complied with all the terms of the agreement and that defendant had failed to contribute his agreed share of the drilling costs. Defendant's answer included as an affirmative defense plaintiff's failure to perform the obligations required of him by the contract. Defendant thereafter filed a cross-complaint asking damages in the sum of $10,000 for fraud and deceit, or, as an alternative, rescission of the agreement and return of the sum of $10,000 paid thereunder to plaintiff. During the trial defendant filed a supplemental cross-complaint to conform with the proof. In accordance with the findings, judgment was entered for defendant and cross-complainant in the sum of $10,000, plus interest and costs of suit.

The findings, omitting those which are surplusage or unnecessary for the determination of the issues presented, are to the following effect: that plaintiff and defendant entered into a written contract under which plaintiff was designated as "operator" of Well No. 10, and defendant as "non-operator." The contract included the following provisions:

"2. On or before October 25, 1951, operator shall commence operations or cause operations to be commenced for the deepening of that certain oil and gas well located on said above described lands and designated as 'Fitzhugh-Wilhite No. 1[1] well,' and prosecute the drilling thereof until oil or gas is discovered in paying quantities, or until the depth of 1900 feet has been reached, or until such time as in the opinion of operator or his geologist the continuance of drilling operations would be undesirable or impractical.

"3. The cost of the deepening of said Fitzhugh-Wilhite No. 1 well, the completion thereof, or the plugging back and completion thereof from a depth less than 1900 feet shall be borne and paid for as follows:

"a. The cost of the drilling of said Fitzhugh-Wilhite No. 1 well from its present depth to the depth of 1900 feet, or less, as provided in paragraph 2 above shall be borne and paid for entirely by non-operator;

"b. In the event that a zone or zones are encountered between the present depth of said Fitzhugh-Wilhite No. 1 well and 1900 feet which such zone is worthy of testing in the opinion of operator or his geologist, then and in that event pipe shall be set and the zone tested and an effort made to place said well on production, the cost of the pipe, the setting thereof and all other completion costs to be borne and paid for—⅔ by operator and ⅓ by non-operator;

"c. In the event that oil or gas is not encountered between the present depth of the Fitzhugh-Wilhite No. 1 well and the depth specified in paragraph 2 above, said well shall be plugged back to approximately 1100 feet, casing run, the well tested and an attempt made to complete said well and place the same on production, the cost thereof to be borne entirely by operator."

The contract was actually executed on Nov. 2, 1951, although it is dated October 19, 1951.

The findings further recite that "oil and gas was not encountered at the 1900 foot level or thereabouts or at all in paying quantities and * * * that it was the understanding and agreement of the parties to the said contract that the said oil to be found would be in paying quantities and that if not so found plaintiff would comply with paragraph 3c of the aforesaid contract * * * and expend plaintiff's funds to plug back to the 1100 foot level and there set casing and endeavor to make a producing well at that level. * * * that the said plaintiff failed and intentionally refused to plug the said well back or to make any effort of partial compliance with the terms of the aforesaid paragraph 3c * * * that said paragraph was an integral part of the obligations and promises undertaken by the plaintiff and that plaintiff's failure to comply with his promise contained in the said paragraph 3c constitutes a material failure of performance."

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[1] No. 1 is a typographical error. The reference at all times where No. 1 is used is to the No. 10 well.

The court found as follows on the question of fraud: That at the time the contract was executed and during the negotiations prior thereto, plaintiff fraudulently represented to defendant that Well No. 10 was at the approximate depth of 1100 feet and that plaintiff was advised that a commercially productive well could be produced at about 1100 feet and that if casing were run and the well completed at that depth oil and gas would be produced in commercial quantities; that plaintiff further represented that there was a probability that greater quantities of oil and gas could be produced at or about the depth of 1900 feet, and that if oil were not encountered between 1100 and 1900 feet the well could then be completed at 1100 feet and oil and gas produced at that depth; that at the time these representations were made, plaintiff knew that a well could not be produced and that he did not intend to produce a well or plug back to the 1100 foot level to endeavor to create a commercially productive well; that at the time the contract was signed, plaintiff suppressed the fact that the well had already been drilled to the depth of 1930 feet and that he had in his possession laboratory tests and electric logs disclosing to him that the said well would not be productive at the 1900 foot level, or at any other level or at all; that plaintiff knew that defendant was relying upon his representations; that defendant relied upon the representations of plaintiff and without further investigation signed the aforesaid contract and paid over to plaintiff the sum of $10,000, which plaintiff accepted well knowing that the contract as written could not and would not be performed and that at the time this money was paid and the contract signed that he had no intention of plugging the said well back to the 1100 foot level; that said well did not produce oil or gas in commercial quantities nor did plaintiff encounter oil or gas at any depth in the drilling of the well; that on about March 15, 1952, as soon as defendant learned of the untruth of the representations made, he served on plaintiff a notice of rescission of the agreement and a demand for the return of the $10,000 paid over by him.

Plaintiff's main contentions are that there is no substantial evidence to support certain of the material findings, hereinafter particularly identified, and that there was no obligation imposed on him by the contract to plug the well back to the 1100 foot zone. We are unable to agree with these contentions.

Under familiar rules of appellate procedure, it will be sufficient to state the evidence which supports the findings and judgment, this court being bound by the findings of the trial court upon substantially conflicting evidence. The record shows that plaintiff and defendant were both members of the Wilshire Country Club and had become acquainted during a golf tournament on the club's links in about 1949 or 1950. At that time, plaintiff, who was a relatively young man, was desirous of establishing a career in the oil business. He inquired of defendant, a veteran in the petroleum industry, about general prospects in the oil business for one starting out. Defendant made various recommendations, and in particular advised him to attempt to acquire oil lands and leases which might be of interest to large producers. Plaintiff subsequently became active in the oil business.

In about September 1951, plaintiff acquired an oil lease on certain acreage in the Poso Creek Oil Field, Kern County, on which was located a well known as Fitzhugh-Wilhite No. 10. In this area are two oil producing strata—an upper sand at 1100 to 1200 feet below the surface, and a lower sand at approximately the 1900 foot level. Some wells in this area had been drilled to tap both the upper and lower oil zones. Well No. 10 had previously been drilled to a depth of 1162 feet by one Wilhite, who had several corings and a Schlumberger electric log made. The cores were taken between 1081 and 1159 feet, but were not submitted for a core analysis because no possible productivity was indicated to Wilhite's geologist. Wilhite thereupon capped and formally abandoned the well on September 1, 1951.

Some time after plaintiff secured his lease he began negotiations to obtain some drilling equipment from Wilhite. The latter informed plaintiff of his experience with the No. 10 well, advising him that he had not been able to put it into production at the 1100 foot level and that he had finally abandoned it. He exhibited the cores he had taken to plaintiff, and gave him a copy of the Schlumberger log. From his own personal investigation of the area, plaintiff was apprised another Wilhite well, located 100 feet away from Well No. 10, was producing only about 7 barrels a day from about 1100 or 1200 feet, with considerable production difficulty. A. L. Hunter, a geologist employed by plaintiff, testified that about 15 barrels a day was the minimum production at this horizon which could be regarded as commercially feasible. Hunter also testified that when first consulted about the production potential of well No. 10, he recommended to plaintiff that a new well be drilled at a different site on the leasehold.

The sequence of some of the succeeding events is shrouded in a degree of uncertainty because a part of the testimony given by the parties erroneously presupposed that the contract out of which this litigation grows was signed on October 19, 1951, the date which appears on the instrument. Both parties subsequently agreed that the written agreement was actually signed on November 2, 1951. The precise time when the parties initiated the oral discussions which culminated in their written contract is also in conflict. Defendant testified that this occurred four or five days before the contract was signed. Plaintiff testified that he first approached defendant about the middle of October, 1951, through a real estate broker named Mile, to procure financial backing for his projected oil venture. Defendant testified that plaintiff informed him of the fact that he had undertaken the drilling of Well No. 10 on the acreage he had leased. Defendant gave the following account of this initial conversation: plaintiff stated that the drilling of No. 10 was nearing the 1100 foot level, and that he was prepared to set 10-inch pipe and make a production test at this horizon. He stated that there were some wells in the surrounding area which were producing 25 to 30 barrels of oil daily from the zone at this level; that although he had the financial means to complete the well at the 1100 foot level, he was anxious to first explore the possibility of extracting oil from the 1900 foot stratum. However, he did not have sufficient money to drill to this lower depth and he proposed that defendant participate in his project by furnishing the capital required to reach and test the 1900 foot zone. Defendant testified that plaintiff assured him he was planning to make a production test at 1100 feet in any event; but assisted by defendant's financial participation, he would also be enabled to explore the lower sand which Hunter thought might prove productive. After a discussion of the overall plan of operations, defendant replied he was willing to invest $10,000 in such a venture and suggested that plaintiff instruct his attorney to draw up a contract embodying their agreement.

Mr. Mile, a broker who was a mutual friend of both plaintiff and defendant, testified that at plaintiff's request he had arranged the meeting at which plaintiff invited defendant to associate with him in the transaction last described. He testified that he was present during their first discussion, which took place about four or five days prior to the signing of the contract. Mile recalled that plaintiff stated that the No. 10 well had been drilled to about 1100 feet or "perhaps a little better" and that he expected to make a producer out of it at that level. He confirmed that plaintiff told defendant he desired also to go down to the lower depth if he could get defendant to participate with an investment.

The draft of the proposed contract was drawn by Mr. Hightower, plaintiff's attorney, and was submitted to defendant about a day after the initial conversation. Defendant objected to some of its provisions and to the fact that it did not specify that his investment was not to exceed $10,000. Defendant discussed these matters with Hightower, who thereafter prepared the final draft of the contract, dated Oct. 19, 1951, but actually signed on November 2, 1951, when defendant paid plaintiff $10,000.

While the negotiations which eventuated in the written agreement were in progress, plaintiff was proceeding with his project on Well No. 10. He started to work on the well on October 16 with the cleaning out of the cement hole to about 1100 feet; redrilling operations were commenced on October 19. The deepening of the well continued until the maximum depth of 1930 feet was reached on October 31, 1951. At that time, a Schlumberger electric log was made and core samples taken to the laboratory for analysis. The reports received by plaintiff of these tests were dated November 1, 1951, but Hunter had obtained a verbal report on the core analysis prior thereto. The results of the tests did not suggest much promise of oil production on a commercial basis to Hunter, but he took the view that there could be no certainty of this without an actual production test, since the presence of some oil was indicated. A telephone call was made to defendant and both Hunter and plaintiff spoke to him. Hunter informed defendant of the unsatisfactory character of the reports but expressed the opinion that the zone should be explored. Plaintiff told defendant that he was planning to set pipe for a test. Defendant's reaction was that the decision was not his obligation, that plaintiff was the operator and it was up to him to do what he saw fit. The date of this telephone conversation is also in dispute. Plaintiff testified he placed the call from Bakersfield on the morning of November 2, just before he departed for Los Angeles for the signing of the contract. Defendant testified the report was communicated to him two or three days after the contract was signed.

The production test of the well commenced about November 8, 1951, and during the pumping operations, about 40 barrels of fluid were pumped from the well each day for some 30 days. Hunter estimated that this fluid contained 99% water and 1% oil; plaintiff estimated it was 95% water and 5% oil. Both plaintiff and Hunter agreed that this did not constitute a commercially profitable well. Operations on the well terminated on about January 1, 1952. Plaintiff made no attempt at any time to test the 1100 foot level. He testified that on November 2, 1951, when the contract was signed, he had already decided to complete the well at 1900 feet and he had no intention of plugging back to the 1100 foot zone. Hunter, who was called as an expert witness in plaintiff's behalf, testified that the flow derived from the 1900 foot level would not be considered as encountering oil by petroleum engineers or geologists in the community; that there is a distinction between receiving laboratory reports and analyses which would warrant the making of a production test and the encountering of oil and gas as that term or concept is understood by petroleum engineers and geologists. In his opinion there was nothing in the indications disclosed by the Schlumberger electric log and the core analysis report to cause a geologist or petroleum engineer to conclude that oil or gas had been encountered.

The record shows that at no time did defendant visit the premises where the well was drilled. Defendant testified he had no personal knowledge of that area. He further stated that he had not obtained any information regarding the No. 10 Well from any source other than plaintiff, and that he relied exclusively on this information in entering into the contract. Plaintiff himself testified he knew defendant was relying on what plaintiff told him. Under cross-examination, defendant testified that so far as he was concerned, the primary object of his venture into the No. 10 project was to complete a well at the 1100 foot level, where plaintiff "told me they were producing 25 to 30 barrel wells in that area." In March, 1952, defendant served upon plaintiff a notice of rescission of the contract, tendering back to plaintiff the return of all rights and benefits to which he was entitled under the contract.

[1-4] Directing our attention first to plaintiff's contention that he had no contractual obligation "to plug the well from the 1900 foot zone to the 1100 foot zone after the well had been completed and tested at the 1900 foot zone," our examination of this issue may be coupled with a

consideration of plaintiff's attack on the court's findings to the effect that (1) plaintiff did not substantially comply with the terms of the agreement, (2) that it was the understanding of the parties that if oil were not found in paying quantities plaintiff would plug back to 1100 feet at his own expense, (3) that oil was not encountered at 1900 feet and (4) that plaintiff's intentional failure to plug back to 1100 feet as required by paragraph 3c of the contract constituted a material failure of performance. The rules governing our inquiry are well established. "In construing a contract, the primary object is to ascertain and give effect to the intention of the parties. (Citations.) That intention must, in the first instance, be derived from the language of the contract. The words, phrases and sentences employed are to be construed in the light of the expressed objectives and fundamental purposes of the parties to the agreement. (Citation.)" Hensler v. City of Los Angeles, 124 Cal.App.2d 71, 268 P.2d 12, 17. It is likewise well settled that a written contract is to be construed strictly against its drafter. Burr v. Sherwin-Williams Co., 42 Cal.2d 682, 268 P.2d 1041; Pacific Lbr. Co. v. Industrial Acc. Com., 22 Cal.2d 410, 422, 139 P.2d 892; E. A. Strout Western Realty Agency v. Gregoire, 101 Cal.App.2d 512, 517, 225 P.2d 585. Where necessary to gain the true intent of the parties, a court will consider the circumstances surrounding the execution of the agreement. Code Civ.Proc. § 1860; Hay v. Allen, 112 Cal.App.2d 676, 682, 247 P.2d 94.

[5] Considering the contract in its entirety and according to each segment a reasonably practical effect, Civ.Code, § 1641, it is patent that the fundamental objective of the venture embraced by the contract was to secure oil in paying quantities from Well No. 10. It is abundantly apparent from an analysis of the provisions of the contract and the circumstances under which it was executed, that the agreement imposed upon plaintiff the obligation, in the event oil was not encountered in paying quantities in the course of the deepening operations prescribed in paragraph 2, to plug back to 1100 feet, run casing, test the well, and make an attempt to complete it at his own expense. This is clear in the first instance from a literal reading of paragraph 2, which specifically refers to the prosecution of the deepening operation with the objective of discovering oil or gas "in paying quantities" up to a maximum depth of 1900 feet. Second, paragraph 3c recites that the plugging back to 1100 feet is to occur "in the event that *oil or gas is not encountered* between the present depth * * * [of Well No. 10] * * * and the depth specified in paragraph 2 above * * *" (Italics added.) The court reasonably interpreted the reference to the encountering of oil and gas as meaning in paying quantities, or in the commercial sense. This was warranted for several reasons: (a) paragraph 3c, where the term is used, itself refers to paragraph 2, where the objective of securing oil "in paying quantities" is mentioned; (b) if paragraph 3c is ambiguous, it was properly construed in a sense favorable to defendant, since plaintiff's attorney drew up the contract, which was to be "interpreted most strongly against the party who caused the uncertainty to exist." Civ.Code, § 1654; (c) the court was aided by Mr. Hunter's testimony as to the interpretation of the term "encountering oil." Mr. Hunter's testimony was to the effect that the Schlumberger electric log and the core analysis reports, which indicated a high resistivity, were not *per se* regarded as encountering oil; high resistivity is as consistent with the presence of fresh water as oil. He also testified that he did not consider the fluid pumped at the 1900 foot level—approximately 1% oil and 99% water—as meeting the criterion of "encountering oil" as that term is understood by petroleum engineers and geologists. Thirdly, the court's interpretation is further fortified by a consideration of paragraph 4,[2] relating to the division of proceeds. Subdivision c-1 of this paragraph provides for the division of income

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[2] "4 * * * The proceeds from the sale of all oil or gas or other hydrocarbon substances produced, saved or sold from said well shall be accounted for and distributed as follows: * * *

"c. The remaining income, after the

in the event Well No. 10 is completed "as a commercial producer" pursuant to the deepening operations specified in paragraph 2; paragraph c-2 thereof provides for division of income in the event the well is completed "as a commercial producer" in accord with paragraph 3c (1100 foot level). Clearly this provision was inserted to express the understanding that commercial production was the contractual objective, and to indicate that if income from No. 10 as a commercial producer were not achieved pursuant to the deepening operations, it was contemplated that it might be obtained at the 1100 foot level. It is significant that the court's construction is compelled not only from the language used, but is in harmony with the testimony as to the circumstances attending the execution of the contract. It is plain that the transaction was presented to defendant as one which would give to the parties two strings to their bows—that the bargain was to attempt to get commercial production from 1900 feet and if that failed, to revert to 1100 feet. Defendant was to pay for the deepening—plaintiff for the plugging back, if necessitated. Defendant testified that he considered the possibility of getting oil from 1100 feet of crucial importance in motivating his entering into the agreement.

In view of the foregoing, no merit appears in the argument that plaintiff was not obligated to plug back after the data on the electric log and core analysis showed a zone worthy of testing, which plaintiff contends is the equivalent of encountering oil. Furthermore, if this were so, since such data was available on November 1, 1951 to plaintiff, there was no necessity for including such sections as paragraph 3c and paragraph 4c(2) in the contract signed the next day. For under plaintiff's theory the obligation to plug back could not arise since plaintiff had already "encountered oil" on November 1, before the contract was signed. Plaintiff also attempts, for some obscure reason, to make much of defendant's purported knowledge of the results of the Schlumberger and core tests before the contract was signed. Defendant denied such knowledge; but even if this information had been known to him, he could not have prevented plaintiff from testing at 1900 feet, since paragraph 9[3] of the contract, as well as paragraph 3(b) thereof, vested in plaintiff discretion to test zones he deemed worthy. But even more devastating to plaintiff's position, supposing, as he claims, that defendant knew on November 1st that the oil tests at 1900 feet were unpromising, is the fact that defendant nevertheless signed the contract on November 2d. This would be an indication that though he did not hold out much hope from a production test at 1900 feet, he was counting on the possibility of oil at 1100 feet when plaintiff performed his obligation of plugging back.

Equally untenable is plaintiff's argument that under paragraph 9 he "had the exclusive right to decide in the light of the facts as they might appear to him at the time of decision, whether or not the well should be plugged back to the 1100 foot level." The discretion there spoken of related simply to general operations and developmental plans; it cannot be given so unbridled an effect as would stultify the plain import of paragraph 3c and enable plaintiff to abrogate the contract which the parties had executed. Such a construction would render nugatory defendant's rights and make illusory and chimerical plaintiff's obligations. That even the operational discretion vested in plaintiff does not extend to all decisions is also suggested by paragraph 18[4] where the question of when further profitable op-

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payment of the foregoing items, shall be divided between the parties and paid on the 25th day of each month for the preceding calendar month as follows:

"(1) In the event said well is completed as a commercial producer in accordance with the terms of paragraph 3a above, said income shall be divided—60% to operator and 40% to non-operator;

"(2) In the event said well is completed as a commercial producer in accordance with the terms of paragraph 3c above, said income shall be divided—75% to operator and 25% to non-operator * * *"

[3] **9. "All of the decisions concerning the operations and development of the property subject to this agreement shall be made solely by operator."**

[4] **Par. 18 reads: "If the production from said leased premises reaches the point,**

eration of the well is no longer possible is made to depend on a joint decision of the parties.

Plaintiff argues that defendant permitted him to continue pumping operations for a month, knowing that the fluid pumped out of the well was 95% water, without requesting him to plug back to 1100 feet. As indicated, it was for plaintiff, as operator, to decide how long the pumping operations should continue. Furthermore, plaintiff was not prejudiced by defendant's failure to request him to plug back, assuming there was a duty to make such request, since plaintiff testified he did not intend to plug back after November 2, 1951.

[6, 7] Plaintiff vainly seeks to escape the obligation of plugging back by asserting the defense of commercial frustation—namely, since there was very little indication of getting oil in paying quantities from 1100 feet he should not be required to make a production test. This argument is entirely specious. The doctrine of frustration is no excuse for nonperformance where there has been no supervening, unforeseeable event and where all the material facts affecting plaintiff's duty of performance were known to him at the time the contract was made. Lloyd v. Murphy, 25 Cal.2d 48, 54, 153 P.2d 47; McCulloch v. Liguori, 88 Cal.App.2d 366, 372, 199 P.2d 25.

[8] For the reasons stated, there was substantial evidentiary support for the court's findings that plaintiff did not comply with an integral obligation under the agreement in intentionally failing to plug back to 1100 feet and that this constituted a material failure of performance. Such findings, independent of the findings of fraud, are sufficient to support the trial court's conclusion that plaintiff had breached the terms of the contract and that defendant was entitled to rescind and recover his $10,000. The language used by this court in Wilson v. Corrugated Kraft Containers, 117 Cal.App.2d 691, 696, 256 P.2d 1012, 1016, is here singularly apposite: "That plaintiffs' willful departure from a fundamental obligation under the contract constituted a material violation thereof is too apparent to admit of controversy. (Citation.) Where, as here, the contract was manifestly an entire and indivisible one with interdependent convenants (citation), and plaintiffs' default in performance went to the very root of the consideration bargained for, such breach amounted to a failure of consideration, entitling defendant to rescind." In this connection, it is immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiff or by the trial court, since "the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." Sears v. Rule, 27 Cal.2d 131, 140–141, 163 P.2d 443, 448; Hay v. Allen, 112 Cal.App.2d 676, 681, 247 P.2d 94; In re Raphael's Estate, 91 Cal.App.2d 931, 940, 206 P.2d 391.

[9–11] In any event the judgment may also be sustained on the ground that certain material representations made by plaintiff to induce defendant to enter into the contract were fraudulent, were relied on by defendant to his detriment, and afforded him a complete right to rescind. Both defendant and Mr. Mile testified that plaintiff represented to defendant that he had a well which he could make into a commercial producer at 1100 feet. The court found that this representation was made and that plaintiff knew when he made it that a commercial well could not be produced at that level. Plaintiff argues that this constituted a statement of opinion upon which fraud may not be predicated. While this is, of course, generally true, it is subject to the exception that the opinion must in fact be honestly entertained. As stated in Barron

in the opinion of both of the parties hereto to where they can no longer be operated at a profit the well or wells thereon shall be abandoned and all of the jointly owned equipment then on the leased premises shall be salvaged and sold and the proceeds thereof divided in accordance with paragraphs 4c(1), 4c(2) or paragraph 5, as the case may be. The parties hereto shall bear their proportionate part of the costs of abandoning any and all of said wells in like manner."

Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 P. 351, 356, 42 L.R.A.,N.S., 125: "But, bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker *believes to be* a fact, it becomes apparent that, by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practiced, injury may be worked, and an action will lie." From the facts: (1) that plaintiff was fully informed of Wilhite's unsuccessful operation and abandonment of Well No. 10; (2) that Hunter had advised him to drill at a different site; and (3) that he knew that a well only 100 feet away was producing only seven barrels of low gravity oil a day, the court was justified in finding that plaintiff had no honest belief in his representation and that it was fraudulent. Furthermore, despite his knowledge of these facts, and knowing that defendant was relying upon his information, plaintiff did not disclose any of these matters to defendant. "Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false." (12 Cal.Jur., 770.) Thus, it is a rule of general application, in dealing with the question of false representations, that one who speaks is not only obligated to tell the truth but he is equally bound not to suppress or conceal any facts within his knowledge which materially qualify those stated. Rogers v. Warden, 20 Cal.2d 286, 289, 126 P.2d 7; Milmoe v. Dixon, 101 Cal.App.2d 257, 260, 225 P.2d 273; Boas v. Bank of America, 51 Cal.App.2d 592, 597, 125 P.2d 620; Dyke v. Zaiser, 80 Cal.App.2d 639, 652, 182 P.2d 344. If he speaks at all, he must make a full and fair disclosure. Pohl v. Mills, 218 Cal. 641, 24 P.2d 476; Milmoe v. Dixon, supra; Boas v. Bank of America, supra. Under these legal principles, the trial court was justified in finding that plaintiff's representation was one which he could not have honestly believed and that it was made in bad faith.

The court found also that at the time plaintiff signed the contract on November 2, 1951, and accepted defendant's money, he had no intention of plugging the well back to 1100 feet. As has been established, it was one of plaintiff's covenants under the contract to do so in the event oil was not discovered in paying quantities at 1900 feet. Yet plaintiff himself testified that on November 2, 1951, when he submitted the contract drawn by his own attorney containing that promise among its terms for defendant's signature, he had no intention of completing a well at 1100 feet at any future time. A promise made without any intention of performing it falls within the statutory definition of fraud, Civ.Code, § 1572(4); and such fraud may serve as the basis of an action for rescission of a contract. Tsang v. Kan, 78 Cal.App.2d 275, 281, 177 P.2d 630; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 765, 33 P.2d 455.

[12] Plaintiff argues that the court erred in finding that defendant relied on plaintiff's representation and asserts that defendant made his own independent investigation. In support thereof, he quotes a part of Mr. Hunter's testimony of a telephone conversation he had with defendant, in which Mr. Hunter testified that before the operation was started, he believed he discussed with defendant the probability of economic production at the 1100 foot level. Plaintiff omits from his quotation Mr. Hunter's testimony a moment before that he did not recall that anything was said by him or defendant about the possibility of production at the 1100 foot zone. The chief topic of discussion was the 1900 foot level and Mr. Hunter's recollection of it was generalized, fragmentary and, as noted, so nebulous and uncertain in regard to the 1100 foot zone, that it was obviously discounted by the trial court. It chose, instead, to credit defendant's testimony that he relied exclusively on the representations made by plaintiff, who alone supplied him with information regarding Well No. 10. Since this evidence supports the finding that defendant made no independent investigation, the fact that there was evidence from which the arbiter of the facts could have reached a different conclusion does not impeach the finding made.

[13] Since these findings amply support the judgment, it is unnecessary to consider

plaintiff's criticism of other findings, which he repeatedly characterizes as not being supported by "one scintilla of evidence." Suffice it to say that they stem from his intransigent unwillingness to regard any of defendant's testimony as being substantial evidence and his reluctance to accept the rule that it is *not* the province of an appellate tribunal to reappraise the evidence, reevaluate the credibility of witnesses, to resolve conflicts in the evidence, or to draw inferences contrary to those drawn by the trial court.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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126 Cal.App.2d Supp. 855

GRANTHAM
v.
STATE FARM MUT. AUTO. INS. CO.

Superior Court No. 184083.
Municipal Court No. 30401.

Appellate Department, Superior Court,
San Diego County, California.

July 12, 1954.

Action to recover upon automobile policy for damage occasioned after original term but during alleged renewal term. The Municipal Court, San Diego Judicial District, County of San Diego, Philip Smith, J., entered judgment for defendant, and plaintiff appealed. The Superior Court, Appellate Department, County of San Diego, Burch, J., held, inter alia, that since policy had lapsed, mistaken issuance of receipt for renewal premium, which had not in fact been paid did not extend period of coverage.

Affirmed.

1. Insurance 🔑177

Where automobile policy, which expired on September 3, provided for renewal upon payment and acceptance of premium, prior to expiration, and company gave notice of impending expiration to insured and subsequently granted 10-day extension of option to renew, but received no premium or other communication from insured, policy expired and became nonoperative on September 13.

2. Insurance 🔑145(3)

Where automobile insurance had lapsed, mistaken issuance of receipt for renewal premium, which had not in fact been paid did not extend period of coverage. Insurance Code, § 484.

3. Insurance 🔑186(1)

Statute providing that acknowledgment in policy of receipt of premium is conclusive evidence of its payment does not establish relationship of insured and insurer where, in fact, it does not exist, but regulates relationship where parties themselves create it. Insurance Code, § 484.

4. Insurance 🔑665(8)

Evidence, on issue whether insured, who claimed insurer was equitably estopped from denying coverage by reason of negligence of insurer in mailing renewal premium receipt, thereby causing insured to believe that local agent had advanced renewal premium for insured, had acted to his injury on faith of the receipt, sustained determination of lower court that insured had not so relied thereon.

5. Appeal and Error 🔑1010(1)

Determinations of fact issues, supported by evidence, are binding on appeal.

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Clarence Harden, San Diego, for appellant.

Gray, Cary, Ames & Frye, by Ward W. Waddell, Jr., San Diego, for respondent.

BURCH, Judge.

The complaint in this action alleges plaintiff was insured by defendant on March 3, 1946, against certain damages to plaintiff's automobile, and that such damages were incurred by him in an accident in which his automobile was involved on January 17, 1947; that such insurance was operative

"* * * during the term between March 3, 1946 and September 3, 1946. For a valuable consideration it was agreed between said parties in writing that the term of such policy, as aforesaid, should be extended from September 3, 1946 to March 3, 1947; * * *."

The answer admits the policy was issued but denies its extension for the term September 3, 1946 to March 3, 1947, and denies the insurance was effective on the date of the accident. Judgment went for defendant and plaintiff appeals.

The policy makes provision for its term and renewal option as follows:

> "Term—The term of this Policy shall be From Mar. 3, '46 To Sep. 3, '46 and for such succeeding terms of six months each thereafter as the required renewal premium is paid by the insured on or before the expiration of the current term and accepted by the Company."

Plaintiff neither paid nor promised payment of the renewal premium until February, 1947, after the accident. He had arranged with the local agent, Mr. Reineman, for payment by Mr. Reineman of the original premium and liquidated this obligation to Mr. Reineman after the accident. Thirty days before the renewal premium was to be due on September 3, 1946, the company mailed a notice thereof to plaintiff. On the due date of September 3, 1946, the company mailed plaintiff a notice of a ten-day extension of the option. Not receiving the premium or other communication from plaintiff, the company lapsed the policy on its records and closed its account with plaintiff.

[1] The relationship of insured and insurer terminated and the insurance expired and became nonoperative under these facts on September 13, 1946. Upton v. Travelers Insurance Co., 179 Cal. 727, 178 P. 851, 2 A.L.R. 1597. Notwithstanding these facts and the lapsing of the insurance, through an error in the defendant's bookkeeping department there was mailed out to plaintiff on September 16, 1946, a form of receipt for the renewal premium which had been prepared along with the notices above referred to on July 24, 1946. Plaintiff contends that this erroneous receipt thus in his possession established his right to insurance coverage as a matter of law by reason of the provisions of Section 484, Insurance Code (formerly Section 2598, Civil Code). That section provides:

> "An acknowledgment *in a policy* of the receipt of premium is conclusive evidence of its payment, *so far as to make the policy binding,* notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." (Emphasis ours.)

[2] If plaintiff's receipt were valid, the contention would be difficult to meet. So, too, if there had been any consideration therefor or had it been used to evidence the parties' assent to an agreement. The proof, however, which supports the judgment and viewed in that light, is to the contrary. The section is inapplicable because at the time of the inadvertence there was no insurance, and the mistake, as a mistake, affected no legal relations of the parties.

[3] It was prepared for future use as a mere form. Until after the accident only plaintiff was aware of its possession by him. Plaintiff took no steps to discover the truth of the assumption to which he testified, to wit: that Mr. Reineman, the agent, had voluntarily and gratuitously paid his premium for him. But the assumption of one party has never been held to fulfill the essential elements of a contract, even where a common law relationship exists in fact. Socol v. King, 36 Cal.2d 342, 346, 223 P.2d 627. Here the relationship terminated when the option expired. Upton v. Travelers Insurance Co., supra. The Insurance Code, including Section 484, does not establish the relationship where, in fact, it does not exist. It but regulates the relationship where the parties themselves create it. New York Life Insurance Company v. Gist, 9 Cir., 63 F.2d 732, 734. The unconditional delivery of the policy was a factor in the cases upon which plaintiff relies. Farnum v. Phoenix Insurance Company, 83 Cal. 246, 23 P. 869; Palmer v. Continental Insurance Company of New York, 132 Cal. 68, 64 P. 97; Masson v. New England Mutual Life

Insurance Company, 85 Cal.App. 633, 260 P. 367; Lincoln National Life Insurance Company v. Mathisen, 9 Cir., 150 F.2d 292.

The business of insurance depends upon premiums. Methvin v. Fidelity Mutual Life Ass'n, 129 Cal. 251, 257, 61 P. 1112; Burton v. Columbian National Life Insurance Company, 20 Cal.App. 21, 25, 127 P. 1037; Schick v. Equitable Life Assurance Society, 15 Cal.App.2d 28, 33, 59 P.2d 163, and authorities cited. Section 484 of the Insurance Code reasonably interpreted does not thrust insurance upon parties who have not contracted for it.

The inadvertence upon which plaintiff relies is insufficient to affect contractual relations between the parties. Williston, Section 1541, subsection 1. The mistake involved here militates against the creation of a contract. The want of consideration was properly shown. Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4; Royer v. Kelly, 174 Cal. 70, 72, 161 P. 1148; Greer v. Los Angeles Athletic Club, 84 Cal. App. 272, 276, 277, 258 P. 155; Code of Civil Procedure, Section 1962(2).

Plaintiff makes the further contention that the court erred in denying his motion to amend the complaint to conform to proof by alleging that the company waived the renewal premium by mailing the receipt. For the purposes of decision, we will assume that this raises the question of equitable estoppel. As pointed out by Professor Langmaid in an article, "Waiver and Estoppel in Insurance Law in California," 20 California Law Review, pages 1 to 41, insurance cases have used the terms "waiver" and "estoppel" with less distinction than one would expect. He quotes Judge Cuthbert Pound, Satz v. Massachusetts Bonding & Insurance Company, 243 N.Y. 385, 393, 153 N.E. 844, 846, 59 A.L.R. 606, as follows:

> "The tendency on the part of the courts to treat insurance contracts as standing in a class by themselves and to protect against forfeitures invoked in defense of honest claims has led to much subtlety. As Professor Woodruff says in his preface to his 'Cases on Insurance' (2d Ed.) page 5: 'What do they know of the law of the insurance contract who only the law of contract know?' "

Professor Langmaid continues:

> "While 'estoppel' is a slippery enough term under ordinary circumstances, being frequently employed indifferently to cover estoppel by misrepresentation and promissory estoppel, it is found in the insurance cases to take on an even more enlarged meaning and to be inextricably interwoven with 'waiver.' The two terms are frequently used synonymously."

For the purpose of decision, we will assume that the motion was directed to an equitable estoppel arising by reason of the negligence of the insurance company in mailing the receipt, causing the plaintiff to believe that the agent, Mr. Reineman, had advanced the renewal premium for the plaintiff.

Sometimes a receipt may create an equitable estoppel if the essential elements are present. 31 C.J.S., Estoppel, § 85, p. 298, deals with this subject. It is there said:

> "Receipts are not per se estoppels, but are open to explanation between the original parties and others not acting to their injury on the faith of them."

In ruling on the motion, the court was required to determine from the record whether plaintiff acted to his injury on the faith of the receipt. There was substantial evidence both ways and the conflict was resolved in favor of the defendant.

It is true that Mr. Grantham testified on more than one occasion that he did not make the renewal payment because he believed that Mr. Reineman had made it for him when the receipt of September 16th came to hand. Mr. Reineman had paid at plaintiff's request the original premium, and plaintiff had not met his personal obligation to Mr. Reineman on this score until after the accident. Since plaintiff had known Mr. Reineman as a friend whom he frequently contacted in their local community, the court well may have questioned why Mr. Grantham did not inform himself of the true fact; why the plaintiff should not have acknowledged to Mr. Reineman his obligation; in fact, why plaintiff remained silent in the light of plaintiff's knowledge that he had not paid the premium. Insurance policies are traditionally contracts "uberrimae fidei." Stipcich v. Metropolitan Life Insurance Company, 277 U.S. 311, 316, 48 S.Ct. 512, 72 L.Ed. 895.

Bearing upon plaintiff's belief and the good faith and reasonableness of his conduct, the court was dependent upon plaintiff's own testimony and circumstantial evidence bearing thereon. He testified:

> "A. Well, getting the receipt, and dealing with Mr. Reineman as I have for years, would lead me to believe that he had went ahead and paid it for me.
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> * * * * * *
>
> "Q. Well, did you so believe? A. Yes.
>
> "Q. Now, had he given you credit before? A. Yes.
>
> "Q. Over how many years? A. No definite period of time, just little odd things that would come up, and does yet.
>
> "Q. Had he extended you credit besides this credit that he gave you in relation to this particular policy? A. You mean on policies?
>
> "Q. Yes, on other policies. A. No, I never had had any other policies from him.
>
> * * * * * *
>
> "Q. Well, what other kind of business was it that you had done with him, for years, that you mentioned?
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> * * * * * *
>
> "A. He figures by income tax and personal papers that way."

On cross-examination plaintiff further testified:

> "Q. At the time that you made application for the policy involved, on or about March 3, 1946, you made no payment of a premium to Mr. Reineman or anyone else connected with the State Farm Insurance Company, did you? A. At that time I did not.
>
> "Q. And at no time from that date until February 3, 1947, did you make any payment of any money for this insurance, or offer to pay any money for it to anyone, Mr. Reineman or anyone identified with the State Farm Insurance Company, is that correct? A. I did not offer to pay, but I saw him and made an excuse, I did not have the money, and talked with the man.
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> * * * * * *
>
> "A. *Well, I would meet him various times on other business, and him being a friend of mine, I would talk with him about it, because I didn't want it running on.*
>
> * * * * * *
>
> "A. *No, but I see the man every once in a while and talked with him."*

Again the record shows:

> "Q. I show you what is a statement of semi-annual net renewal premium, and ask you whether or not you were ever sent a premium notice prior to the expiration of the policy in September, 1946? A. *Absolutely not.*
>
> * * * * * *
>
> "A. *No, I have never received anything from the company, only that card with my receipt on it."*

In contrast with this testimony, the plaintiff further testified:

> "Q. Did you receive any notice that the premium was due in September, 1946? A. *I received a letter telling me that the premium would be due on a certain day, just a letter typed out.*
>
> "The Court: When did you receive the letter, do you remember? A. *It was about ten days before the expiration date of the premium."*

[4] The plaintiff's silence about the receipt for more than four months, knowing that he had not himself paid the premium, coupled with his opportunities to explain his undisclosed assumption in the face of frequent contacts with his friend, Mr. Reineman, together with the free discussion of his pending obligation for the original premium, were all circumstances bearing upon the question of reliance.

[5] The determination of this issue in favor of the defendant is, therefore, binding on appeal. The judgment is affirmed.

TURRENTINE, P. J., concurs.

127 Cal.App.2d Supp. 831

SMITH et al.

v.

BERING MONROE MOTORS.

C. A. 19.

Appellate Department, Superior Court,
San Bernardino County. California.
July 23, 1954.

Rehearing Denied Aug. 19, 1954.

Action by buyer against seller to recover treble damages for over ceiling sale of used automobile, and for fraud. The Municipal Court, San Bernardino Judicial District, Edward P. Fogg, J., entered judgment for defendant and plaintiff filed notice of appeal. The Appellate Department, Superior Court, Hilliard, J., held that where proposed settled statement of appeal, which had neither been settled nor engrossed, consisted of generalities and conclusions, it was impossible for reviewing court to reach any decision concerning alleged errors in law in rulings of trial court upon basis of such statement.

Appeal dismissed.

1. Courts ⚷190(6)

Where record on appeal had not been certified by trial judge or clerk, or stipulated to by parties, it could not be presumed to include all matters material to determination of points on appeal as provided by court rule. Rules on Appeal from Municipal Courts—Civil Cases, rules 7, 21.

2. Courts ⚷190(6)

Where proposed settled statement of appeal, which had neither been settled nor engrossed, consisted of generalities and conclusions, it was impossible for reviewing court to reach any decision concerning alleged errors in law in rulings of trial court upon basis of such statement and appeal was dismissed. Rules on Appeal from Municipal Courts—Civil Cases, rules 7, 21.

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Norman P. Courtney, Fontana, for appellants.

Weddell & Petry, San Bernardino, for respondent.

HILLIARD, Judge.

In this action the plaintiffs allege, by the first cause of action in their complaint, the purchase of a used 1950 Morris Minor automobile from defendant was at a sales price in excess of the ceiling price fixed by the Office of Price Stabilization, and seek to recover treble the amount alleged overpayment. In the second cause of action in their complaint the plaintiffs allege that the purchase was induced by fraudulent representations on the part of the defendant, and seek to recover damages therefor. Following entry of judgment by the Trial Court in favor of the defendant and adverse to plaintiffs upon each cause of action, and the denial of motion for a new trial upon the second cause of action, plaintiffs filed their Notice of Appeal.

Concurrently with the filing of such Notice of Appeal, plaintiffs also filed documents entitled, "The Proposed Settled Statement on Appeal" and "Notice of Election to Appeal on a Settled Statement". Copies of the latter pleadings were served upon defendant's counsel by mail on April 6, 1954. Apparently no further proceedings were taken in the Trial Court to perfect the record on Appeal until May 26, 1954 when the judgment roll, papers, and records were transferred to this Court.

Appellants' "Notice of Election to Appeal" recites that such appeal is taken in accord with the procedural requirements of Rule 7 of the "Rules on Appeal from Municipal Courts in Civil Cases". Such rule provides for the serving and filing of a condensed statement, in narrative form, of pertinent portions of the oral proceedings, a filing by respondent of proposed amendments thereto, the settlement of the statement after notice and hearing by the trial judge, the engrossing of the settled statement by appellant, and the right of objection by respondent.

[1] The proposed statement has neither been settled nor engrossed. The record before the Court is, therefore, lacking in any authenticated or approved statement of the oral proceedings. Since the record on appeal has not been certified by

the trial judge or the clerk, or stipulated to by the parties, it cannot be presumed to include all matters material to a determination of the points on appeal as provided by Rule 21 as amended.

[2] "The Proposed Settled Statement of Appeal" consists of generalities and conclusions. It would be impossible for this Court to reach any decision concerning alleged errors in law in the rulings of the Trial Court upon the basis of such statement.

For the reasons herein set forth the Appeal is dismissed.

MITCHELL, J., concurs.

COUGHLIN, P. J., deeming himself disqualified, did not participate in this opinion.